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MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

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Foreword

In 1950, the International Law Commission considered ways and means for making customary international law more readily available, in accordance with article 24 of its Statute. The Commission recommended, *inter alia*, that the General Assembly of the United Nations should authorize the Secretariat to prepare and issue, with as wide a distribution as possible, a *Legislative Series* containing the texts of current national legislation on matters of international interest. In this connection, it was recommended that the Secretariat should assemble and publish from time to time collections of the texts of national legislation on special topics of general interest. The *Legislative Series* is prepared by the Codification Division of the Office of Legal Affairs.

The first 24 volumes in the *Legislative Series* have addressed a broad range of special topics of general interest relating, *inter alia*, to the law of the sea, the law of treaties, nationality, diplomatic and consular law, international organizations, State succession, non-navigational uses of international watercourses, jurisdictional immunities of States and their property, the multilateral treaty-making process as well as the prevention and suppression of international terrorism. The legal materials contained in this series have included not only national legislation but also treaties, judicial decisions, diplomatic correspondence and other relevant materials depending on the topic. The present volume of this series is devoted to the topic of the responsibility of States for internationally wrongful acts.

In 2001, at its fifty-third session, the International Law Commission adopted the draft articles on responsibility of States for internationally wrongful acts. In resolution 56/83 of 12 December 2001, the General Assembly took note of the articles, the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. The General Assembly commended again the articles to the attention of Governments without prejudice to the question of their future adoption or other appropriate action, in 2004, 2007, 2010, 2013, 2016, 2019 and 2022.[1]

In resolution 59/35, the General Assembly also requested the Secretary-General, *inter alia*, to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles.[2] The compilation was subsequently updated on five further occasions,[3] on the basis of requests by the General Assembly in each resolution adopted from 2007 onwards.[4]

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[1] See General Assembly resolutions 59/35 of 2 December 2004, 62/61 of 6 December 2007, 65/19 of 6 December 2010, 68/104 of 16 December 2013, 71/133 of 13 December 2016, 74/180 of 18 December 2019 and 77/97 of 7 December 2022.

[2] See A/62/62 and Corr.1 and Add.1 (covering the period 1973 until April 2007).

[3] See A/65/76 (covering the period from May 2007 until 31 January 2010); A/68/72 (covering the period from February 2010 until 31 January 2013); A/71/80 and Add.1 (covering the period from February 2013 until 31 January 2016); A/74/83 (covering the period from February 2016 until 31 January 2019) and A/77/74 83 (covering the period from February 2019 until 31 January 2022). In resolution 71/133 of 13 December 2016, the General Assembly also requested the preparation of a technical report listing, in a tabular format, the references to the articles contained in the compilation of decisions of international courts, tribunals and other bodies referring to the articles prepared since 2001, as well as references to the articles made in submissions presented by Member States before international courts, tribunals and other bodies since 2001. The request was repeated in resolution 74/180 of 18 December 2019. Two such technical reports were prepared (see: A/71/80/Add.1 and A/77/74, annex).

[4] See footnote 1 above.

This collection of materials, in its second edition,[5] reproduces the text of the articles, with commentaries thereto, as presented in the *Yearbook of the International Law Commission*,[6] together with the compilation of decisions in which the articles and commentaries were referred to, by international courts, tribunals and other bodies,[7] during the period from 1973 to 1996 when the draft articles were adopted on first reading, from 1996 to their adoption on second reading in 2001,[8] and up to 31 January 2022, as contained in the five reports of the Secretary-General. The compilation of decisions recorded a combined total of 453 instances in which international courts, tribunals and other bodies had referred to the articles (both in their form prior to, and following, their adoption in 2001) and corresponding commentaries.

The collection of materials is organized in accordance with the structure of the articles as adopted in 2001, with each article (or Part or Chapter heading) presented together with its commentary, followed by the respective extract from the compilation of decisions prepared by the Secretary-General. The compilation of decisions reproduced the extracts of decisions in which the articles were referred to by international courts, tribunals or other bodies. Under each article, the extracts of decisions appeared in chronological order to reflect historical developments and to facilitate the understanding of decisions containing references to previous case law. In view of the number and length of those decisions, only the relevant extracts referring to the articles were included. Each extract was accompanied by a brief description of the context in which the statement was made by the international court, tribunal or other body. Only those extracts in which the articles were invoked as the basis for the decision or where the articles were referred to as reflecting the existing law governing the issue at hand were included. Submissions of parties invoking the articles, and opinions of judges appended to a decision were not included.

Annex I reproduces the articles on the responsibility of States for internationally wrongful acts. Annex II lists the various cases and decisions pertaining to each article, or part of the articles (where applicable), cited in both the commentaries and the extracts from the compilation of decisions. Annex III lists, in alphabetical order, all the cases and decisions cited in the present volume.

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[5] The first edition, published in 2012, reproduced the original compilation together with the first two subsequent Secretary-General reports (covering the period until 31 January 2010). See United Nations Sales No. E.12.V.12.

[6] 2001, vol. II (Part Two), para. 77.

[7] Following a comprehensive review of the decisions of international, regional and sub-regional courts, tribunals and other bodies, the extracts reproduced in this volume were identified in the decisions of: the International Court of Justice; the International Criminal Court; the International Criminal Tribunal for Rwanda; the International Tribunal for the former Yugoslavia; the Special Court for Sierra Leone; the Special Tribunal for Lebanon; the International Tribunal for the Law of the Sea; the African Court on Human and Peoples' Rights; the African Commission for Human Rights; the Caribbean Court of Justice; the European Court of Human Rights; the Court of Justice of the European Union; the General Court of the European Union; the European Commission of Human Rights; the Inter-American Court of Human Rights; the Economic Community of West African States Court of Justice; international arbitral tribunals; the Iran-United States Claims Tribunal; the United Nations Compensation Commission; the WTO Appellate Body; panels established under GATT and WTO; the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; and the Committee on the Rights of the Child.

[8] References to draft articles adopted prior to the final adoption of the articles in 2001 were included only when the draft article was incorporated in the final articles. In those cases, the text of the draft article was reproduced in a footnote accompanying the extract.

Explanatory note

The respective original documents have been reproduced with minor changes, limited to editorial modifications introduced to ensure the consistency of presentation within the present volume.

In accordance with its Statute, the International Law Commission adopts "draft" instruments, including "draft articles". In the recent practice of the General Assembly, when draft articles, as presented by the Commission, are taken note of by the Assembly and annexed to one of its resolutions, the reference to "draft" is excluded. Accordingly, the practice of the Secretariat has been to use "draft articles" when referring to the text in the stages of preparation leading up to, and including, their adoption by the Commission. The word "draft" is not included when making references to the "articles" in their contemporary form, *i.e.* as subsequently annexed to a General Assembly resolution. This practice has not been uniformly followed by the various courts and instances cited in the compilation of decisions prepared by the Secretary-General. The respective methods of referring to the articles, as reflected in the extracts, have been retained for reasons of historical accuracy.

A reference (in square brackets) to the United Nations document symbol (together with the relevant paragraph or footnote number therein) has been added after each decision extracted from the compilation of decisions prepared by the Secretary-General.

The footnotes in the present volume are numbered consecutively (in square brackets) for ease of reference, and are presented together with the corresponding footnote numbers appearing in the respective original documents.

With regard to the Annexes, where a title of a decision was presented in English in one of the original documents, that title is retained. Where a title of a decision was not reflected in English in the original documents, the title is reproduced in the language in which it was presented in the English version of those documents.

Abbreviations

AJIL	American Journal of International Law
ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
BIT	bilateral investment treaty
BYBIL	The British Yearbook of International Law
CCJ	Caribbean Court of Justice
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CRC	Committee on the Rights of the Child
DSU	Dispute Settlement Understanding
EC	European Community
Eur. Court H.R.	European Court of Human Rights
ECOWAS	Economic Community of West African States
EECC	Eritrea-Ethiopia Claims Commission
FCN Treaty	Treaty of Friendship, Commerce and Navigation
FRY	Federal Republic of Yugoslavia
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICSID Additional Facility Rules	RulesGoverning the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force in Bosnia and Herzegovina
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Iran-U.S. C.T.R	Iran-United States Claims Tribunal Reports
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-United States Claims Tribunal

MERCOSUR	Southern Common Market
NAFO	Northwest Atlantic Fisheries Organization
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NYIL	Netherlands Yearbook of International Law
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RGDIP	Revue Générale de Droit International Public
SCC	Stockholm Chamber of Commerce
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SFOR	Stabilization Force in Bosnia and Herzegovina
STL	Special Tribunal for Lebanon
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNIDROIT	International Institute for the Unification of Private Law
UNRIAA	United Nations Reports of International Arbitral Awards
WTO	World Trade Organization

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

General commentary

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

> the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility … [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.[1] 32

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(*a*) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(*b*) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(*c*) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(*d*) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(*e*) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(*f*) Specifying the content of State responsibility, *i.e.* the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(*g*) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

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[1] 32 *Yearbook … 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (*c*).

(*h*) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(*a*) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(*b*) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[2] [33] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (*e.g.* the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(*c*) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (*e.g.* compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status quo* which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

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[2] [33] For the purposes of the articles, the term "internationally wrongful act" includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

(*d*) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, *e.g.* under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled "The internationally wrongful act of a State". It deals with the requirements for the international responsibility of a State to arise. Part Two, "Content of the international responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled "The implementation of the international responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

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* made the following assessment of the status of the State responsibility articles:

> The Tribunal acknowledges the fact that the ILC Articles are the product of over five decades of ILC work. They represent in part the 'progressive development' of international law—pursuant to its UN mandate—and represent to a large extent a restatement of customary international law regarding secondary principles of state responsibility.[3] [4]

[A/65/76, para. 9]

[3] [4] ICSID, Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 116.

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc. v. *The United Mexican States*

In its 2008 Decision on Responsibility, the tribunal established to consider the case of *Corn Products International Inc.* v. *Mexico* noted that it was "accepted" that the State responsibility articles constituted the "most authoritative statement" on the rules on State responsibility.[4] 5

[A/65/76, para. 10]

International arbitral tribunal (under the ICSID Convention)

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

The tribunal in the 2008 *Biwater Gauff (Tanzania) Ltd.* v. *Tanzania* case referred to the articles as "a codification of the rules of customary international law on the responsibility of States for their internationally wrongful acts".[5] 6

[A/65/76, para. 11]

Ad hoc committee (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The *ad hoc* committee in *Sempra Energy International* v. *Argentine Republic* found that the rules of customary international law reflected in the articles did not necessarily enjoy a peremptory (*jus cogens*) status.[6] 4

[A/68/72, para. 8]

World Trade Organization panel

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

The panel established in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, as part of its analysis of the Agreement on Subsidies and Countervailing Measures SCM Agreement, considered whether the State responsibility articles (1) were "recognized in the WTO as 'rules of international law applicable in the relations between the parties' to the dispute", and (2) whether the articles were "relevant" to the particular dispute at issue.[7] 5

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[4] 5 ICSID, Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para. 76.

[5] 6 ICSID, Case No. ARB/05/22, Award, 24 July 2008, paras. 773 and 774.

[6] 4 ICSID, Case No. ARB/02/16, Decision on the Argentine Republic's request for annulment of the award, 29 June 2010, para. 202 ("*Jus cogens* does not require parties to a bilateral investment treaty to forego the possibility of invoking a defence of necessity in whatever terms they may agree"). See also the discussion of the Decision under article 25, below.

[7] 5 WTO, Panel Report, WT/DS379/R, 22 October 2010, para. 8.87.

On the first question, the panel indicated that, in its view, citations to the articles in prior WTO disputes "have been as conceptual guidance only to supplement, or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements".[8] [6] In addition, the panel referenced cases where "panels and the Appellate Body have made explicit that the Draft Articles are not binding", and thus found that there was "no basis for the assertion that as a general matter the Appellate Body and panels have found that the Draft Articles must be taken into account as 'rules of international law applicable in the relations between parties' in interpreting the WTO Agreement … ".[9] [7]

The panel also noted that the articles are "not concerned with the substance of the underlying international obligations, but are rather concerned with determining whether a state is or is not responsible for a given action that may constitute a substantive breach of such an obligation".[10] [8] The panel concluded that the articles were not "relevant rules of international law applicable to the relations between the parties', such that [it] should 'take them into account, together with the context' in the sense of Article 31(3)(*c*) of the Vienna Convention [on the Law of Treaties, 1969]."[11] [9]

[A/68/72, paras. 9–11]

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 indicated that, as confirmed by the State responsibility articles, "[t]he failure by a Sponsoring State to meet its obligations not resulting in material damage is covered by customary law which does not make damage a requirement for the liability of States."[12] [10]

[A/68/72, para. 12]

World Trade Organization Appellate Body

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

In its report reviewing the panel report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case (see above), the Appellate Body stated that:

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[8] [6] *Ibid*.

[9] [7] *Ibid*., para. 8.89.

[10] [8] *Ibid*., para. 8.90. For discussion of the panel's consideration of the State responsibility article on *lex specialis*, see the discussion of the Panel Report under article 55.

[11] [9] *Ibid*., para. 8.91.

[12] [10] ITLOS, Seabed Disputes Chamber, Case No. 17, Advisory Opinion, 1 February 2011, para. 210.

… the Panel misconstrued the role of the ILC Articles when it set out to analyze 'whether [the ILC Articles] would override [the Panel's] analysis and conclusions based on the text of the SCM Agreement itself'. The question is not whether intermediate results of one element of the interpretative exercise 'override' the results of another. Rules of international law within the meaning of Article 31(3)(*c*) are one of several means to ascertain the common intention of the parties to a particular agreement reflected in Article 31 of the Vienna Convention [on the Law of Treaties].[13] 11

The Appellate Body continued by noting that:

[w]e are puzzled by the Panel's statement that the ILC Articles have been cited by panels and the Appellate Body 'as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements'.[14] 12

While the WTO panel, as noted previously, found that panels and the Appellate Body had not considered the State responsibility articles to constitute rules of international law in the sense of article 31(3)(*c*) of the Vienna Convention on the Law of Treaties, the Appellate Body observed that prior WTO jurisprudence "evinces that these ILC Articles have been 'taken into account' in the sense of Article 31(3)(*c*) by panels and the Appellate Body … ".[15] 13

[A/68/72, paras. 13–15]

European Court of Human Rights

Kotov v. *Russia*

In *Kotov* v. *Russia*, the European Court of Human Rights referred to the State responsibility articles as "codified principles developed in modern international law in respect of the State's responsibility for internationally wrongful acts".[16] 14

[A/68/72, para. 16]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* acknowledged that although the status of the State responsibility articles remains that of a draft, the "degree of approval accorded to them by the UN General Assembly and in subsequent international practice amply justifies treating the draft Articles as guidelines for present purposes".[17] 5

[A/71/80, para. 8]

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[13] 11 WTO, Appellate Body, WT/DS379/AB/R, 11 March 2011, para. 312 (quoting the Panel Report (footnote [7] 5 above), para. 8.84).

[14] 12 *Ibid*., para. 313 (quoting the Panel Report (footnote [7] 5 above), para. 8.87).

[15] 13 *Ibid*., para. 313.

[16] 14 ECHR, Grand Chamber, Application No. 54522/00, Judgment, 3 April 2012, para. 30.

[17] 5 ICSID, Case No. ARB/06/3, Award, 6 May 2013, para. 189 (footnotes omitted).

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

In *ConocoPhillips Petrozuata B.V., and others* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal indicated that the State responsibility articles "have been regularly referred to in subsequent decisions, including ICSID awards and decisions, as codifying or declaring customary international law".[18] [6]

[A/71/80, para. 9]

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* noted that the substantive law applied by the tribunal also consisted of "principles of international law, including those authoritatively set out in the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations".[19] [7]

[A/71/80, para. 10]

European Court of Human Rights

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights stated that the State responsibility articles "ont codifié les principes dégagés par le droit international moderne concernant la responsabilité de l'Etat pour fait internationalement illicite".[20] [8]

[A/71/80, para. 11]

Liseytseva and Maslov v. *Russia*

The European Court of Human Rights in *Liseytseva and Maslov* v. *Russia*, recognized the State responsibility articles and their commentaries as "codified principles developed in modern international law in respect of the State's responsibility for internationally wrongful acts".[21] [9]

[A/71/80, para. 12]

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[18] [6] ICSID, Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, para. 339.

[19] [7] PCA, Case No. AA 226, Final Award 18 July 2014, para. 113, specifically citing articles 1–11, 28–39 and 49–54. Hereinafter the reference to *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* includes the references to two largely identical awards (with the exception of the quantification of damages), *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 and *Veteran Petroleum Limited (Cyprus)* v. *The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014.

[20] [8] ECHR, First Section, Application No. 2880/10, Decision, 16 September 2014, para. 45.

[21] [9] ECHR, First Section, Application Nos. 39483/05 and 40527/10, Judgment, 9 October 2014, para. 128.

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal referred to the State responsibility articles as a "codification of customary international law".[22] [10]

[A/71/80, para. 13]

[22] [10] ICSID, Case No. ARB/07/19, Award, 25 November 2015, para. 7.60.

Part One

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Rankin v. *Islamic Republic of Iran*

In its 1987 award in the *Rankin* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether it had jurisdiction over the case, considered that Part One of the articles provisionally adopted by the International Law Commission in 1980 constituted "the most recent and authoritative statement of current international law" on the origin of State responsibility for internationally wrongful acts:[23] [4]

> … the Tribunal observes that only injuries resulting from popular movements which are not an act of the Government of Iran are excluded from the Tribunal's jurisdiction by this provision [*i.e.*, paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981[24] [5]], which exclusion is no more than a restatement of the customary international law requirement that a State's responsibility is engaged only by wrongful conduct attributable to the State. Such conduct has in recent years come under the scrutiny of the United Nations International Law Commission, culminating in the development of a set of draft articles on the origins of State responsibility for internationally wrongful acts. The Tribunal has adopted the criteria set down by the International Law Commission as the most recent and authoritative statement of current international law in this area. *See* draft articles on State responsibility (Part 2 of the draft) as provisionally adopted by the International Law Commission, cited *1980 Yearbook of the International Law Commission*, vol. II, Part Two at

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[23] [4] Part One of the articles provisionally adopted by the International Law Commission (entitled "Origin of international responsibility") became, with amendments, Part One of the articles finally adopted in 2001.

[24] [5] Under paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981, the United States of America agreed to "bar and preclude prosecution against Iran of any pending or future claim … arising out of events occurring before the date of this Declaration related to … (*d*) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran".

pp. 30–34, United Nations doc. A/CN.4/SER.A/1980/Add.1 (Part 2); accord Alfred L.W. Short v. The Islamic Republic of Iran, Award No. 312–11135–3 (14 July 1987).[25] [6]

In furtherance of this finding, the Tribunal later referred to draft articles 5 to 10 provisionally adopted by the International Law Commission as the legal basis

to examine the circumstances of each departure [of United States citizens from the Islamic Republic of Iran] and to identify the general and specific acts relied on and evidenced to determine how they affected or motivated at that time the individual who now is alleging expulsion and whether such acts are attributable to Iran.[26] [7]

[A/62/62, para. 7]

International arbitral tribunal (under the ICSID Convention)

Burlington Resources Inc. v. *Republic of Ecuador*

The arbitral tribunal in *Burlington Resources Inc.* v. *Republic of Ecuador* referred generally to the State responsibility articles in support of the assertion that "someone's breach of an obligation corresponds to the breach of another's right".[27] [15]

[A/68/72, para. 17]

[25] [6] IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 141, para. 18. The relevant extract of the previous case referred to in this passage (*Short* v. *Islamic Republic of Iran*) is reported [on pp. 168–169] below.

[26] [7] *Ibid.*, pp. 147–148, para. 30.

[27] [15] ICSID, Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 214, footnote 355.

Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[28] [34] ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[29] [35] in the *Military and Paramilitary Activities in and against Nicaragua* case,[30] [36] and in the *Gabčíkovo-Nagymaros Project* case.[31] [37] The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,[32] [38] and on the *Interpretation of Peace Treaties (Second Phase)*,[33] [39] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[34] [40] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,[35] [41] in

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[28] [34] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1,* p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, *Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; and *ibid., Merits*, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17,* p. 29.

[29] [35] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949,* p. 4, at p. 23.

[30] [36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 14, at p. 142, para. 283, and p. 149, para. 292.

[31] [37] *Gabčíkovo-Nagymaros Project* [*(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7], at p. 38, para. 47.

[32] [38] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 174, at p. 184.

[33] [39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

[34] [40] *Ibid.*, p. 228.

[35] [41] Seven of these awards rendered in 1901 reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by

the *Dickson Car Wheel Company* case,[36] [42] in the *International Fisheries Company* case,[37] [43] in the *British Claims in the Spanish Zone of Morocco* case[38] [44] and in the *Armstrong Cork Company* case.[39] [45] In the *"Rainbow Warrior"* case,[40] [46] the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[41] [47]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[42] [48] and since[43] [49] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[44] [50] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible

its agents" (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

[36] [42] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

[37] [43] *International Fisheries Company (U.S.A.)* v. *United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

[38] [44] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility", UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

[39] [45] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law", UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

[40] [46] 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, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[41] [47] *Ibid.*, p. 251, para. 75.

[42] [48] See, *e.g.*, D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnoshenia, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

[43] [49] See, *e.g.*, I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[44] [50] See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[45] [51] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, *i.e.* concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[46] [52]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[47] [53] In later cases the Court has reaffirmed this idea.[48] [54] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic

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[45] [51] See, *e.g.*, R. Ago, "Le délit international", *Recueil des cours … , 1939–II* (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise,* vol. I, *Peace,* 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

[46] [52] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.

[47] [53] *Ibid.*, para. 34.

[48] [54] See *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 595, at pp. 615–616, paras. 31–32.

principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has capacity to maintain its rights by bringing international claims".[49] [55] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[50] [56] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[51] [57]

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French *fait* has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* in the *Blaškić* case, which was later submitted to review by the Appeals Chamber,[52] [8] Trial Chamber II of the International Tribunal for the Former Yugoslavia, in considering whether individuals could be subject to orders (more specifically *subpoe-*

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[49] [55] *Reparation for Injuries* (footnote [32] 38 above), p. 179.

[50] [56] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

[51] [57] For the position of international organizations, see article 57 and commentary.

[52] [8] In this decision, Trial Chamber II considered that "it is incumbent upon an individual acting in an official capacity to comply with the orders of the International Tribunal" (International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Decision on the Objection of the Republic of Croatia to the Issuance of* Subpoenae Duces Tecum, Case No. IT-95–14, 18 July 1997, para. 96) and therefore reinstated the *subpoena duces tecum* issued on 15 January 1997 by Judge McDonald to the Republic of Croatia and the Croatian Defence Minister, Mr. Gojko Susak (*ibid*., disposition). The Appeals Chamber, on the contrary, later found that "the International Tribunal may not address binding orders under Article 29 to State officials acting in their official capacity" and thus quashed the *subpoena duces tecum* (International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for*

nae duces tecum) from the Tribunal, quoted the text of draft article 1 adopted on first reading,[53] [9] which it considered to be an "established rule of international law":

> If the individual complies with the order in defiance of this government, he may face the loss of his position and possibly far greater sanctions than need be mentioned here. Given the International Tribunal's lack of police power, it would be very difficult to provide adequate protection for an official who so defied his State. Based on the principle *ultra posse nemo tenetur*, which states that one should not be compelled to engage in a behaviour that is nearly impossible, it may not be proper to compel an individual to comply with such an order in his official capacity in such circumstances. However, these concerns must be balanced with the need of the International Tribunal to obtain the information necessary for a just and fair adjudication of the criminal charges before it. Due to these concerns and noting the established rule of international law that "[e]very internationally wrong act of a State entails the international responsibility of that State", the duty to comply in such a scenario must be placed on the State, with appropriate sanctions or penalties for non-compliance … [54] [10]

[A/62/62, para. 8]

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in support of its finding that a State may be responsible for omissions by its organs, quoted the commentary to article 1 finally adopted by the International Law Commission in 2001.[55] [11]

[A/62/62, para. 9]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* referred to articles 1 and 3 of the State responsibility articles in determining that "the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions".[56] [16]

[A/68/72, para. 18]

Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95–14, 29 October 1997, disposition). On the Appeals Chamber judgement, see [pp. 52–53] below.

[53] [9] This provision was reproduced without change in article 1 finally adopted by the International Law Commission in 2001.

[54] [10] ICTY, Trial Chamber II, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum* (footnote [52] 8 above), para. 95 (footnotes omitted).

[55] [11] Partial Award, 19 August 2005, para. 188. The arbitral tribunal referred in particular to paragraphs (1) and (8) of the commentary to article 1 (*Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[56] [16] ICSID, Case No. ARB/03/15, Award, 31 October 2011, para. 130.

Swisslion DOO Skopje v. *The Former Yugoslav Republic of Macedonia*

In its award, the arbitral tribunal in *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia* referred to articles 1 and 6 of the State responsibility articles in support of the assertion that, "under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary".[57] [17]

[A/68/72, para. 19]

International Tribunal for the Law of the Sea

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

In *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, the International Tribunal for the Law of the Sea noted that articles 1 and 31, paragraph 1, of the State responsibility articles reaffirmed that "every internationally wrongful act of a State entails the international responsibility of that State".[58] [11] The Tribunal noted that the Seabed Disputes Chamber of the Tribunal, in its advisory opinion on *Responsibilities and Obligations of States with Respect to Activities in the Area*, had indicated the customary international law status of article 31,[59] [12] and added that article 1 "also reflects customary international law".[60] [13]

[A/71/80, para. 14]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela* agreed with the respondent that the State responsibility articles "primarily concern internationally wrongful acts against States, not individuals or other non-state actors, and some prominent commentators have warned against uncritical conflation of the two".[61] [14]

[A/71/80, para. 15]

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

[57] [17] ICSID, Case No. ARB/09/16, Award, 6 July 2012, para. 261, footnote 323.

[58] [11] ITLOS, Judgment, *ITLOS Reports 2014*, p. 4, at para. 429.

[59] [12] See footnote [12] 10 above, para. 194.

[60] [13] See footnote [58] 11 above, para. 430.

[61] [14] ICSID, (Additional Facility), Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 679.

to what extent the flag State shall be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag.[62] [15]

[A/71/80, para. 16]

International arbitral tribunal (under the ICSID Additional Facility Rules)

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

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, the arbitral tribunal noted, based on the commentary to article 1, that "the term 'international responsibility' … covers the new legal relations which arise under international law by the internationally wrongful act of a State".[63] [16] It further observed that "Argentina, by reason of its international wrong in not respecting its obligations under the three BITs, is therefore subject to a new relationship toward the Claimants".[64] [17]

[A/71/80, para. 17]

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 the principle enshrined in article 1, which is that States incur responsibility for their internationally wrongful acts, was "a basic principle of international law".[65] [18]

[A/71/80, para. 18]

International Criminal Court

Prosecutor (on the application of Victims) v. *Ruto (William Samoei) and Sang (Joshua Arap)*

In *Prosecutor (on the application of Victims)* v. *Ruto (William Samoei) and Sang (Joshua Arap)*, the International Criminal Court referred to article 1 of the State responsibility articles in discussing whether it does "amount to an internationally wrongful act for the government of a State to set out to meddle with an on-going case before an international criminal court, with the view to occasioning its abortion without proper consideration of the charges".[66] [9]

[A/74/83, p. 6]

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[62] [15] ITLOS, Advisory Opinion, 2 April 2015, para. 144.

[63] [16] ICSID, Case No. ARB/03/19, Award, 9 April 2015, para. 25. Hereinafter this reference to *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic* includes the reference to the identical award in *AWG Group Ltd.* v. *The Argentine Republic*, Award, 9 April 2015.

[64] [17] *Ibid.*

[65] [18] ICSID, Case No. ARB/06/2, Award, 16 September 2015, para. 327.

[66] [9] International Criminal Court, Trial Chamber V(A), Decision on defence applications for judgments of acquittal, ICC-01/09–01/11–2027-Red, Case No. ICC-01/09–01/11, 5 April 2016, paras. 207–210.

International Tribunal for the Law of the Sea

Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)

In *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, a Special Chamber of the International Tribunal for the Law of the Sea observed that the Seabed Disputes Chamber of the Tribunal, in its advisory opinion on *Responsibilities and Obligations of States with Respect to Activities in the Area*, established the customary international law status of several articles of the State responsibility articles, and added that article 1 "also reflects customary international law".[67] 10

[A/74/83, p. 6]

European Court of Human Rights

Abu Zubaydah v. *Lithuania*

The European Court of Human Rights, in *Abu Zubaydah* v. *Lithuania*, recited articles 1, 2, 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[68] 11

[A/74/83, p. 7]

Al Nashiri v. *Romania*

The European Court of Human Rights, in *Al Nashiri* v. *Romania*, referred to articles 1, 2, 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[69] 12

[A/74/83, p. 7]

International Court of Justice

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965

In its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice referred to article 1 in concluding that,

> [t]he Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State.[70] 10

[A/77/74, p. 6]

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[67] 10 ITLOS, Judgment of 23 September 2017, para. 558, citing Seabed Disputes Chamber, Advisory Opinion (footnote [12] 10 above), para. 169.

[68] 11 ECHR, First Section, Application No. 46454/11, Judgment, 31 May 2018, para. 232.

[69] 12 ECHR, First Section, Application No. 33234/12, Judgment, 31 May 2018, para. 210.

[70] 10 ICJ, *Advisory Opinion, I.C.J. Reports 2019*, p. 95, at pp. 138–139, para. 177.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

B3 Croatian Courier Coöperatief U.A. v. *Republic of Croatia*

In *B3 Croatian Courier Coöperatief U.A.* v. *Republic of Croatia*, the arbitral tribunal considered "it to be uncontroversial that an expropriation claim may be based not only on positive acts of the State, but also on omissions", referring to the commentary to article 1.[71] [11]

[A/77/74, p. 7]

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 noted that, as stated in article 1, "[e]very internationally wrongful act of a State entails the international responsibility of that State", and observed that article 1 "also reflects customary international law".[72] [12]

[A/77/74, p. 7]

[INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[73] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[74] [43]

[A/77/74, p. 11]]

[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".[75] [130]

[A/77/74, p. 24]]

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[71] [11] ICSID, Case No. ARB/15/5, Award, 5 April 2019, para. 1050.

[72] [12] ITLOS, *Judgment, ITLOS Reports 2018–2019*, p. 10, at p. 94, para. 317, citing *M/V "Virginia G" (Panama/Guinea-Bissau)* (footnote [58] 11 above), para. 430.

[73] [42 Final Award, 26 March 2021, para. 72.]

[74] [43 *Ibid*., paras. 72 and 134–135.]

[75] [130 IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 14 October 2019, para. 30.]

[*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".[76] 139

[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.[77] 143

The tribunal also cited articles 1 and 2.[78] 144

[A/77/74, p. 26]]

[76] [139 IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 3 September 2020, para. 17.]

[77] [143 ICSID, Case No. ARB/15/37, Award, 26 February 2021, para. 513.]

[78] [144 *Ibid*., para. 512.]

Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, *i.e.* the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[79] [58] ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[80] [59]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[81] [60]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[82] [61] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such … " In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence

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[79] [58] See footnote [28] 34 above.

[80] [59] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 54, para. 78.

[81] [60] See footnote [36] 42 above.

[82] [61] Cf. *Yearbook … 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[83] [62] In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[84] [63] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[85] [64]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[86] [65] The question is which persons should be considered as acting on behalf of the State, *i.e.* what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is

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[83] [62] *Corfu Channel, Merits* (footnote [29] 35 above), pp. 22–23.

[84] [63] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez* v. *Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

[85] [64] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[86] [65] *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[87] [66] It employed the same expression in its subsequent judgment on the merits.[88] [67] ICJ referred explicitly to these words in the *Reparation for Injuries* case.[89] [68] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[90] [69] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[91] [70] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (*c*), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[92] [71] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[93] [72]

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes

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[87] [66] *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above).

[88] [67] *Factory at Chorzów, Merits* (*ibid.*).

[89] [68] *Reparation for Injuries* (footnote [32] 38 above), p. 184.

[90] [69] *"Rainbow Warrior"* (footnote [40] 46 above), p. 251, para. 75.

[91] [70] At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure … to carry out the international obligations of the State" was adopted (see *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

[92] [71] See footnote [28] 34 above.

[93] [72] See also article 33, paragraph 2, and commentary.

said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[94] 73

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (*a*)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (*b*)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (*a*), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[95] 74 But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

(13) In subparagraph (*b*), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

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[94] 73 For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 30–33, paras. 62–68; *"Rainbow Warrior"* (footnote [40] 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 *et seq.*

[95] 74 See, *e.g.*, *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 51, para. 86.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Amco Asia Corporation and Others v. *Republic of Indonesia*

In its 1984 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 3 provisionally adopted by the International Law Commission[96] [12] (as well as articles 5 and 10 provisionally adopted), which it quoted *in extenso*, constituted "an expression of accepted principles of international law":

> It is a generally accepted rule of international law, clearly stated in international awards and judgements and generally accepted in the literature, that a State has a duty to protect aliens and their investments against unlawful acts committed by some of its citizens … If such acts are committed with the active assistance of state-organs a breach of international law occurs. In this respect, the Tribunal wants to draw attention to the draft articles on State responsibility formulated in 1979 by the International Law Commission and presented to the General Assembly of the United Nations as an expression of accepted principles of international law.[97] [13]

[A/62/62, para. 10]

Ad hoc committee (under the ICSID Convention)

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

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the *ad hoc* committee noted that,

> [i]n considering the [arbitral] Tribunal's findings on the merits [in the award involved in the annulment proceedings], it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims 'based directly on alleged actions or failures to act of the Argentine Republic' and, on the other hand, claims relating to conduct of the [Argentine province of] Tucumán authorities which are nonetheless brought against Argentina and 'rely … upon the principle of attribution'.[98] [14]

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[96] [12] This provision was amended and incorporated in article 2 adopted by the International Law Commission in 2001. The text of draft article 3 provisionally adopted read as follows:

> Article 3
>
> Elements of an internationally wrongful act of a State
>
> There is an internationally wrongful act of a State when:
>
> (*a*) Conduct consisting of an action or omission is attributable to the State under international law; and
>
> (*b*) That conduct constitutes a breach of an international obligation of the State. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[97] [13] ICSID, Award on the merits, 20 November 1984, para. 172 reproduced in *International Law Reports*, vol. 89, p. 457.

[98] [14] ICSID, Case No. ARB/97/3, Decision of Annulment, 3 July 2002, para. 16 (footnote omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, p. 100.

In a footnote, the *adhoc* committee criticized the arbitral tribunal's terminology on the basis of the text of and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission:

… The terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. *See* International Law Commission articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 54/83, 12 December 2001 … , articles 2(*a*), 4 and the Commission's commentary to article 4, paras. (8)-(10). A similar remark may be made concerning the Tribunal's later reference to "a strict liability of attribution" … Attribution has nothing to do with the standard of liability or responsibility. The question whether a State's responsibility is "strict" or is based on due diligence or on some other standard is a separate issue from the question of attribution (cf. International Law Commission articles, arts. 2, 12). It does not, however, appear that either of these terminological issues affected the reasoning of the Tribunal, and no more need be said of them.[99] [15]

[A/62/62, para. 11]

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in support of its finding that a State may be responsible for omissions by its organs, quoted the commentary to article 2 finally adopted by the International Law Commission in 2001.[100] [16]

[A/62/62, para. 12]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Fireman's Fund Insurance Company v. *The United Mexican States*

In its 2006 award, the arbitral tribunal constituted to hear the *Fireman's Fund Insurance Company* v. *The United Mexican States* case, in the first case under NAFTA to be heard under Chapter Fourteen devoted to cross-border investment in Financial Services, considered the meaning of the term "expropriation" in article 1110(1) of NAFTA. Upon a review of prior decisions and "customary international law in general", the tribunal identified a number of elements, including that expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by NAFTA. In a footnote citing article 2 of the State responsibility articles, the tribunal added that:

[a] failure to act (an 'omission') by a host State may also constitute a State measure tantamount to expropriation under particular circumstances, although those cases will be rare and seldom concern the omission alone.[101] [17]

[A/65/76, para. 12]

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[99] [15] *Ibid*., p. 100, para. 16, footnote 17.

[100] [16] See footnote [55] 11 above, para. 188. The arbitral tribunal referred in particular to paragraph (4) of the commentary to article 2 (*Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[101] [7] ICSID, Case No. ARB(AF)/ 02/01, Award, 17 July 2006, para. 176(*a*), footnote 155.

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 2 as reflecting a rule applicable under customary international law.[102] [8]

[A/65/76, para. 13]

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, considered the question as to whether actual economic loss or damage was necessary for a cause of action relating to expropriation. The tribunal held that "the suffering of substantive and quantifiable economic loss by the investor [was] not a pre-condition for the finding of an expropriation" under the bilateral investment treaty in question, but that where there had been "substantial interference with an investor's rights, so as to amount to an expropriation … there may be scope for a non-compensatory remedy for the expropriation (*e.g.* injunctive, declaratory or restitutionary relief)". In coming to that conclusion, the tribunal referred to the commentary to article 2 of the State responsibility articles, where the Commission stated:

> It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, 'damage' to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect.[103] [9]

[A/65/76, para. 14]

International arbitral tribunal (under UNCITRAL Rules)

Merrill & Ring Forestry L.P. v. *The Government of Canada*

The arbitral tribunal constituted to hear the *Merrill & Ring Forestry L.P.* v. *The Government of Canada* case indicated that, although the commentary to article 2 provides that whether damage is "'required depends on the content of the primary obligation, and there is no general rule in this respect'[,] … in the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the primary obligation is quite clearly inseparable from the existence of damage".[104] [19]

[A/68/72, para.20]

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[102] [8] *Archer Daniels Midland Company* (footnote [3] 4 above), para. 275.

[103] [9] *Biwater Gauff* (footnote [5] 6 above), para. 466, citing paragraph (9) of the commentary to article 2.

[104] [19] Award, 31 March 2010, para. 245 (quoting James Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, at 84).

International arbitral tribunal (under the ICSID Convention)

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

The arbitral tribunal in *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* indicated that article 2 is "not an autonomous basis for attribution", but rather "only articulates the elements of the definition an internationally wrongful act of a State", which "must be attributable to the State and violate an international obligation of the State".[105] [20]

[A/68/72, para. 21]

Permanent Court of Arbitration (under UNCITRAL Rules)

Frontier Petroleum Services LTD. v. *The Czech Republic*

In its final award, the arbitral tribunal in *Frontier Petroleum Services LTD.* v. *The Czech Republic* referred to article 2 and its accompanying commentary in support of the assertion that "[t]here is little doubt that the term 'measure' generally encompasses both actions and omissions of a state in international law".[106] [21]

[A/68/72, para. 22]

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 indicated that a provision of UNCLOS constitutes an exception to the customary international law rule reflected in the commentary to article 2, which provides that "a State may be held liable … even if no material damage results from its failure to meet its international obligations".[107] [22]

[A/68/72, para. 23]

[Inter-American Court of Human Rights

Castillo González et al. v. *Venezuela*

In its judgment in *Castillo González et al.* v. *Venezuela,* the Inter-American Court of Human Rights indicated that articles 2 and 4 constituted part of "the basic principle of the law on international State responsibility".[108] [51]

[See A/68/72, footnote 18 and para. 41]]

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[105] [20] ICSID, Case No. ARB/07/24, Award, 18 June 2010, para. 173.

[106] [21] PCA, Final Award, 12 November 2010, para. 223.

[107] [22] See footnote [12] 10 above, para. 178 (citing para. (9) of the commentary to article 2) and para. 210.

[108] [[51] IACHR, Judgment, Series C, No. 256, 27 November 2012, para. 110, footnote 51 (quoting articles 2 and 4 of the State responsibility articles).]

[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.[109] [15]

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

European Court of Human Rights

Likvidējamā P/S Selga and Lūcija Vasiļevska v. *Latvia*

In *Likvidējamā P/S Selga and Lūcija Vasiļevska* v. *Latvia*, the European Court of Human Rights considered article 2 of the State responsibility articles and excerpts of the commentary thereto as relevant international law.[110] [20] In assessing the responsibility of Latvia, the Court relied on article 2 to note that the two conditions of attribution of conduct and breach "form a cornerstone of State responsibility under international law".[111] [21]

[A/71/80, para. 19]

Inter-American Court of Human Rights

Gutiérrez and Family v. *Argentina*

In *Gutiérrez and Family* v. *Argentina*, the Inter-American Court of Human Rights referred to article 2 when recalling that

> in order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as under domestic criminal law, the guilt of the authors or their intentions, nor is it necessary to identify, individually, the agents to which the violations are attributed. It is sufficient that the State has an obligation that it has failed to comply with; in other words, that this unlawful act is attributed to it.[112] [22]

[A/71/80, para. 20]

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[109] [15 ITLOS, Advisory Opinion, 2 April 2015, para. 144.]

[110] [20] ECHR, Fourth Section, Application Nos. 17126/02 and 24991/02, Decision, 1 October 2013, paras. 64–65.

[111] [21] *Ibid*., para. 95.

[112] [22] IACHR, Judgment, 25 November 2013, para. 78, footnote 163 (footnotes omitted).

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* referred to article 2 as being "generally considered as a statement of customary international law".[113] [23]

[A/71/80, para. 21]

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

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal noted that a "[b]reach of the BIT would be an internationally wrongful act within Article 2 of the ILC Articles as a 'breach of an international obligation', which can include treaty obligations".[114] [24]

[A/71/80, para. 22]

Ad hoc committee (under the ICSID Convention)

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the [*ad hoc* Committee], constituted to decide an application to annul the award, observed that article 2 of the State responsibility articles "codifies customary international law".[115] [25]

[A/71/80, para. 23]

[European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[116] [80] In establishing jurisdiction in respect of the Netherlands, the Court could not find that

> the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility).[117] [81]

[A/71/80, para. 65]]

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[113] [23] See footnote [63] 16 above, para. 24.

[114] [24] ICSID, Case No. ARB/10/15, Award, 28 July 2015, para. 722. See also the reference to article 2 in the text accompanying footnote [1518] 189 below.

[115] [25] ICSID, Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 183.

[116] [80 ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.]

[117] [81 *Ibid*., para. 151.]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Vestey Group Limited Ltd.* v. *Bolivarian Republic of Venezuela*, also relying on articles 1 and 31 of the State responsibility articles, found that "Venezuela has committed an internationally wrongful act as defined by Article 2 of the ILC Articles on State Responsibility, which entails the international responsibility of the state, and gives rise to an obligation to make full reparation for the injury caused by the illicit act".[118] [14]

[A/74/83, p. 7]

Permanent Court of Arbitration (under UNCITRAL Rules)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal stated that

> [i]t is important to note that Article 2 of the ILC Articles states that two conditions must be met for the attribution to a State of an internationally wrongful act: (i) the act must be attributable to the State under international law; and (ii) it must constitute a breach of an international obligation of the State.[119] [15]

[A/74/83, p. 7]

Arbitration Institute of the Stockholm Chamber of Commerce

Busta and Busta v. *The Czech Republic*

In *Busta and Busta* v. *The Czech Republic*, the arbitral tribunal referred to article 2 of the State responsibility articles, when noting that "a State's international responsibility can be engaged by both action and inaction of its organs".[120] [16]

[A/74/83, p. 7]

Economic Community of West African States Court of Justice

Benson Olua Okomba v. *Republic of Benin*

In *Benson Olua Okomba* v. *Republic of Benin*, the Economic Community of West African States Court of Justice observed, in considering articles 1 and 2 of State responsibility articles, that "[t]he rules of state responsibility appl[y] to international human rights law".[121] [17]

[A/74/83, p. 7]

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[118] [14] ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 326 and footnote 306.

[119] [15] PCA, Case No. 2013–09, Award on Jurisdiction and the Merits, 25 July 2016, para. 283.

[120] [16] SCC, Case No. V (2015/014), Final Award, 10 March 2017, para. 399.

[121] [17] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, p. 20.

International arbitral tribunal (under the ICSID Convention)

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

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal stated, with reference to article 2 of the State responsibility articles, that "[t]he issue for the purposes of the present Award is the threshold question whether the conduct of which the Claimant complains is attributable to the Respondent under international law".[122] [18] The arbitral tribunal found that

> [t]he Respondent's breaches of Article 3(1) of the BIT amount to an internationally wrongful act as this provision gives rise to an international obligation on the Respondent and the Tribunal has found the breaches of this provision to be attributable to the Respondent (Article 2 of the ILC Articles).[123] [19]

[A/74/83, p. 7]

Economic Community of West African States Court of Justice

Chief Damian Onwuham and Others v. *Federal Republic of Nigeria and Imo State Government*

In *Chief Damian Onwuham and Others* v. *Federal Republic of Nigeria and Imo State Government*, the Economic Community of West African States Court of Justice, quoting articles 1 and 2 of the State responsibility articles, observed that

> [i]t is trite that the rules of state responsibility appl[y] to international human rights law. […] This implies that states will be responsible for acts done without due care and diligence in preventing human right[s] violations and for failure to investigate and punish acts violating those rights.[124] [20]

[A/74/83, p. 8]

Permanent Court of Arbitration (under UNCITRAL Rules)

Consutel Group S.P.A. in liquidazione (Italy) v. *People's Democratic Republic of Algeria*

In *Consutel Group S.P.A. in liquidazione (Italy)* v. *People's Democratic Republic of Algeria*, the arbitral tribunal stated that "the attribution to the State of acts or omissions committed by a public entity has no consequences, under international law, with regard to the lawfulness of those acts", noting that article 2 "stipulates, in that regard, that two separate conditions must be met in order for there to be an 'internationally wrongful act of a State': there must be (i) an act attributable to the State and (ii) a breach of an international obligation of the State".[125] [13]

[A/77/74, p. 7]

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[122] [18] ICSID, Case No. ARB/12/33, Award, 22 December 2017, para. 795.

[123] [19] *Ibid*., para. 1127.

[124] [20] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/22/18, Judgment, 3 July 2018, pp. 24–25.

[125] [13] PCA, Case No. 2017–33, Final Award, 3 February 2020, para. 317.

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* recalled that "attribution is a concept of international law firmly rooted in the rules on State responsibility".[126] [14] Thus,

> [w]here there is a claim of a breach of an international obligation of a State under a BIT, the claimant has to prove (i) that the conduct complained of is, under international law, attributable to a State, *i.e.*, under international law it is considered to be the conduct of a State; and (ii) that the obligation allegedly breached is an obligation which that State has undertaken under the applicable BIT.[127] [15]

[A/77/74, p. 7]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* noted that, in many respects, the articles "codify customary international law".[128] [16] The tribunal referred to article 2, which "provides that an internationally wrongful act of a State occurs when two cumulative conditions are met: (i) the act can be attributed to the State under international law; and (ii) the act constitutes a breach of an international obligation".[129] [17] Thus, the tribunal stated that "one must first determine whether an act is attributable to the State before assessing whether the act can be deemed to be in breach of an international obligation",[130] [18] and recalled that "under international law, the State is treated as a unity".[131] [19]

[A/77/74, p. 7]

[*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.[132] [143]

The tribunal also cited articles 1 and 2.[133] [144]

[A/77/74, p. 26]]

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[126] [14] PCA, Case No. 2013–34, Partial Award (Jurisdiction and Liability), 5 February 2021, para. 154.

[127] [15] *Ibid*., para. 155.

[128] [16] ICSID, Case No. ARB/12/6, Award, 4 May 2021, para. 736 (footnote 628), citing *Tulip Real Estate Investment and Development Netherlands B.V.* v. *Republic of Turkey* (footnote [210] 40 below).

[129] [17] *Ibid*., para. 736.

[130] [18] *Ibid*., para. 737, citing para. (5) of the commentary to article 2.

[131] [19] *Ibid*., para. 742, citing para. (6) of the commentary to article 2.

[132] [[143] ICSID, Case No. ARB/15/37, Award, 26 February 2021, para. 513.]

[133] [[144] *Ibid*., para. 512.]

Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.[134] [75] The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

> according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted … [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force … The application of the Danzig Constitution may … result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law … However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.[135] [76]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

> a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. … under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.[136] [77]

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[134] [75] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44,* p. 4.

[135] [76] *Ibid.*, pp. 24–25. See also *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 24.

[136] [77] *S.S. "Wimbledon"* (footnote [28] 34 above), pp. 29–30.

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;[137] [78]

… it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[138] [79]

… a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[139] [80]

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*[140] [81] and *Jurisdiction of the Courts of Danzig*.[141] [82]

(4) ICJ has often referred to and applied the principle.[142] [83] For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law".[143] [84] In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[144] [85]

Conversely, as the Chamber explained:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[145] [86]

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[137] [78] *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

[138] [79] *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid.*, *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[139] [80] *Treatment of Polish Nationals* (footnote [134] 75 above), p. 24.

[140] [81] *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

[141] [82] *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

[142] [83] See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

[143] [84] *Reparation for Injuries* (footnote [32] 38 above), at p. 180.

[144] [85] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

[145] [86] *Ibid.*, p. 74, para. 124.

The principle has also been applied by numerous arbitral tribunals.[146] [87]

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,[147] [88] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

> Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[148] [89]

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[149] [90]

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the

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[146] [87] See, *e.g.*, the Geneva Arbitration (the *"Alabama"* case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) (*Great Britain* v. *Costa Rica*), *ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer, ibid.*, p. 327, at p. 360 (1958).

[147] [88] In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

> "In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(*c*) M.145(*c*).1930.V; reproduced in *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

[148] [89] See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook … 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[149] [90] Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of … internal law of fundamental importance".

provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, *e.g.* by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[150] [91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[150] [91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred in a footnote to draft article 4 adopted by the International Law Commission on first reading in support of its assertion that "[w]hether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law".[151] [17]

[A/62/62, para. 13]

Ad hoc committee (under the ICSID Convention)

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

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the *ad hoc* committee, in considering the relation between the breach of a contract and the breach of a treaty in the said instance, referred to article 3 finally adopted by the International Law Commission in 2001, which it considered to be "undoubtedly declaratory of general international law". The *ad hoc* committee further quoted passages of the commentary of the Commission to that provision:

> 95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the bilateral investment treaty [Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments of 3 July 1991] do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the bilateral investment treaty. The point is made clear in article 3 of the International Law Commission articles, which is entitled 'Characterization of an act of a State as internationally wrongful': …
>
> 96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the bilateral investment treaty and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the bilateral investment treaty, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

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[151] [17] ICSID, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 82, footnote 64, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 31.

97. The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to article 3 of the International Law Commission articles, which reads in relevant part as follows:

> (4) The International Court has often referred to and applied the principle. For example in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law." In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:
>
> > Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.
>
> Conversely, as the Chamber explained:
>
> > … the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.
>
> …
>
> (7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, *e.g.* by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.[152] [18]

[A/62/62, para. 14]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *Mexico* case, having stated that the fact "[t]hat the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement

[152] [18] ICSID, *Ad Hoc* Committee, Case No. ARB/97/3, Decision of Annulment, 3 July 2002 (footnotes omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, pp. 127–129.

[at issue in the case] or to international law", quoted the following passage taken from the commentary to article 3 finally adopted by the International Law Commission:

An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.[153] [19]

[A/62/62, para. 15]

International arbitral tribunal (under the ICSID Convention)

SGS Société générale de Surveillance S.A. v. *Islamic Republic of Pakistan*

In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *SGS* v. *Pakistan* case, in the context of its interpretation of article 11 of the bilateral investment agreement between Switzerland and Pakistan,[154] [20] quoted *in extenso* the passage of the decision on annulment in the *Vivendi* case, reproduced [on pages 38–39] above, to illustrate the statement according to which "[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders".[155] [21] The tribunal thus considered that claims under the bilateral investment treaty at issue and contract claims were reasonably distinct in principle.

[A/62/62, para. 16]

SGS Société générale de Surveillance S.A. v. *Republic of the Philippines*

In its 2004 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *SGS* v. *Philippines* case, in the context of its interpretation of article X(2) of the bilateral investment treaty between Switzerland and the Philippines,[156] [22] recognized the "well established" principle that "a violation of a contract entered into by a State with an investor of another State is not, by itself, a violation of international law", as it was affirmed in the *Vivendi* case and relied upon by the tribunal in the *SGS* v. *Pakistan* case (see passages quoted [on pages 38–39] above). It noted however, that, contrary to the *ad hoc* committee in the *Vivendi* case, the tribunal in the *SGS* v. *Pakistan* case, as the tribunal in this case, needed to "consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law". In this respect, it considered that "it might do so, as the International Law Commission observed in its commentary to article 3

[153] [19] ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original). The quoted passage is taken from paragraph (1) of the International Law Commission's commentary to article 3 (*Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[154] [20] That provision stipulated that "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party".

[155] [21] ICSID, Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, para. 147, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 352–355.

[156] [22] That provision, similar to article 11 of the Switzerland-Pakistan bilateral investment treaty referred to above, stipulated that "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party".

of the International Law Commission articles on responsibility of States for internationally wrongful acts", adding that "the question is essentially one of interpretation, and does not seem to be determined by any presumption".[157] [23]

[A/62/62, para. 17]

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in the context of its interpretation of article II(2)(*c*) of the bilateral investment treaty at issue, noted that the distinction between municipal law and international law as two separate legal systems was reflected, *inter alia*, in article 3 finally adopted by the International Law Commission in 2001:

… The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in *inter alia* Article Three of the International Law Commission's Articles on State Responsibility adopted in 2001.[158] [24]

[A/62/62, para. 18]

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*

In its interim award on jurisdiction and admissibility in *Hulley Enterprises Limited* v. *The Russian Federation*,[159] [24] *Yukos Universal Limited* v. *The Russian Federation*[160] [25] and *Veteran Petroleum Limited* v. *The Russian Federation*,[161] [26] the arbitral tribunal, as part of its consideration of the relationship between international and domestic law in the treaty context, 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".[162] [27]

[A/68/72, para. 24]

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[157] [23] ICSID, Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 122 and footnote 54. The tribunal was referring more particularly to paragraph (7) of the commentary to article 3, mentioning the possibility that "the provisions of internal law are actually incorporated in some form, conditionally or unconditionally, into [the international] standard".

[158] [24] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 53.

[159] [24] PCA, Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[160] [25] *Ibid*., *Yukos Universal Limited* v. *The Russian Federation*, Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[161] [26] *Ibid*., *Veteran Petroleum Limited* v. *The Russian Federation*, Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[162] [27] See footnotes [159] 24, [160] 25 and [161] 26 above, para. 316.

Ad hoc committee (under the ICSID Convention)

Helnan International Hotels A/S v. *Arab Republic of Egypt*

The *ad hoc* committee constituted to consider the Application for Annulment of the Award rendered in the *Helnan International Hotels A/S* v. *Arab Republic of Egypt* case relied upon article 3 in finding that "a decision by a municipal court … could not preclude the international tribunal from coming to another conclusion applying international law".[163] [28]

[A/68/72, para. 25]

Total S.A. v. *Argentine Republic*

The arbitral tribunal in *Total S.A.* v. *Argentine Republic* referred to article 3 as a restatement of the "general principle of customary international law according to which, for the purpose of State responsibility for the commission of an internationally wrongful act, the characterization of an act as lawful under the State's law is irrelevant".[164] [29]

[A/68/72, para. 26]

International arbitral tribunal

Claimant v. *The Slovak Republic*

The arbitral tribunal constituted to hear the *Claimant* v. *The Slovak Republic* case referred to article 3 in support of the assertion that, even where municipal law may be relevant to the merits, it was "not the 'governing' law, but it constitute[d] a factual circumstance to be considered for ascertaining whether the host State committed a breach of its international duties in the enforcement of its own law".[165] [30]

[A/68/72, para. 27]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* referred to articles 1 and 3 of the State responsibility articles in determining that "the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions".[166] [16]

[See A/68/72, footnote 23 and para. 18]]

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[163] [28] ICSID, Case No. ARB/05/19, Decision of the *Ad Hoc* Committee, 14 June 2010, para. 51, footnote 48.

[164] [29] ICSID, Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 40, footnote 21.

[165] [30] *Ad hoc* Arbitration, Award, 5 March 2011, para. 197, footnote 217 (citing ICSID, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal* v. *The Argentine Republic,* Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 94 and footnotes (commenting on article 3)).

[166] [[16] See footnote [56] 16, para. 130.]

EDF International S.A., et al. v. *Argentine Republic*

In its award, the arbitral tribunal in *EDF International S.A., et al.* v. *Argentine Republic* referred to article 3 in support of the assertion that "the legality of the Respondent's acts under national law does not determine their lawfulness under international legal principles".[167] [31]

[A/68/72, para. 28]

Iberdrola Energía S.A. v. *The Republic of Guatemala*

The arbitral tribunal in *Iberdrola Energía S.A.* v. *The Republic of Guatemala* referred to article 3 in agreeing that "the legality of the conduct of a State under its domestic law does not necessarily lead to the legality of such conduct under international law".[168] [32]

[A/68/72, para. 29]

Permanent Court of Arbitration (under UNCITRAL Rules)

Luigiterzo Bosca v. *Lithuania*

The arbitral tribunal in *Luigiterzo Bosca* v. *Lithuania* relied on article 3 to explain that it "ha[d] to base its conclusions on the substantive provisions of that Agreement [Between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments of 1994]".[169] [26]

[A/71/80, para. 24]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* cited article 3 and the commentary thereto when outlining

two elementary propositions: first, that it is well established that a breach of local law injuring a foreigner does not, in and of itself, amount to a breach of international law; second, that the provisions or requirements of local law cannot be advanced as an excuse for non-compliance with an international obligation.[170] [27]

[A/71/80, para. 25]

Convial Callao S.A. and CCI v. *Peru*

In *Convial Callao S.A. and CCI* v. *Peru*, the arbitral tribunal cited article 3 when it indicated that:

Es un principio bien establecido del derecho internacional, que se trate de la responsabilidad internacional del Estado o de la validez de normas o de figuras jurídicas de derecho interno en derecho

[167] [31] ICSID, Case No. ARB/03/23, Award, 11 June 2012, paras. 906–907.

[168] [32] ICSID, Case No. ARB/09/5, Award, 17 August 2012, para. 367, footnote 354.

[169] [26] PCA, Case No. 2011–05, Award, 17 May 2013, para. 199.

[170] [27] See note [17] 5 above, para. 174, footnote 299.

internacional, que este último es independiente del primero cuando se trata de analizar la validez y el alcance internacionales del derecho interno o de los comportamientos estatales de carácter interno. Así, en el terreno de la responsabilidad, la violación de derecho interno no significa necesariamente que el derecho internacional resulte violado, y en el terreno de la validez de normas y figuras jurídicas internas en el derecho internacional, tampoco significa que aquellas gocen de plena validez en el derecho internacional y sean oponibles a terceros Estados.[171] [28]

[A/71/80, para. 26]

Inter-American Court of Human Rights

Case of the Ituango Massacres v. *Colombia*

In *Case of the Ituango Massacres* v. *Colombia*, the Inter-American Court of Human Rights, in an order regarding compliance of the State with its previous judgment, referred to the State responsibility articles in conjunction with the principle codified in article 27 of the Vienna Convention on the Law of Treaties that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[172] [29]

[A/71/80, para. 27]

European Court of Human Rights

Anchugov and Gladkov v. *Russia*

In *Anchugov and Gladkov* v. *Russia*, the European Court of Human Rights referred to article 3 and excerpts of the commentary thereto as relevant international law.[173] [30]

[A/71/80, para. 28]

Permanent Court of Arbitration (under UNCITRAL Rules)

ECE Projektmanagement v. *The Czech Republic*

The arbitral tribunal, in *ECE Projektmanagement* v. *The Czech Republic*, noted that the principle that an unlawful act under domestic law does not necessarily mean that the act was unlawful under international law

forms part of the more general principle, recognised in Article 27 of the Vienna Convention on the Law of Treaties, and more generally in Article 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, that the characterisation of a given act as internationally wrongful is independent of its characterisation as lawful under the internal law of a State.[174] [31]

The arbitral tribunal further noted that, "[a]s indicated in the ILC's Commentary, the principle embodies two elements", first that only a breach of an international obligation can be characterized as internationally wrongful, and second, that a State cannot escape

[171] [28] ICSID, Case No. ARB/10/2, Final Award, 21 May 2013, para. 405, footnote 427 (footnotes omitted).

[172] [29] IACHR, Order, 21 May 2013, para. 27, footnote 20 (quoting article 27 of the Vienna Convention on the Law of Treaties).

[173] [30] ECHR, First Section, Application No. 11157/04, Judgment, 4 July 2013, para 37.

[174] [31] PCA, Case No. 2010–5, Award, 19 September 2013, para. 4.749.

that characterization as internationally wrongful "by pleading that its conduct conforms to the provisions of its internal law".[175] [32]

[A/71/80, para. 29]

Inter-American Court of Human Rights

Gutiérrez and Family v. *Argentina*

In *Gutiérrez and Family* v. *Argentina*, the Inter-American Court of Human Rights cited article 3 when "reiterat[ing] that, in cases such as this one, it must rule on the conformity of the State's actions with the American Convention".[176] [33]

[A/71/80, para. 30]

Rights and guarantees of children in the context of migration and/or in need of international protection

In its advisory opinion on *Rights and guarantees of children in the context of migration and/or in need of international protection*, the Inter-American Court of Human Rights, citing article 3, stated that its mandate "consists, essentially, in the interpretation and application of the American Convention or other treaties for which it has jurisdiction, in order to determine … the international responsibility of the State under international law".[177] [34]

[A/71/80, para. 31]

International arbitral tribunal (under the ICSID Convention)

Perenco Ecuador Ltd. v. *Ecuador*

In *Perenco Ecuador Ltd.* v. *Ecuador*, the arbitral tribunal noted, on the basis of the "well-established principle" recognized in article 3, that international law prevails in case of conflict with internal law.[178] [35] It further noted that

> under well-established principles of international law, as codified in Article 3 of the ILC Articles on State Responsibility, the fact that a law has been declared constitutional by the local courts, even by the highest court of the land, is not dispositive of whether it was in conformity with international law.[179] [36]

[A/71/80, para. 32]

Vigotop Limited v. *Hungary*

In *Vigotop Limited* v. *Hungary*, the arbitral tribunal, referring to article 3, agreed with the claimant's submission that "even though a finding that the termination violated the

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[175] [32] *Ibid.*, para. 4.750 (quoting para. (1) of the commentary to article 3).

[176] [33] See note [112] 22 above, footnote 242.

[177] [34] IACHR, Advisory Opinion, 19 August 2014, footnote 52 (footnotes omitted).

[178] [35] ICSID, Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 534.

[179] [36] *Ibid.*, para. 583.

terms of the Concession Contract or provisions of Hungarian law may be relevant to its expropriation analysis, such a finding is neither necessary nor sufficient to conclude that Article 4 of the Treaty was violated".[180] 37

[A/71/80, para. 33]

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. *Serbia)*

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the International Court of Justice noted that

> in either of these situations [of showing that genocide as defined in the Genocide Convention has been committed], the Court applies the rules of general international law on the responsibility of States for internationally wrongful acts. Specifically, Article 3 of the ILC Articles on State Responsibility, which reflects a rule of customary law, states that '[t]he characterization of an act of a State as internationally wrongful is governed by international law'.[181] 38

[A/71/80, para. 34]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*

In *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 3 when noting that "[a]s is well-established in investment treaty jurisprudence, treaty and contract claims are distinct issues".[182] 21

[A/74/83, p. 8]

International arbitral tribunal (under the ICSID Additional Facility Rules)

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

The arbitral tribunal in *Vestey Group Limited Ltd.* v. *Bolivarian Republic of Venezuela* decided "not [to] consider the provisions of the Land Law in assessing [applicant's] ownership over allegedly expropriated land", noting that this was also in line with article 3 of the State responsibility articles as a "cornerstone rule of international law".[183] 22

[A/74/83, p. 8]

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[180] 37 ICSID, Case No. ARB/11/22, Award, 1 October 2014, para. 327.

[181] 38 ICJ, Judgment of 3 February 2015, para. 128.

[182] 21 ICSID, (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 474, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 95–96.

[183] 22 ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 254 and footnote 234.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal cited article 3 to emphasize that "the circumstance that an entity is not considered a State organ under domestic law does not prevent that entity from being considered as such under international law for State responsibility purposes".[184] [23]

[A/74/83, p. 8]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Pac Rim Casado Llc v. *Republic of El Salvador*

In *Pac Rim Casado Llc* v. *Republic of El Salvador*, the arbitral tribunal, citing article 3, noted that "[i]t is well established that a State cannot justify the non-observance of its international obligations in an international arbitration by invoking provisions of its domestic law".[185] [24]

[A/74/83, p. 8]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Venezuela Holdings BV and ors v. *Venezuela*

In *Venezuela Holdings BV and ors* v. *Venezuela*, the *ad hoc* committee constituted to decide on the annulment of the award referred to the commentary to article 3 of the State responsibility when stating that it seemed "obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires".[186] [25]

[A/74/83, p. 9]

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

SunReserve Luxco Holdings S.R.L. v. *Italy*

The arbitral tribunal in *SunReserve Luxco Holdings S.R.L.* v. *Italy* considered that article 3 of the State responsibility articles and article 27 of the Vienna Convention on the Law of Treaties "codify the principles that a State cannot invoke its domestic law to either (i) influence or affect the characterization of an internationally wrongful act; or (ii) justify its failure to perform a treaty obligation".[187] [20]

[A/77/74, p. 8]

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[184] [23] PCA, Award, IIC 883 (2016), 12 August 2016, para. 433.

[185] [24] ICSID, Case No. ARB/09/12, Award, 14 October 2016, para. 5.62.

[186] [25] ICSID, Case No. ARB/07/27, Decision on annulment, 9 March 2017, paras. 161 and 181.

[187] [20] SCC, Case No. 132/2016, Final Award, 25 March 2020, para. 982.

International arbitral tribunal (under the ICSID Convention)

Addiko Bank AG and Addiko Bank d.d. v. *Republic of Croatia*

In *Addiko Bank AG and Addiko Bank d.d.* v. *Republic of Croatia*, the arbitral tribunal analysed the role of domestic law and whether investments had to be carried out under Croatian law to qualify for protection under the investment treaty. The tribunal recalled that in the decision on annulment in *Azurix* v. *Argentine Republic*, the committee had used article 3 and its commentary as the framework for a similar analysis, under which "'internal law is relevant to the question of international responsibility', but 'this is because the rule of international law makes it relevant'", particularly when the provisions of internal law "'are actually incorporated in some form, conditionally or unconditionally, into that standard', but international law remains the governing law of the dispute".[188] [21]

[A/77/74, p. 8]

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 referred to article 3,

> which codif[ies] customary international law and [is] applicable to the Union, the characterization of an act of a State as being 'internationally wrongful' is governed solely by international law. Consequently, that characterization cannot be affected by any characterization of the same act that might be made under [European Union] law.[189] [22]

[A/77/74, p. 8]

International arbitral tribunal (under the ICSID Convention)

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. *Kingdom of Spain*

In *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH* v. *Kingdom of Spain*, the arbitral tribunal referred to article 3 in stating that, "[i]n an international forum such as the present one, a host State may not rely on its domestic law as a ground for non-fulfilment of its international obligations".[190] [23]

[A/77/74, p. 8]

[188] [21] ICSID, Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, para. 263, citing *Azurix Corp.* v. *Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009, para. 149.

[189] [22] CJEU, Grand Chamber, Case No. C-66/18, Judgment, 6 October 2020, para. 88.

[190] [23] ICSID, Case No. ARB/15/16, Award, 25 January 2021, para. 569 (*a*).

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

América Móvil S.A.B. de C.V. v. *Colombia*

The arbitral tribunal in *América Móvil S.A.B. de C.V.* v. *Colombia* noted that "it is undisputable … that international law does not permit States to shield themselves behind their domestic law in order to evade their responsibility under international law, since international law excludes the possibility of the international lawfulness of the conduct of a State being assessed on the basis of domestic law", a "fundamental principle" that was codified in article 27 of the Vienna Convention on the Law of Treaties and article 3 of the State responsibility articles.[191] [24] Furthermore, the arbitral tribunal noted that "referring to Colombian law to determine the existence of a right to non-reversion clearly does not violate the principle codified in article 3 of the articles on State responsibility, which prevent a State from using its internal law to absolve itself of its international responsibility".[192] [25]

[A/77/74, p. 8]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal quoted article 3,[193] [26] going on to explain "[t]hat a treaty claim remains governed by treaty law does not mean, however, that domestic law is wholly irrelevant for the determination of compliance with, or liability under, a BIT, including the BIT governing the present dispute". The tribunal noted that an investment treaty "may expressly refer to domestic law" for the determination of questions such as the investor's nationality "or compliance with domestic law under an in-accordance-with-host-State-law clause", as "certain elements of a treaty can only be determined by recourse to domestic law (such as whether an investor has title to a certain asset or what the treatment afforded under domestic law is for purposes of assessing compliance with a national treatment provision)".[194] [27]

[A/77/74, p. 9]

[191] [24] ICSID, Case No. ARB(AF)/16/5, Award, 7 May 2021, para. 417.

[192] [25] *Ibid*., para. 422.

[193] [26] ICSID, Case No. ARB/14/32, Award, 5 November 2021, para. 315.

[194] [27] *Ibid*., para. 316.

Chapter II

ATTRIBUTION OF CONDUCT TO A STATE

Commentary

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, *i.e.* when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *i.e.* as agents of the State.[195] [92]

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[196] [93] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[197] [94]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual

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[195] [92] See, *e.g.*, I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours … , 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours … , 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[196] [93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[197] [94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[198] [95] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[199] [96] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[200] [97] Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (*e.g.* the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[201] [98] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[202] [99]

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under

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[198] [95] See *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above).

[199] [96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[200] [97] The point was emphasized, in the context of federal States, in *LaGrand* (footnote [150] 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[201] [98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[202] [99] See article 7 and commentary.

internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[203] [100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[204] [101] This follows already from the provisions of article 2.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia considered the situation in which, following the issue of a binding order of the Tribunal to a State for the production of documents necessary for trial, "a State official who holds evidence in his official capacity, having been requested by his authorities to surrender it to the International Tribunal … refuses

[203] [100] See article 55 and commentary.

[204] [101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

to do so, and the central authorities [do] not have the legal or factual means available to enforce the International Tribunal's request".[205] [25] The Appeals Chamber observed that

> in this scenario, the State official, in spite of the instructions received from his Government, is deliberately obstructing international criminal proceedings, thus jeopardizing the essential function of the International Tribunal: dispensation of justice. It will then be for the Trial Chamber to determine whether or not also to call to account the State; the Trial Chamber will have to decide whether or not to make a judicial finding of the State's failure to comply with article 29 (on the basis of article 11 of the International Law Commission's draft articles on State responsibility) and ask the President of the International Tribunal to forward it to the Security Council.[206] [26]

[A/62/62, para. 19]

World Trade Organization panel

United States—Certain Country of Origin Labelling (COOL) Requirements

The panel in *United States—Certain Country of Origin Labelling (COOL) Requirements* observed that the "relevant provisions" of the State responsibility articles are consistent with the notion that acts or omissions attributable to a WTO member are "in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".[207] [33]

[A/68/72, para. 30]

European Court of Human Rights

Kotov v. *Russia*

In *Kotov* v. *Russia*, the European Court of Human Rights referred to the commentary to Chapter II in describing the law relevant to the attribution of international responsibility to States.[208] [34]

[A/68/72, para. 31]

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[205] [25] ICTY, Appeals Chamber, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 51.

[206] [26] *Ibid.* Draft article 11, as adopted by the International Law Commission on first reading, was deleted on second reading on the understanding that its "negative formulation" rendered it "unnecessary" in the codification of State responsibility (*Yearbook … 1998*, vol. II (Part Two), p. 85, para. 419). However, the principles reflected in that provision are referred to in paragraphs (3) and (4) of the introductory commentary to chapter II of the articles finally adopted in 2001 (see *Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77). The text of draft article 11 adopted on first reading was the following:

> Article 11
>
> Conduct of persons not acting on behalf of the State
>
> 1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
>
> 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

[207] [33] WTO, Panel Reports, WT/DS384/R and WT/DS386/R, 18 November 2011, para. 7.16, footnote 41.

[208] [34] See footnote [16] 14 above, para. 30 (citing paragraph (6) of the commentary to Chapter II).

Permanent Court of Arbitration (under UNCITRAL Rules)

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

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal noted

> [t]he ILC Articles on State Responsibility are in point. … Chapter II, 'Attribution of Conduct to a State,' in its introductory commentary, observes that, 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *i.e.*, as agents of the State'.[209] 39

[A/71/80, para. 35]

International arbitral tribunal (under the ICSID Convention) and *Ad Hoc* Committee (under the ICSID Convention)

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the arbitral tribunal "accept[ed] that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute".[210] 40 The *ad hoc* committee subsequently constituted to decide upon an application to annul the award in the case, noted that "[i]nternational law contains rules on attribution which the ILC codified and developed in Chapter II of its Articles on State Responsibility (Articles 4–11)".[211] 41

[A/71/80, para. 36]

European Court of Human Rights

Tagayeva and Others v. *Russia*

In *Tagayeva and Others* v. *Russia*, the European Court of Human Rights took note of the State responsibility articles, in particular of the principle stated in paragraph 3 of the commentary to chapter II, when indicating that "the conduct of private persons is not as such attributable to the State". As such, "human rights violations committed by private persons are outside of the Court's competence *ratione personae*".[212] 42

[A/71/80, para. 37]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* cited the commentary to Chapter II of the State responsibility when stating that

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[209] 39 See footnote [19] 7 above, para. 1466.

[210] 40 ICSID, Case No. ARB/11/28, Award, 10 March 2014, para. 281. (See also footnote [128] 16 above.)

[211] 41 See footnote [115] 25 above, para. 184.

[212] 42 ECHR, First Section, Application No. 26562, Decision, 9 June 2015, para. 581.

"ANR [the Polish Agricultural Property Agency] does not meet the criteria usually applied to determine whether an entity is a *de facto* State organ".[213] [26]

[A/74/83, p. 9]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, noted that it

does not have to decide whether CVG Bauxilum's conduct is attributable to Respondent under the ILC Draft Articles and whether a breach of contract could give rise to Respondent's liability under international law in light of CVG Bauxilum's State-granted monopoly over the supply of bauxite in Venezuela.[214] [27]

[A/74/83, p. 9]

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

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* characterized resolution 56/83 of 12 December 2001, containing the State responsibility articles, as "as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties".[215] [28]

[A/74/83, p. 9]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* observed that

the ILC Articles are the relevant rules on attribution that are widely considered to reflect international law. They concern the responsibility of States for their internationally wrongful acts, given the existence of a primary rule establishing an obligation. These principles of attribution do not operate to attach responsibility for 'non-wrongful acts' for which the State is assumed to have knowledge.[216] [29]

The tribunal also noted that

the rules of attribution under international law as codified in the ILC Articles do not operate to define the content of primary obligations, the breach of which gives rise to responsibility. Rather, the

[213] [26] PCA, Case No. 2015–13, Award, 27 June 2016, para. 210 (original emphasis).

[214] [27] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 536.

[215] [28] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 167.

[216] [29] ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 779 and 804.

rules concern the responsibility of States for their internationally wrongful acts. It follows that the rules of attribution cannot be applied to create primary obligations for a State under a contract.[217] [30]

[A/74/83, p. 9]

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

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal "determine[d] the issues of attribution by reference to Articles 4, 5, 8 and 11 of the ILC's Articles on State Responsibility, being declaratory of customary international law, as argued by the Parties".[218] [31]

[A/74/83, p. 10]

[217] [30] *Ibid*., para. 856.

[218] [31] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.49 (see also para. 9.90).

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Commentary

(1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority".[219] [102] There have been many statements of the principle since then.[220] [103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[221] [104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[222] [105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international

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[219] [102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[220] [103] See, *e.g.*, *Claims of Italian Nationals* (footnote [35] 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid*., vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[221] [104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion … (footnote [147] 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(*a*) M.69(*a*).1929.V), pp. 2–3 and 6.

[222] [105] Reproduced in *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[223] 106

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[224] 107

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[225] 108 As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits):*

> From the standpoint of International Law and of the Court which is its organ, municipal laws … express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[226] 109

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[223] 106 See *Salvador Commercial Company* (footnote [220] 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[224] 107 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (footnote [50] 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[225] 108 As to legislative acts, see, *e.g.*, *German Settlers in Poland* (footnote [86] 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote [134] 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote [28] 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, *e.g.*, *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above); and *ELSI* (footnote [144] 85 above). As to judicial acts, see, *e.g.*, *"Lotus"* (footnote [135] 76 above); *Jurisdiction of the Courts of Danzig* (footnote [141] 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953,* p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, *e.g.*, *Application of the Convention of 1902* (footnote [142] 83 above), at p. 65.

[226] 109 *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

Thus article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[227] [110] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[228] [111] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[229] [112] and it might in certain circumstances amount to an internationally wrongful act.[230] [113]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[231] [114]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

> For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State

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[227] [110] These functions might involve, *e.g.* the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, *e.g.*, GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[228] [111] See article 3 and commentary.

[229] [112] See, *e.g.*, the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden*, *Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden*, *ibid.*, *Series A, No. 21* (1976), at p. 15.

[230] [113] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook … 1998*, vol. II (Part Two), p. 17, para. 35).

[231] [114] See, *e.g.*, the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote [223] 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey*, *ibid.*, p. 155 (1927); *Way*, *ibid.*, p. 391, at p. 400 (1928); and *Baldwin*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (footnote [144] 85 above), *e.g.* at p. 50, para. 70.

is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[232] [115]

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, *etc.*)". All answered in the affirmative.[233] [116]

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *"Montijo"* case is the starting point for a consistent series of decisions to this effect.[234] [117] The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility … of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "… cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[235] [118] That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[236] [119]

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[237] [120] the other party may well have agreed to limit itself to

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[232] [115] UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, *e.g.*, the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[233] [116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 90; *Supplement to Vol. III …* (footnote [221] 104 above), pp. 3 and 18.

[234] [117] See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, pp. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote [232] 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote [197] 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[235] [118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[236] [119] *LaGrand, Provisional Measures* (footnote [150] 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 495, para. 81.

[237] [120] See, *e.g.*, articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[238] [121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[239] [122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, *etc*. The term "entity" is used in a similar sense[240] [123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[241] [124] The latter action was, and the former was not, held attributable to the

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[238] [121] See, *e.g.*, article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[239] [122] See, *e.g.*, the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[240] [123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[241] [124] *Mallén* (footnote [234] 117 above), at p. 175.

State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[242] [125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[243] [126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary v. *Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force, and the Ministry of National Defense, acting for the Civil Aviation Organization*

In its 1985 award in the *International Technical Products Corp.* v. *Islamic Republic of Iran* case, the Tribunal, in examining the issue whether Bank Tejarat, a Government-owned bank with a separate legal personality, had acted in its capacity as a State organ in taking control of a building owned by the claimants, referred in a footnote to the text of draft article 5 provisionally adopted by the International Law Commission[244] [27] and the commentary thereto.[245] [28] The Tribunal found, with regard to the taking of property, that Bank Tejarat had not acted on instructions of the Government of the Islamic Republic of Iran or otherwise performed governmental functions.

[A/62/62, para. 20]

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the tribunal, in determining whether its jurisdiction over the case was precluded by paragraph 11 of the Dec-

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[242] [125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid*., p. 2999 (1880). See further article 7 and commentary.

[243] [126] See paragraph (7) of the commentary to article 7.

[244] [27] This provision was amended and incorporated in article 4 finally adopted by the International Law Commission in 2001. The text of draft article 5 provisionally adopted by the Commission was the following:

> Article 5
>
> Attribution to the State of the conduct of its organs
>
> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[245] [28] IUSCT, Award No. 196–302–3, 24 October 1985, Iran-United States Claims Tribunal Reports, vol. 9 (1985-II), p. 238, footnote 35.

laration of the Government of Algeria of 19 January 1981 (also known as the "General Declaration"),[246] [29] referred in the following terms to draft articles 5 *et seq.* of the articles provisionally adopted by the International Law Commission:

… the exclusion [referred to in paragraph 11(*d*) of the General Declaration] would only apply to acts "which are not an act of the Government of Iran". The Claimant relies on acts which he contends are attributable to the Government of Iran. Acts "attributable" to a State are considered "acts of State". *See* draft articles on State responsibility adopted by the International Law Commission on first reading ("ILC-Draft", articles 5 *et seq.*, *1980 Yearbook International Law Commission*, vol. II, Part 2, at pp. 30–34, United Nations doc. A/CN.4/SER.A/1980/Add.1 (Part 2). Therefore, paragraph 11 of the General Declaration does not effectively restrict the Tribunal's jurisdiction over this Claim.[247] [30]

[A/62/62, para. 21]

International arbitral tribunal (under the ICSID Convention)

Amco Asia Corporation and Others v. *Republic of Indonesia*

In its 1984 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 5 provisionally adopted by the International Law Commission (as well as articles 3 and 10 provisionally adopted), which it quoted *in extenso*, constituted "an expression of accepted principles of international law". The relevant passage is reproduced [on page 25] above.

[A/62/62, para. 22]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* in the *Blaškić* case, Trial Chamber II, in examining the question whether individuals could be subject to orders (more specifically *subpoenae duces tecum*) from the International Tribunal, quoted in a footnote, without any comment, but together with draft article 1,[248] [31] the text of draft article 5 adopted by the International Law Commission on first reading.[249] [32]

[A/62/62, para. 23]

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[246] [29] Under paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981, the United States of America agreed to "bar and preclude prosecution against Iran of any pending or future claim … arising out of events occurring before the date of this Declaration related to … (*d*) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran".

[247] [30] IUSCT, Award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 100–101, para. 33. (See also footnote [204] 101 above.)

[248] [31] See footnote [54] 10 and accompanying text above.)

[249] [32] ICTY, Trial Chamber II, *Decision on the Objection of the Republic of Croatia to the Issuance of Supoenae Duces Tecum*, Case No. IT-95–14, 18 July 1997, para. 95, footnote 156. The text of draft article 5 adopted by the International Law Commission on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65) was identical to that of draft article 5 provisionally adopted (see footnote [244] 27 above).

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

The decision of the *Blaškić* case (above) was later submitted, on request by the Republic of Croatia, to review by the Appeals Chamber.[250] [33] In its 1997 judgement on this matter in the *Blaškić* case, the Appeals Chamber observed that Croatia had submitted in its brief that the International Tribunal could not issue binding orders to State organs acting in their official capacity. The Appeals Chamber noted that, in support of this contention, Croatia had argued, *inter alia*,

> that such a power, if there is one, would be in conflict with well-established principles of international law, in particular the principle, restated in article 5 of the draft articles on State responsibility adopted by the International Law Commission, whereby the conduct of any State organ must be considered as an act of the State concerned, with the consequence that any internationally wrongful act of a State official entails the international responsibility of the State as such and not that of the official.[251] [34]

In dealing with this issue, the Appeals Chamber did not refer explicitly to the draft articles adopted by the International Law Commission. It observed nevertheless that:

> It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.[252] [35]

The Appeals Chamber considered that there were no provisions or principles of the Statute of the International Tribunal which justified a departure from this well-established rule of international law and concluded that, both under general international law and the Statute itself, judges or a trial chamber could not address binding orders to State officials.[253] [36]

[A/62/62, para. 24]

International Court of Justice

Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights

In its 1999 advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court considered that the principle embodied in draft article 6 adopted by the International Law Commission on first reading[254] [37] was "of a customary character" and constituted "a well-established rule of international law":

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[250] [33] See footnote [52] 8 above.

[251] [34] ICTY, Appeals Chamber, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 39. Croatia was referring to draft article 5 adopted by the International Law Commission on first reading.

[252] [35] *Ibid*., para. 41.

[253] [36] *Ibid*., paras. 42–43.

[254] [37] This provision was amended and incorporated in article 4 finally adopted by the International Law Commission in 2001. The text of draft article 6 adopted on first reading was the following:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in article 6 of the draft articles on State responsibility adopted provisionally by the International Law Commission on first reading … [255] 38

[A/62/62, para. 25]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, took note of the further statement made by the International Court of Justice in its 1999 advisory opinion quoted above in the following terms:

It would … seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as 'a well-established rule of international law' [see the advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* quoted […] above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[256] 39

In a footnote to this passage, the Appeals Chamber observed that "customary law on the matter is correctly restated in article 5 of the draft articles on State responsibility adopted in its first reading by the United Nations International Law Commission".[257] 40 It further quoted the text of that provision, as well as of the corresponding draft article provisionally adopted by the Commission's Drafting Committee in 1998,[258] 41 which it considered "even clearer" in that regard.

[A/62/62, para. 26]

Article 6

Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[255] 38 See footnote [50] 56 above, para. 62.

[256] 39 ICTY, Appeals Chamber, Case No. IT-94–1-A, 15 July 1999, para. 109 (footnotes omitted).

[257] 40 *Ibid*., para. 109, footnote 129.

[258] 41 The text of draft article 4 adopted by the Drafting Committee in 1998 was the following:

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State. (*Yearbook … 2000*, vol. II (Part Two), p. 65.)

World Trade Organization panel

Korea—Measures Affecting Government Procurement

In its 2000 report on *Korea—Measures Affecting Government Procurement*, the panel rejected the Republic of Korea's argument according to which it would not be responsible for the answer given by its ministry of commerce to questions asked by the United States during the negotiations for the Republic of Korea's accession to the Agreement on Government Procurement based on the fact that the issues dealt with were under the competence of the ministry of transportation. The panel considered that its finding according to which such answer was given on behalf of the whole Korean Government was "supported by the long established international law principles of State responsibility" by which "the actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law". In a footnote, the panel then referred to draft articles 5 and 6, and the commentary thereto, as adopted by the International Law Commission on first reading, which it considered applicable to the context of negotiations of a multilateral agreement such as the Agreement on Government Procurement.[259] [42]

[A/62/62, para. 27]

Ad hoc arbitral tribunal (MERCOSUR)

Import Prohibition of Remolded Tires from Uruguay

In its 2002 award, the *ad hoc* arbitral tribunal of MERCOSUR constituted to hear the dispute presented by Uruguay against Brazil on the import prohibition of remolded tires from Uruguay, in response to Brazil's argument according to which some of the relevant norms, rulings, reports and other acts from administrative organs were opinions from various sectors of the public administration that had no specific competence regarding the regulation of the country's foreign trade policy, invoked the articles finally adopted by the International Law Commission in 2001, and more particularly article 4, which it considered a codification of customary law:

> It should be recalled that the draft articles of the International Law Commission on State responsibility, that codify customary law, state that, under international law, the conduct of any State organ shall be considered an act of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State (see article 4 of the draft articles on State responsibility, adopted by the International Law Commission at its fifty-third session …)[260] [43]

The tribunal thus considered that all the said acts of the administration were attributable to Brazil.

[A/62/62, para. 28]

[259] [42] WTO, Panel Report, WT/DS163/R, 1 May 2000, para. 6.5, footnote 683.

[260] [43] MERCOSUR, *Ad Hoc* Tribunal, 9 January 2002, p. 39 (unofficial English translation).

Ad Hoc Committee (under the ICSID Convention)

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

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ICSID *ad hoc* committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passage is quoted [on page 26 above]. Later in the same decision, when commenting on a passage of the challenged award which "appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, a priori, have breached" the bilateral investment treaty concerned, the *ad hoc* committee again referred to the commentaries to articles 4 and 12 in support of the statement that "there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."[261] [44]

[A/62/62, para. 29]

International arbitral tribunal (under ICSID Additional Facility Rules)

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

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case noted that the United States had not disputed that the decisions of the City of Boston, the Boston Redevelopment Authority and the Massachusetts courts that were at stake in that case were attributable to it for purposes of NAFTA. In a footnote, it referred to article 105 of NAFTA and to article 4 of the International Law Commission articles as finally adopted in 2001.[262] [45]

[A/62/62, para. 30]

ADF Group Inc. v. United States of America

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc*. v. *United States* case, after having found that an "existing non-conforming measure" of a "Party" saved by article 1108(1) of NAFTA might "not only be a federal government measure but also a state or provincial government measure and even a measure of a local government",[263] [46] considered that its view was "in line with

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[261] [44] ICSID, *Ad Hoc* Committee, Case No. ARB/97/3, Decision of Annulment, 3 July 2002, para. 110 and footnote 78, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, p. 134. The committee referred, in particular, to paragraph (6) of the commentary to article 4 and paragraphs (9) and (10) of the commentary to article 12 (see *Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[262] [45] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 67, footnote 12, reproduced in *International Law Reports*, vol. 125, p. 130.

[263] [46] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 165, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 269–270. As noted by the tribunal, the pertinent part of article 1108(1) of NAFTA states that articles 1102, 1103, 1106 and 1107 of the agreement do not apply to any "existing non-conforming measure" main-

the established rule of customary international law", formulated in article 4 finally adopted by the International Law Commission in 2001, that "acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units".[264] [47] The tribunal then quoted the text of that provision and observed in a footnote, with reference to the commentary thereto, that

> [t]he international customary law status of the rule is recognized in, *inter alia*, *Differences relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* … [see page 65 above]. See also paras. (8), (9) and (10) of the commentary of the International Law Commission [to article 4], stressing that "the principle in article 4 applies equally to organs of the central government and to those of regional or local units" (para. (8) ([*Yearbook of the International Law Commission, 2001,* vol. II (Part Two)],, para. 77)), and that "[i]t does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. (para. (9) [*ibid.*]).[265] [48]

[A/62/62, para. 31]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred to the text of article 4 finally adopted by the International Law Commission in 2001, as well as to the commentary thereto, in support of its finding that actions by the National Ecology Institute of Mexico, an entity of the United Mexican States in charge of designing Mexican ecological and environmental policy and of concentrating the issuance of all environmental regulations and standards, were attributable to Mexico.[266] [49]

[A/62/62, para. 32]

International arbitral tribunal

Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. *United Kingdom)*

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention explained that its proposed interpretation of article 9(1) of the Convention was "consistent with contemporary principles of State responsibility", and in par-

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tained "by (i) a Party at the federal level, as set out in its Schedule to Annex I or III, [or] (ii) a state or province, for two years after the date of entry into force of [NAFTA] … , or (iii) a local government".

[264] [47] *Ibid.*, p. 270, para. 166.

[265] [48] *Ibid.*, p. 270, para. 166, footnote 161.

[266] [49] ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original).

ticular with the principle according to which "[a] State is internationally responsible for the acts of its organs".[267] [50] It added that:

… this submission is confirmed by articles 4 and 5 of the International Law Commission draft articles on the responsibility of States for internationally wrongful acts, providing for rules of attribution of certain acts to States. On the international plane, acts of "competent authorities" are considered to be attributable to the State as long as such authorities fall within the notion of state organs or entities that are empowered to exercise elements of the government authority. As the International Court of Justice stated in the *LaGrand* case, "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be".[268] [51]

[A/62/62, para. 33]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *CMS Transmission Company* v. *Argentina* case stated, with reference to article 4 as finally adopted by the International Law Commission in 2001:

Insofar as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the articles on State responsibility adopted by the International Law Commission is abundantly clear on this point. Unless a specific reservation is made in accordance with articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other State institutions does not necessarily make them separate disputes. No such reservation took place in connection with the [relevant bilateral investment treaty].[269] [52]

[A/62/62, para. 34]

Tokios Tokelés v. *Ukraine*

In its 2004 decision on jurisdiction, the arbitral tribunal constituted to hear the *Tokios Tokelés* v. *Ukraine* case found evidence of extensive negotiations between the claimant and municipal government authorities and, having recalled that "actions of municipal authorities are attributable to the central government", quoted in a footnote part of the text of article 4 finally adopted by the International Law Commission in 2001.[270] [53]

[A/62/62, para. 35]

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[267] [50] Decision, 2 July 2003, para. 144, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 100.

[268] [51] *Ibid*., para. 145 (footnotes omitted), p. 101.

[269] [52] ICSID, Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 108 (footnote omitted).

[270] [53] ICSID, Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 102 and footnote 113, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 20, No. 1, 2005, p. 242. In the original of the decision, the tribunal inadvertently indicates that the text it quotes, which is actually taken from article 4, belongs to article 17 of the International Law Commission articles.

World Trade Organization panel

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

In its 2004 report on *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the panel considered that its finding according to which the actions taken by the United States International Trade Commission (an agency of the United States Government) pursuant to its responsibilities and powers were attributable to the United States was supported by article 4 and its commentary, as finally adopted by the International Law Commission in 2001, which it considered to be a "provision … not binding as such, but … reflect[ing] customary principles of international law concerning attribution":

> 6.128. This conclusion is supported by the International Law Commission articles on the responsibility for States for internationally wrongful acts. Article 4, which is based on the principle of the unity of the State, defines generally the circumstances in which certain conduct is attributable to a State. This provision is not binding as such, but does reflect customary principles of international law concerning attribution. As the International Law Commission points out in its commentary on the articles on State responsibility, the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions". As explained by the International Law Commission, the term "State organ" is to be understood in the most general sense. It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.[271] [54]

[A/62/62, para. 36]

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, observed that "it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State". It then quoted the text of article 4 finally adopted by the International Law Commission in 2001, which it considered "crystal clear" in that regard,[272] [55] and later referred to the commentary thereto.[273] [56]

[A/62/62, para. 37]

International arbitral tribunal (under the ICSID Convention)

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in determining whether the acts of a Romanian "institution of public interest" (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to

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[271] [54] WTO, Panel Report, WT/DS285/R, 10 November 2004, para. 6.128 (footnotes omitted).

[272] [55] See footnote [55] 11 above, paras. 127–128.

[273] [56] *Ibid.*, paras. 130–131. The arbitral tribunal referred in particular to paragraphs (6) and (7) of the commentary to article 4 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

article 4 finally adopted by the International Law Commission in 2001, which it considered to lay down a "well-established rule":

> As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The bilateral investment treaty does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the bilateral investment treaty in this respect. Regarding general international law on international responsibility, reference can be made to the draft articles on State responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the United Nations General Assembly in res. 56/83 of 12 December 2001 … While those draft articles are not binding, they are widely regarded as a codification of customary international law. The 2001 International Law Commission draft provides a whole set of rules concerning attribution. Article 4 of the 2001 International Law Commission draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence.[274] [57]

Later in the award, in response to an argument by the respondent that a distinction should be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the arbitral tribunal observed, with reference to the commentary of the International Law Commission to article 4, that

> … in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so call *acta iure imperii*, should be attributable. The International Law Commission draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the International Law Commission regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the International law Commission in its draft articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.[275] [58]

[A/62/62, para. 38]

Jan de Nul NV and Dredging International NV v. *Arab Republic of Egypt*

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt* case explained that, when assessing the merits of the dispute, it would rule on the issue of attribution under international law, especially by reference to the articles finally adopted by the International Law Commission in 2001 (more particularly articles 4 and 5), which it considered "a codification of customary international law". The tribunal briefly described the contents of the two provisions it intended to apply.[276] [59]

[A/62/62, para. 39]

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[274] [57] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 69.

[275] [58] *Ibid*., para. 82.

[276] [59] ICSID, Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 89.

World Trade Organization panel

European Communities—Selected Customs Matters

In its 2006 report on *European Communities—Selected Customs Matters*, the panel noted that the European Communities had invoked article 4, paragraph 1, finally adopted by the International Law Commission in 2001 as a statement of "international law", to contradict the United States allegation according to which only executive authorities, but not judicial authorities, of the member States should be recognized as authorities of the Community when implementing community law for the purposes of complying with article X.3(*b*) of GATT 1994.[277] [60] According to the European Communities (EC):

> 4.706. The US arguments are … incompatible with principles of general international law regarding responsibility for wrongful acts. In this regard, the EC would refer to article 4(1) of the articles on responsibility of States for internationally wrongful acts elaborated by the International Law Commission.
>
> 4.707. It follows clearly from this provision that, when it comes to the acts of a State under international law, there is no distinction between acts of the legislative, executive and judicial organs. For this very same reason, it would seem unjustifiable to consider that only the executive authorities of the member States, but not the judicial authorities of the member States, can act as EC organs.
>
> 4.708. Similarly, it follows from the International Law Commission's articles on state responsibility that the responsibility for internationally wrongful acts extends not only to organs of the central government, but also to organs of territorial units. Accordingly, the EC has never contested that it is responsible in international law for the compliance by EC member States with the obligations of the EC under the WTO Agreements.[278] [61]

The panel found that "the European Communities may comply with its obligations under Article X.3(*b*) of GATT 1994 through organs of its member States", on the basis of an interpretation of the terms of that provision. It further observed, in a footnote, that this finding also followed article 4 of the International Law Commission articles.[279] [62]

[A/62/62, para. 40]

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[277] [60] Under that provision:

> Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

[278] [61] WTO, Panel Report, WT/DS315/R, 16 June 2006, paras. 4.706–4.708.

[279] [62] *Ibid.*, para. 7.552 and footnote 932. This aspect of the panel report was not reversed on appeals: see WTO, Appellate Body, *European Communities—Selected Customs Matters*, WT/DS315/AB/R, 13 November 2006.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Azurix Corp. v. *Argentina Republic*

In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp.* v. *Argentina* case observed that the claimant, in arguing that Argentina was responsible for the actions of the Argentine Province of Buenos Aires under the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America and customary international law, had referred in particular to "the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission".[280] [63] The tribunal considered, in this regard, that

> [t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.[281] [64]

[A/62/62, para. 41]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Grand River Enterprises Six Nations Ltd. et al. v. *United States*

In its 2006 decision on objections to jurisdiction, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA under the UNCITRAL rules to hear the *Grand River Enterprises Six Nations Ltd.* et al. v. *United States* case, having noted that the defendant acknowledged its responsibility under NAFTA for actions taken by states of the United States, referred in a footnote, *inter alia*, to the text and commentary to article 4 finally adopted by the International Law Commission in 2001.[282] [65]

[A/62/62, para. 42]

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 examining the question whether the massacres committed at Srebrenica (which it had found to be a crime of genocide within the meaning of articles II and III, paragraph (*a*), of the Genocide Convention) were attributable, in whole or in part, to the Respondent, considered the question whether those acts had been perpetrated by organs of the latter. The Court referred to article 4 finally adopted by the International Law Commission in 2001, stating that this question

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[280] [63] ICSID, Case No. ARB/01/12, Award, 14 July 2006, para. 46.

[281] [64] *Ibid*., para. 50.

[282] [65] NAFTA, Decision on Objections to Jurisdiction, 20 July 2006, para. 1, footnote 1. The arbitral tribunal referred in particular to paragraph (4) of the commentary to article 4 (*Yearbook of the International Law Commission*, *2001*, vol. II (Part Two), para. 77).

relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility … . [283] 3

The Court thereafter applied this rule to the facts of the case. In that context, it observed *inter alia* that "[t]he expression 'State organ', as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC commentary to Art. 4, para. (1))".[284] 4 The Court concluded that "the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility"[285] 5 and it went on to consider the question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control (see [pages 144–146] below).

[A/62/62/Add.1, para. 2]

World Trade Organization panel

Brazil—Measures Affecting Imports of Retreaded Tyres

In its 2007 report, the panel in the *Brazil—Measures Affecting Imports of Retreaded Tyres* case, cited, in a footnote, article 4 of the State responsibility articles, in support of its finding that Brazilian domestic court rulings did not exonerate Brazil from its obligation to comply with the requirements of article XX of the General Agreement on Tariffs and Trade 1994.[286] 10

[A/65/76, para. 15]

World Trade Organization Appellate Body

United States—Measures Relating to Zeroing and Sunset Reviews, recourse to Article 21.5 of the DSU by Japan

In its 2009 report in the *United States—Measures Relating to Zeroing and Sunset Reviews* case, the WTO Appellate Body referred to article 4 of the State responsibility articles in support of its assertion that:

[i]rrespective of whether an act is defined as "ministerial" or otherwise under United States law, and irrespective of any discretion that the authority issuing such instructions or taking such action may have, the United States, as a Member of the WTO, is responsible for those acts in accordance with the covered agreements and international law.[287] 11

[A/65/76, para. 16]

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[283] 3 [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 385.

[284] 4 *Ibid.*, para. 388.

[285] 5 *Ibid.*, para. 395.

[286] 10 WTO, Panel Report, WT/DS332/R, 12 June 2007, para. 7.305, footnote 1480.

[287] 11 WTO, Appellate Body, Case No. AB-2009–2, Report of the Appellate Body, 18 August 2009, para. 183 and footnote 466.

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[288] [36] The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[289] [37]

[A/68/72, para. 32]

Ad hoc committee (under the ICSID Convention)

Helnan International Hotels A/S v. *Arab Republic of Egypt*

The *ad hoc* committee constituted to hear the annulment proceeding in the case of *Helnan International Hotels A/S* v. *Arab Republic of Egypt* referred to article 4 of the State responsibility articles in finding that: "the decision of a Government Minister, taken at the end of an administrative process … is one for which the State is undoubtedly responsible at international law, in the event that it breaches the international obligations of the State".[290] [38]

[A/68/72, para. 33]

[International arbitral tribunal (under the ICSID Convention)

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[291] [56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when

> the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8).[292] [57]

[See A/68/72, footnote 35 and para. 45]]

Alpha Projektholding GmbH v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the

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[288] [36] ICSID, Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 274 (quoting articles 4, 5 and 11).

[289] [37] *Ibid*., paras. 274 and 280.

[290] [38] See footnote [163] 28 above, para. 51, footnote 47.

[291] [[56] See footnote [105] 20 above, para. 172.]

[292] [[57] *Ibid*.]

ILC Articles".[293] [39] The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[294] [40]

[A/68/72, para. 34]

[World Trade Organization Appellate Body

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

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[295] [64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[296] [65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[297] [66]

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[298] [67]

[See A/68/72, paras. 50–51]]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in the *Sergei Paushok et al.* v. *The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[299] [41] While noting that the State responsibility articles "do not contain a definition

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[293] [39] ICSID, Case No. ARB/07/16, Award, 8 November 2010, para. 401.

[294] [40] *Ibid*., para. 402.

[295] [[64] See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, 1963, art. 31(3)(*c*)).]

[296] [[65] *Ibid*., para. 308.]

[297] [[66] *Ibid*., para. 309.]

[298] [[67] *Ibid*., para. 308; see below the text accompanying footnote [2156] 203 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid*., para. 314.]

[299] [41] Award on jurisdiction and liability, 28 April 2011, paras. 576 and 577.

of what constitutes an organ of the State",[300] [42] the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article's reference to "State organ".[301] [43]

The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[302] [44]

[A/68/72, paras. 35 and 36]

[*White Industries Australia Limited* v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[303] [87]

[See A/68/72, footnote 35 and para. 67]]

Permanent Court of Arbitration

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 the State responsibility articles and recalled that, "as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs … ".[304] [45]

[A/68/72, para. 37]

International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[305] [46] Upon consideration of article 4, Slovak law and the relevant factual circumstances, the tribunal determined that certain entities and individuals were State organs, "responsible for the actions they have performed in their official capacity in accordance with Article 4 of the ILC Articles",[306] [47] while others were not.[307] [48]

[A/68/72, para. 38]

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[300] [42] *Ibid*., para. 581.

[301] [43] *Ibid*., para. 582.

[302] [44] *Ibid*., para. 580.

[303] [[87] Final Award, 30 November 2011, para. 8.1.2.]

[304] [45] PCA, Case No. 2009–23, First Interim Award on Interim Measures, 25 January 2012, para. [2.10.2].

[305] [46] Final Award, 23 April 2012, paras. 150–151.

[306] [47] *Ibid*., para. 152.

[307] [48] *Ibid*., paras. 155 and 163.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Ulysseas, Inc. v. *The Republic of Ecuador*

The arbitral tribunal constituted to hear the *Ulysseas, Inc.* v. *The Republic of Ecuador* case relied upon article 4 in determining that certain entities were not organs of the Ecuadorian State, notwithstanding that they were "part of the Ecuadorian public sector and [were] subject to a system of controls by the State in view of the public interests involved in their activity … ".[308] [49]

[A/68/72, para. 39]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

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

The arbitral tribunal in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador* noted that, "[u]nder international law, a State can be found to have discriminated either by law, regulation or decree. Article 4.1 of the Articles on Responsibility of States for Internationally Wrongful Acts … is controlling".[309] [50]

[A/68/72, para. 40]

[*Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise*

In its 2012 award, the arbitral tribunal constituted to hear the *Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise* case referred to article 4 in its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[310] [75]

The tribunal also stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles".[311] [77]

[See A/68/72, footnote 35 and para. 60]]

INTER-AMERICAN COURT OF HUMAN RIGHTS

Castillo González et al. v. *Venezuela*

In its judgment in *Castillo González et al.* v. *Venezuela, the Inter-American Court of Human Rights* indicated that articles 2 and 4 constituted part of "the basic principle of the law on international State responsibility".[312] [51]

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[308] [49] PCA, Final Award, 12 June 2012, paras. 135 and 126.

[309] [50] ICSID, Case No. ARB/06/11, Award, 5 October 2012, para. 559.

[310] [[75] ICSID, Case No. ARB/08/11, Award, 25 October 2012, para. 246.]

[311] [[77] *Ibid*., para. 163. For additional discussion regarding the tribunal's treatment of the University and the question of attribution, see below under article 5.]

[312] [51] See footnote [108] 51 (quoting articles 2 and 4 of the State responsibility articles).

The Court also referred to article 4 in finding that "it is for the Court to determine whether or not the actions of a State organ, such as those in charge of the investigations, constitute a wrongful international act … ".[313] [52]

[A/68/72, paras. 41–42]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Electrabel S.A. v. *The Republic of Hungary*

The arbitral tribunal constituted to hear the *Electrabel S.A.* v. *The Republic of Hungary* case determined that "[t]here is no question that the acts of the Hungarian Parliament are attributable to the Hungarian State, in accordance with Article 4 of the ILC Articles … ".[314] [53]

[A/68/72, para. 43]

[*Teinver S.A., et al.* v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[315] [99] Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[316] [100]

[See A/68/72, footnote 35 and para. 73]]

Vannessa Ventures Ltd. v. *The Bolivarian Republic of Venezuela*

In its January 2013 award, the arbitral tribunal in *Vannessa Ventures Ltd.* v. *The Bolivarian Republic of Venezuela* cited the commentary to article 4 in support of the assertion that "[i]t is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt".[317] [54]

[A/68/72, para. 44]

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[313] [52] *Ibid*., para. 160, footnote 94 (citing article 4.1 of the State responsibility articles) (internal footnote omitted).

[314] [53] ICSID, Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.89. For an extended account of the tribunal's consideration of the State responsibility articles and the question of attribution under international law, see below p. 150.

[315] [[99] ICSID, Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 274.]

[316] [[100] *Ibid*., para. 275.]

[317] [54] ICSID (Additional Facility), Case No. ARB/(AF)/04/6, Award, 16 January 2013, para. 209, note 209 (citing para. (6) of the commentary to article 4).

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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

In *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, the arbitral tribunal confirmed and restated its Third Order on Interim Measures,[318] [44] providing that

> as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as expressed in Chapter II of Part One [of the State responsibility articles] … If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission's Articles on State Responsibility.[319] [45]

[A/71/80, para. 38]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* found

> that as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made).[320] [46]

[A/71/80, para. 39]

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

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[321] [47]

[A/71/80, para. 40]

TECO Guatemala Holdings LLC v. *Republic of Guatemala*

In *TECO Guatemala Holdings LLC* v. *Republic of Guatemala*, the arbitral tribunal acknowledged, citing the text of article 4, that "[t]he conduct of a state organ such as the CNEE [National Commission of Electric Energy] is indeed attributable to the State".[322] [48]

[A/71/80, para. 41]

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[318] [44] PCA, Case No. 2009–23, Third Order on Interim Measures, 28 January 2011, paras. 2–3.

[319] [45] PCA, Case No. 2009–23, Fourth Interim Award on Interim Measures, 7 February 2013, paras. 55 and 77.

[320] [46] ICSID, Case No. ARB/11/23, Award, 8 April 2013, para. 347.

[321] [47] See footnote 17 5 above, para. 173, footnote 298.

[322] [48] ICSID, Case No. ARB/10/23, Award, 19 December 2013, para. 479.

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 referred to article 4 as relevant international law[323] [49] and stated that the State responsibility articles "for their part, provide for attribution of acts to a State, on the basis that they were carried out … by organs of the State as defined in Article 4".[324] [50]

[A/71/80, para. 42]

International arbitral tribunal (under the ICSID Convention)

Renee Rose Levy de Levi v. *Republic of Peru*

The arbitral tribunal in *Renee Rose Levy de Levi* v. *Republic of Peru* considered it "important to reproduce Article 4(1) of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts".[325] [51]

[A/71/80, para. 43]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the arbitral tribunal quoted article 4, paragraph 2, which establishes that an "organ includes any person or entity which has that status in accordance with the internal law of the State".[326] [52] The tribunal accepted the submission of the respondent "that there is no 'quasi-state' organ for the purposes of Art. 4".[327] [53]

[A/71/80, para. 44]

Permanent Court of Arbitration (under UNCITRAL Rules)

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

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal stated that the respondent's argument that the acts of a State organ were not in breach of the Energy Charter Treaty because it was acting only in a commercial capacity "runs up … against the ILC Articles on State Responsibility". With reference to the text of article 4, the arbitral tribunal further explained that "[t]he commentary to this article specifies that '[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*"".[328] [54]

[A/71/80, para. 45]

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[323] [49] ECHR, Fourth Section, Application Nos. 34356/06 and 40528/06, Judgment, 14 January 2014, para. 107.

[324] [50] *Ibid*., para. 207.

[325] [51] ICSID, Case No. ARB/10/17, Award, 26 February 2014, para. 157.

[326] [52] See footnote [210] 40 and [128] 16 above, para. 285 (quoting article 4).

[327] [53] *Ibid*., para. 288.

[328] [54] See footnote [19] 7 above, para. 1479 (quoting para. (6) of the commentary to article 4).

African Court on Human and Peoples' Rights

Lohé Issa Konaté v. *Burkina Faso*

The African Court on Human and Peoples' Rights in *Lohé Issa Konaté* v. *Burkina Faso* relied on article 4 as support for the finding that "the conduct of the Burkinabé courts fall[s] squarely on the Respondent State".[329] [55]

[A/71/80, para. 46]

European Court of Human Rights

Čikanović v. *Croatia*

In *Čikanović* v. *Croatia*, the European Court of Human Rights listed article 4 as relevant international law.[330] [56] In stating that "[m]unicipalities are public-law entities which exercise public authority and whose acts or failures to act, notwithstanding the extent of their autonomy *vis-à-vis* the central organs, can engage the responsibility of the State under the Convention", the Court referred to the State responsibility articles, in particular article 4, as reflecting customary international law.[331] [57]

[A/71/80, para. 47]

International arbitral tribunal (under the ICSID Convention)

Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. *Romania*

The arbitral tribunal in *Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation* v. *Romania* determined that "AVAS' [Authority for State Assets Recovery] acts under the Contract are attributable to the State under international law based on Article 4" of the State responsibility articles.[332] [58]

[A/71/80, para. 48]

Permanent Court of Arbitration (under UNCITRAL Rules)

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

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that

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[329] [55] African Court on Human and Peoples' Rights, Application No. 004/2013, Judgment, 5 December 2014, para. 170, footnote 36 (quoting article 4).

[330] [56] ECHR, First Section, Application No. 27630/07, Judgment, 5 February 2015, para. 37.

[331] [57] *Ibid*., para. 53.

[332] [58] ICSID, Case No. ARB/10/13, Award, 2 March 2015, para. 323.

the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties.[333] [59]

The tribunal observed that "[a] body that exercises impartial judgment, however, can well be an organ of the state; Article 4 of the ILC Articles, just quoted, specifically includes those exercising 'judicial' functions".[334] [60] The tribunal further quoted the commentary to article 4 to explain that "a state cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law".[335] [61]

[A/71/80, para. 49]

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* cited article 4 of the State responsibility articles in concluding that the relevant wrongful acts, as "actions done by state organs, were clearly attributable to the Argentine State".[336] [62]

[A/71/80, para. 50]

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

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal stated that "[i]t is clear under Article 4 of the ILC Articles and the Commentary thereon that organs of State include, for the purposes of attribution, the President, Ministers, provincial government, legislature, Central Bank, defence forces and the police, *inter alia*, as argued by the Claimants", and that "[r]esponsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (*i.e.* it includes *ultra vires* acts performed in an official capacity). Only acts performed in a purely private capacity would not be attributable".[337] [63] The tribunal also noted that "indirect liability for the acts of others can also occur under Article 4—for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it".[338] [64]

[A/71/80, para. 51]

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[333] [59] PCA, Case No. 2009–04, Award on Jurisdiction and Liability, 17 March 2015, paras. 306–307.

[334] [60] *Ibid*., para. 308.

[335] [61] *Ibid*., para. 315 (quoting para. (11) of the commentary to article 4).

[336] [62] See footnote [63] 16 above, para. 25, footnote 14.

[337] [63] See footnote [114] 24 above, paras. 443–444.

[338] [64] *Ibid*., para. 445.

Inter-American Court of Human Rights

Case of Ruano Torres et. Al. v. *El Salvador*

In the *Case of Ruano Torres et. Al.* v. *El Salvador*, the Inter-American Court of Human Rights referred to the State responsibility articles in support of its assertion that

> en el diseño institucional de El Salvador, la Unidad de Defensoría Pública se inserta dentro de la Procuraduría General de la República y puede ser asimilada a un órgano del Estado, por lo que su conducta debe ser considerada como un acto del Estado en el sentido que le otorga el proyecto de artículos sobre responsabilidad del Estado por hechos internacionalmente ilícitos realizados por auxiliares de la administración de justicia.[339] [65]

[A/71/80, para. 52]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman* referenced article 4 as support for the assertion that the attribution of the conduct of State organs to the State is "broadly supported in international law".[340] [66]

[A/71/80, para. 53]

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal referred to article 4 in finding that there was "no question that the acts of the Hungarian Parliament [were] attributable to the Hungarian State".[341] [67]

[A/71/80, para. 54]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal, "[o]n the basis of all the materials available to it … concludes that CVG FMO [Ferrominera del Orinoco] is not an organ of the State for the purposes of ILC Article 4 of the ILC Articles".[342] [68]

[A/71/80, para. 55]

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal referred to article 4 of the State responsibility articles as a reflection of customary international law when finding

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[339] [65] IACHR, Judgment, 5 October 2015, para. 160.

[340] [66] ICSID, Case No. ARB/11/33, Award, 3 November 2015, para. 344, footnote 706.

[341] [67] See footnote [22] 10 above, para. 7.89.

[342] [68] ICSID, Case No. ARB/12/23, Award, 29 January 2016, paras. 412–413.

that the Burundian authorities, who were aware of the damage on Claimant's investment, had not only failed to take the minimum measures necessary to protect this investment, but had also directly contributed to the damage.[343] [33]

[A/74/83, p. 10]

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal, agreeing with the respondent, "conclude[d] that CVG FMO is not an organ of the State for the purposes of ILC Article 4…".[344] [34]

[A/74/83, p. 10]

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 found "no basis for holding that the OPA [the Ontario Power Authority], Hydro One and the IESO [the Independent Electricity System Operator] are organs of Canada under Article 4 of the ILC Articles".[345] [35]

[A/74/83, p. 10]

Caribbean Court of Justice

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

In *Maurice Tomlinson* v. *The State of Belize and The State of Trinidad and Tobago*, the Caribbean Court of Justice observed that:

> Article 4 clarifies that an act of State may be constituted by conduct of the legislature, executive or the judiciary. Accordingly, in deciding whether a State has breached its international obligation, it is necessary to examine the relevant acts of the State, that is to say, the relevant State practice, to ascertain whether those acts are inconsistent with the international obligation of the State. In this regard, acts of the legislature constitute important indications of State practice and as such warrant close examination.[346] [36]

[A/74/83, p. 10]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* concluded, referring to article 4 and the commentary thereto, that "[i]n light of its

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[343] [33] ICSID, Case No. ARB/13/7, Award, 12 January 2016, paras. 172 and 175.

[344] [34] ICSID, Case No. ARB/11/26, Award, 29 January 2016, para. 413.

[345] [35] PCA, Case No. 2012–17, Award, 24 March 2016, para. 345.

[346] [36] CCJ, Judgment, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.

autonomous management and financial status, ANR [Polish Agricultural Property Agency] is not a *de facto* organ of the Polish State".[347] [37]

[A/74/83, p. 11]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[348] [38]

[A/74/83, p. 11]

Flemingo Duty Free Shop Private Limited v. *The Republic of Poland*

The arbitral tribunal in *Flemingo Duty Free Shop Private Limited* v. *The Republic of Poland* observed that the conduct of the Governor of Mazovia, the Polish courts, and the Polish custom authorities as State organs "can trigger Poland's international responsibility under Article 4 of the ILC articles".[349] [39] Holding that the Polish Airports State Enterprise (PPL) is a *de facto* State organ,[350] [40] the tribunal explained that "Article 4(2) of the ILC Articles, however, only provides that entities, which in accordance with the internal law of a State are qualified as State-organs, are State organs for purpose of State responsibility; it does not *per se* exclude entities which are not qualified as State organs under domestic law".[351] [41]

[A/74/83, p. 11]

Arbitration Institute of the Stockholm Chamber of Commerce

Busta and Busta v. *The Czech Republic*

In *Busta and Busta* v. *The Czech Republic*, the arbitral tribunal cited article 4 of the State responsibility articles, noting that "it is undisputed between the Parties that a State's police authorities are organs of that State".[352] [42]

[A/74/83, p. 11]

International arbitral tribunal (under UNCITRAL Rules)

Eli Lilly and Company v. *The Government of Canada*

In *Eli Lilly and Company* v. *The Government of Canada*, the arbitral tribunal, following a reference to article 4 of the State responsibility articles in the claimant's arguments,[353] [43]

[347] [37] PCA, Case No. 2015–13, Award, 27 June 2016, para. 213 (original emphasis).

[348] [38] PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.

[349] [39] PCA, Award, IIC 883 (2016), 12 August 2016, para. 424.

[350] [40] *Ibid.*, para. 435.

[351] [41] *Ibid.*, para. 433.

[352] [42] SCC, Case No. V (2015/014), Final Award, 10 March 2017, para. 400.

[353] [43] ICSID (UNCITRAL), Case No. UNCT/14/2, Final Award, 16 March 2017, para. 175.

stated that "the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility".[354] 44

[A/74/83, p. 11]

International arbitral tribunal (under the ICSID Convention)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic* observed that "the Parties agree that insofar as the conduct of Mr. Cirielli as the Undersecretary of Air Transportation is concerned, the applicable principles are contained in Article IV of the ILC Articles on State Responsibility"[355] 45 and concluded "that the only conduct of Mr. Cirielli that was attributable to Respondent was his conduct while he was in office as Undersecretary of Air Transportation".[356] 46

[A/74/83, p. 11]

Economic Community of West African States Court of Justice

Wing Commander Danladi A Kwasu v. *Republic of Nigeria*

In *Wing Commander Danladi A Kwasu* v. *Republic of Nigeria*, the Economic Community of West African States Court of Justice referred to article 4 of the State responsibility articles when stating that

> [i]nternational Law admits the duty of due diligence which enjoins States to take action to prevent violations of human rights of persons within its territory. This obligation cannot be derogated from nor even by any purported agreement or consent. All actions of institutions or officials of States are imputed to a State as its own conduct.[357] 47

[A/74/83, p. 12]

Benson Olua Okomba v. *Republic of Benin*

In *Benson Olua Okomba* v. *Republic of Benin*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte* v. *Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, and concluded that "it is well-established that the conduct of any organ of a state is regarded as act of that state".[358] 48

[A/74/83, p. 12]

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[354] 44 *Ibid*., para. 221.

[355] 45 ICSID, Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 702.

[356] 46 *Ibid*., para. 711.

[357] 47 ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/04/17, Judgment, 10 October 2017, p. 25.

[358] 48 ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, pp. 21–22, citing Judgment No. ECW/CCJ/JUD/11/14.

Dorothy Chioma Njemanze and Others v. *Federal Republic of Nigeria*

In *Dorothy Chioma Njemanze and Others* v. *Federal Republic of Nigeria*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte* v. *Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, noting that "[a]part from any other acts or omission alleged on the part of the State or its officials, failure to investigate such allegations [following formal complaints] itself constitutes a breach of the States duty under International law".[359] [49]

[A/74/83, p. 12]

International arbitral tribunal (under the ICSID Convention)

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

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal citing article 4 and the commentary thereto, found that "[p]rovided that the acts in question are performed in an official capacity, they are attributable to the State. There is no dispute that the acts of the Municipality in this case were performed in an official capacity … All of the actions of the Municipality at issue in this case are therefore attributable to the Respondent".[360] [50] Moreover, the arbitral tribunal noted that "the nature of the Regulator as a State organ as understood under Article 4 of the ILC Articles may be inferred from provisions of the Public Utilities Regulators Act".[361] [51]

[A/74/83, p. 12]

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

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[362] [52]

[A/74/83, p. 12]

Economic Community of West African States Court of Justice

Hembadoon Chia and Others v. *Federal Republic of Nigeria and Others*

In *Hembadoon Chia and Others* v. *Federal Republic of Nigeria and Others*, the Economic Community of West African States Court of Justice explained that "[a] state cannot take refuge on the notion that the act or omissions were not carried out by its agents in their official capacity or that the organ or official acted contrary to orders, or exceed its authority under internal law".[363] [53] Referring to its earlier decision in *Tidjane Konte* v.

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[359] [49] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/08/17, Judgment, 12 October 2017, pp. 39–40, citing Judgment No. ECW/CCJ/JUD/11/14.

[360] [50] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 800–801.

[361] [51] *Ibid*., para. 804.

[362] [52] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.

[363] [53] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/21/18, Judgment, 3 July 2018, p. 15, citing Judgment No. ECW/CCJ/JUD/11/14.

Republic of Ghana in which it had relied on article 4 of the State responsibility articles, Community Court of Justice concluded that "the Nigerian Police and its officers are agents of the 1st Defendant who carried out the alleged act in their official capacity. Therefore, the 1st Defendant being responsible for the acts of its agents is a proper party in this suit".[364] [54]

[A/74/83, p. 13]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* cited the text of article 4 of the State responsibility articles and the commentary thereto when observing that

[the] conduct of an organ of the State in an apparently official capacity may be attributable to the State, even if the organ exceeded its competence under internal law or in breach of the rules governing its operations. The corollary of this is that acts that an organ commits in its purely private capacity are not attributable to the State, even if it has used the means placed at its disposal by the State for the exercise of its function."[365] [55] The tribunal concluded that "[i]t follows from Article 4 of the ILC Articles that the actions of the Bankruptcy Judge and the Bankruptcy Council are, at first sight, attributable to the Respondent.[366] [56]

[A/74/83, p. 13]

Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. *Republic of Cyprus*

The arbitral tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others* v. *Republic of Cyprus* recited the text of article 4 and

agree[d] with Claimants that such organs [of Cyprus] include: the President of the Republic, the Attorney General and the Deputy Attorney General, the CBC, the CySEC, the Cypriot courts, the Minister of Finance and the Cypriot Parliament. Consequently, any and all acts committed by these organs are attributable to Respondent pursuant to ILC Article 4.[367] [57]

[A/74/83, p. 13]

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* found that "by the acts of its judicial branch, attributable to the Respondent under Article 4 of the ILC Articles on State Responsibility, the Respondent violated its obligations under Article II(3)(*c*) of the Treaty, thereby committing international wrongs towards each of Chevron and TexPet".[368] [58]

[A/74/83, p. 13]

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[364] [54] *Ibid.*

[365] [55] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 801.

[366] [56] *Ibid.*, para. 803.

[367] [57] ICSID, Case No. ARB/13/27, Award, 26 July 2018, paras. 670–671.

[368] [58] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 8.8.

International arbitral tribunal (under the ICSID Convention)

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

> [a]rticle 4 of the ILC Articles on State Responsibility confirms that, under international law, the conduct of a State's executive branch shall be considered as an act of that State. Hence, the conduct of the Ministry of Petroleum, as with other Ministries and the Council of Ministers, is attributable to the Respondent.[369] 59

The tribunal further stated that

> [a]ccording to the ILC Commentary to Article 4, '[t]he reference to a 'State organ' covers all the individual or collective entities which make up the organization of the State and act on its behalf.' Of course, a State may become subject to obligations entered into on its behalf by entities other that organs of the State, but this is governed by general principles of the law of agency (not attribution).[370] 60

The tribunal concluded that the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were not an organs of the respondent "within the meaning of Article 4 of the ILC Articles on State Responsibility".[371] 61

[A/74/83, p. 13]

General Court of the European Union

Ahmed Abdelaziz Ezz et al. v. *Council*

In *Ahmed Abdelaziz Ezz et al.* v. *Council*, the General Court of the European Union did not accept:

> [t]he applicants' argument that the Council's assessment does not comply with 'general international law'… . In that regard, it suffices to note that the applicants refer to the concept of 'organ of the State', as defined in the commentary of the United Nations International Law Commission on the 2001 Resolution on Responsibility of States for Internationally Wrongful Acts and in international arbitral decisions ruling on responsibility of States in the context of disputes between States and private companies. Thus, those references, for reasons similar to those set out in paragraph 268 above, are irrelevant in the present case.[372] 62

[A/74/83, p. 14]

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[369] 59 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.92.

[370] 60 *Ibid*., para. 9.93.

[371] 61 *Ibid*., para. 9.112.

[372] 62 EU, General Court, *Ahmed Abdelaziz Ezz et al.* v. *Council*, Case T 288/15, Judgment of 27 September 2018, para. 272.

World Trade Organization Panel

Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines

The panel established in *Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines* "consider[ed] that Article 4(1) of these Articles [on State responsibility] is an expression of customary international law".[373] [63]

[A/74/83, p. 14]

[Inter-American Court of Human Rights

Women Victims of Sexual Torture in Atenco v. *Mexico*

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco* v. *Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[374] [79]

[A/74/83, p. 17]]

[World Trade Organization Panel

United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia

In *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[375] [83]

[A/74/83, p. 17]]

International arbitral tribunal (under the ICSID Convention)

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provi-

[373] [63] WTO, Panel Report, WT/DS371/RW, 12 November 2018, paras. 7.636 and 7.771 (note 1654); see also WTO, Panel Report, *Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines*, WT/DS371/R, 15 November 2010, para. 7.120.

[374] [[79] IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment of 28 November 2018, para. 205 and footnote 303.]

[375] [[83] WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.]

sions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[376] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[377] 97

[A/74/83, p. 20]]

Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. *Republic of Latvia*

The arbitral tribunal in *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia* noted that "[i]t is common ground that under Article 4, the conduct of a State organ acting as such is attributable to the State".[378] 29 The tribunal added that "a person or entity may be characterized as an organ of the State as a matter of international law even if it does not possess that character under the State's internal law".[379] 30

[A/77/74, p. 9]

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 international law, as expressed in Article 4 of the ILC Articles, the conduct of a State's judiciary is attributable to the State, since the judiciary is a branch of the State".[380] 31

[A/77/74, p. 9]

International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal referred to article 4 and the commentary thereto and noted that it was uncontested that "any person or entity having the status of a State organ under Algerian law is a *de jure* organ of the State of Algeria" and that "article 4 (2) does not exclude the possibility of a person or entity that does not have that status of a State organ under Algerian law nevertheless being a *de facto* organ, or of the acts or omissions of such a *de facto* organ being

[376] [96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

[377] [97 *Ibid*., para. 146.]

[378] 29 ICSID, Case No. ARB/16/38, Award, 28 February 2020, para. 312.

[379] 30 *Ibid*., para. 313.

[380] 31 IUSCT, Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, Partial Award, 10 March 2020, para. 1141.

attributable to the State of Algeria under article 4".[381] [32] The tribunal stressed that articles 4 to 11 reflected customary international law on the subject of State responsibility.[382] [33]

[A/77/74, p. 10]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[383] [70]

[A/77/74, p. 14]]

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)* referred to article 4, suggesting that "there exists a presumption under international law that a State is right about the characterization of the conduct of its official as being official in nature".[384] [34]

[A/77/74, p. 10]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited the text of article 4, noting that as a consequence of such rule

a [WTO] Member is responsible for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government. Thus, the responsibility of Members under international law applies irrespective of the branch of government at the origin of the action having international repercussions.[385] [35]

[A/77/74, p. 10]

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[381] [32] ICSID, Case No. ARB/17/1, Award, 29 April 2020, paras. 160–161.

[382] [33] *Ibid*., para. 155.

[383] [[70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

[384] [34] PCA, Case No. 2015–28, Award, 21 May 2020, para. 858.

[385] [35] WTO, Panel Report, WT/DS567/R, 16 June 2020, para. 7.50.

International arbitral tribunal (under the ICSID Convention)

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal cited the commentary to article 4, noting that, except in the case of umbrella clauses contained in investment treaties, "in order for the international responsibility of a State to be engaged in connection with the breach of an investment treaty, the State must have acted in the exercise of sovereign prerogatives, not as a party in a contractual relationship".[386] [36]

[A/77/74, p. 10]

Arbitration Institute of the Stockholm Chamber of Commerce

State Development Corporation "VEB.RF" v. *Ukraine*

The arbitral tribunal in *State Development Corporation "VEB.RF"* v. *Ukraine* referred to article 4 in ascertaining whether the claimant investor should be characterized as an organ of the Russian Federation.[387] [37] The tribunal cited the commentary to article 4, paragraph 2, according to which "it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading".[388] [38] The tribunal concluded "that the internal law of the Russian Federation may be relevant in the characterization of the Claimant as a matter of international law, but it will not be determinative of that characterization".[389] [39]

[A/77/74, p. 10]

International arbitral tribunal (under UNCITRAL Rules)

Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia, S.L. v. *Republic of Colombia*

In *Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia, S.L.* v. *Republic of Colombia*, the arbitral tribunal analysed whether the national authorities could be responsible for the debt for non-payment of electricity bills by certain governmental entities to the investor's local company. The tribunal referred to article 4, noting that, "while the Tribunal recognizes that the concept of State organ is broadly defined in article 4 …, the Tribunal reads this article simply as attributing the debts of regional public entities to the State".[390] [40] However, it rejected the idea that all debts from decentralized entities, including city halls and clinics, could be considered attributable to the State.[391] [41]

[A/77/74, p. 11]

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[386] [36] ICSID, Case No. ARB/17/16, Award, 11 January 2021, para. 259.

[387] [37] SCC, Case No. V2019/088, Partial Award on Preliminary Objections, 31 January 2021, para. 153.

[388] [38] *Ibid*., para. 154.

[389] [39] *Ibid*., para. 155.

[390] [40] ICSID (UNCITRAL), Case No. UNCT/18/1, Award, 12 March 2021, para. 423.

[391] [41] See, generally, *ibid*., paras. 421–423.

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[392] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[393] [43]

[A/77/74, p. 11]

International arbitral tribunal (under the ICSID Additional Facility Rules)

América Móvil S.A.B. de C.V. v. *Colombia*

In *América Móvil S.A.B. de C.V.* v. *Colombia*, the arbitral tribunal recalled the duty of international judges to respect domestic judicial decisions concerning issues of domestic law, but noted that, pursuant to article 4, "in some cases, actions of the judiciary, like those of other branches of Government, may also give rise to State responsibility".[394] [44]

[A/77/74, p. 11]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* recalled that "under international law, the State is treated as a unity".[395] [45] Furthermore, the tribunal pointed out that "the unity of the State in international law is the reason why all conduct of any State organ is attributable to the State under ILC Article 4 … Thus, the conduct of central and local State organs will be attributable to the State, as will be the conduct of legislative, judicial or executive organs".[396] [46]

Furthermore, citing the commentary to article 4, the tribunal noted that "it is irrelevant if the State organ's conduct is sovereign or commercial in nature. While the nature of the conduct can be determinative for a liability analysis, for purposes of attribution under ILC Article 4, a State organ's commercial conduct will also be deemed an act of the State".[397] [47] It considered that

> the fact that an entity is not specifically classified as a State organ under domestic law, while relevant, is not outcome-determinative for the attribution inquiry under ILC Article 4, which is carried out pursuant to international law. Equally, the fact that an entity may have separate legal personality is not *per se* an impediment to that entity qualifying as a State organ.[398] [48]

The tribunal considered a number of factors to determine "whether an entity can be deemed a State organ in international law":

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[392] [42] Final Award, 26 March 2021, para. 72.

[393] [43] *Ibid*., paras. 72 and 134–135.

[394] [44] See footnote [191] 24 above, para. 345.

[395] [45] See footnote [128] 16 above, para. 742.

[396] [46] *Ibid*., para. 743.

[397] [47] *Ibid*., para. 744.

[398] [48] *Ibid*., para. 745.

(i) whether the entity carries out an overwhelming governmental purpose; (ii) whether the entity relies on other State organs for making and implementing decisions; (iii) whether the entity is in a relationship of complete dependence on the State; and (iv) whether the entity carries out the role of an executive agency, merely implementing decisions taken by State organs.[399] 49

The tribunal concluded that "the conduct of State ministries and State agencies, and the conduct of subdivisions of State, such as provinces and municipalities, are always attributable to a State under ILC Article 4".[400] 50

[A/77/74, p. 11]

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

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to article 4 in the context of attribution, and found that "Colombia should have ensured that its various arms took the necessary steps to comply with [its] … obligation".[401] 51

[A/77/74, p. 12]

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 concluded that "[t]he Mayor of Benice represents an organ of the Czech Republic at a territorial level, and in accordance with Article 4 of the ILC Articles her conduct must be attributed to the Czech Republic".[402] 52

[A/77/74, p. 12]

Inter-American Court of Human Rights

Manuela et al. v. *El Salvador*

In *Manuela et al.* v. *El Salvador*, the Inter-American Court of Human Rights analysed whether the actions of public defenders could be attributable to the State. It referred to article 4, noting that

[t]he Public Defenders' Unit is part of the Office of the Attorney General and can be considered an organ of the State; therefore, its actions should be considered acts of the State in the sense accorded to this by the articles on Responsibility of States for Internationally Wrongful Acts drawn up by the International Law Commission.[403] 53

[A/77/74, p. 12

[399] 49 *Ibid*., para. 746.

[400] 50 *Ibid*., para. 749.

[401] 51 ICSID, Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 821.

[402] 52 ICSID, Case No. ARB/17/11, Award, 1 November 2021, para. 373.

[403] 53 IACHR, Series C, No. 441, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 November 2021, para. 123.

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[404] [127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

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[404] [127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[405] 128

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[406] 129

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (*e.g.* the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; *i.e.* where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is

[405] 128 League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[406] 129 *Ibid.*, p. 92.

not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Phillips Petroleum Co. Iran v. *Islamic Republic of Iran*

In its 1987 award in the *Phillips Petroleum Co. Iran* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether the Islamic Republic of Iran was responsible for expropriation of goods of the claimant when it allegedly took the latter's property interests through the National Iranian Oil Company (NIOC), observed in a footnote, with reference to draft article 7 provisionally adopted by the International Law Commission:[407] [66]

> International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. *See* article 7(2) of the draft articles on State responsibility adopted by the International Law Commission, *Yearbook International Law Commission 2 (1975)*, at p. 60. The 1974 Petroleum Law of Iran explicitly vests in NIOC "the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources". NIOC was later integrated into the newly-formed Ministry of Petroleum in October 1979.[408] [67]

[A/62/62, para. 43]

World Trade Organization panel

Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products

In its 1999 reports on Canada—*Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the panel referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading[409] [68] in support of its finding that

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[407] [66] This provision was amended and incorporated in article 5 finally adopted by the International Law Commission in 2001. The text of draft article 7 provisionally adopted was as follows:

> Article 7
>
> Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority
>
> 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
>
> 2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[408] [67] IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 21 (1989), p. 79, para. 89, footnote 22.

[409] [68] Draft article 7 adopted on first reading was amended and incorporated in article 5 as finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook … 1996*, vol. II

the Canadian provincial marketing boards acting under the explicit authority delegated to them by either the federal Government or a provincial Government were "agencies" of those Governments in the sense of article 9.1(*a*) of the Agreement on Agriculture, even if they were not formally incorporated as Government agencies. In a footnote, the panel reproduced the text of article 7, paragraph 2, and noted that this provision "might be considered as reflecting customary international law".[410] 69

[A/62/62, para. 44]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, observed:

> It would … seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law" [see page 65 above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[411] 70

In a footnote,[412] 71 the Appeals Chamber quoted draft article 7 adopted by the International Law Commission on first reading, as well as the corresponding draft article provisionally adopted by the Commission's Drafting Committee in 1998.[413] 72

Later in the same judgement, the Appeals Chamber twice referred to draft article 7 adopted by the ILC on first reading in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals.[414] 73 In a footnote corresponding to the statement that "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of indi-

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(Part Two), para. 65) was identical to that of article 7 provisionally adopted. (See footnote [407] 66 above.)

[410] 69 WTO, Panel Report, WT/DS103/R and WT/DS113/R, 17 May 1999, para. 7.77, footnote 427.

[411] 70 ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 109 (footnotes omitted).

[412] 71 *Ibid*., para. 109, footnote 130.

[413] 72 The text of draft article 5 (Attribution to the State of the conduct of entities exercising elements of the governmental authority) adopted by the International Law Commission Drafting Committee in 1998 was the following:

> The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question. (*Yearbook … 2000*, vol. II (Part Two), p. 65.)

[414] 73 For the complete passage of the Appeals Chamber's judgement on that issue, see [p. 128] below.

viduals must answer for their actions, even when they act contrary to their directives",[415] [74] the Appeals Chamber noted that

[t]his sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in article 7 of the International Law Commission draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member states of federal States, *etc.*) even if under the national Constitution these organs enjoy broad independence or complete autonomy.[416] [75]

Subsequently, the Appeals Chamber also observed that

[i]n the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity.[417] [76]

[A/62/62, para. 45]

International arbitral tribunal (under the ICSID Convention)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading:

a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil. Paragraph 2 of article 7 of the International Law Commission's draft articles on State responsibility supports this position.[418] [77]

[A/62/62, para. 46]

International arbitral tribunal

Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. *United Kingdom)*

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention referred to article 5 (as well as article 4) finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 69] above.

[A/62/62, para. 47]

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[415] [74] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 122.

[416] [75] *Ibid*., para. 122, footnote 140.

[417] [76] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 123 (footnotes omitted).

[418] [77] ICSID, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 78 (footnotes omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 29.

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, referred to the commentary to article 5 finally adopted by the International Law Commission in 2001.[419] [78]

[A/62/62, para. 48]

International arbitral tribunal (under the ICSID Convention)

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in determining whether the acts of a Romanian "institution of public interest" (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 5 finally adopted by the International Law Commission in 2001:

> The 2001 draft articles … attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by article 5 of the 2001 International Law Commission draft.[420] [79]

[A/62/62, para. 49]

Consorzio Groupement LESI-DIPENTA v. *People's Democratic Republic of Algeria and LESI, S.p.A. and Astaldi, S.p.A.* v. *People's Democratic Republic of Algeria*

In its 2005 and 2006 awards, the arbitral tribunal constituted to hear the Consorzio Groupement LESI-DIPENTA v. Algeria and the LESI and Astaldi v. Algeria cases referred, *inter alia*, to article 6 finally adopted by the International Law Commission in 2001 in support of its finding according to which "the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence".[421] [80]

[A/62/62, para. 50]

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[419] [78] See footnote [55] 11 above, para. 132. The arbitral tribunal referred in particular to paragraph (1) of the commentary to article 5 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

[420] [79] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 70.

[421] [80] ICSID, Case No. ARB/03/08, Award, 10 January 2005, para. 19, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 2, 2004, pp. 455–456 (unofficial English translation by ICSID of the French original) and Case No. ARB/05/3, Award, 12 July 2006, para. 78. Although in these awards the tribunal inadvertently refers to article 8 (concerning the conduct of private persons directed or controlled by a State), the situation it was dealing with involved the conduct of a public entity

International arbitral tribunal (under UNCITRAL Rules)

Encana Corporation v. *Republic of Ecuador*

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp.* v. *Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, after having found that the conduct at issue of Petroecuador, a State-owned and State-controlled instrumentality of Ecuador, was attributable to the latter, noted that it "does not matter for this purpose whether this result flows from the principle stated in article 5 of the International Law Commission's articles on responsibility of States for internationally wrongful acts or that stated in article 8", and quoted the text of these provisions as finally adopted by the Commission in 2001.[422] [81]

[A/62/62, para. 51]

International arbitral tribunal (under the ICSID Convention)

Jan de Nul NV and Dredging International NV v. *Arab Republic of Egypt*

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt* case referred, *inter alia*, to article 5 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 52]

Helnan International Hotels A/S v. *The Arab Republic of Egypt*

The arbitral tribunal in the *Helnan International Hotels A/S* v. *Egypt* case considered a challenge by the Respondent to its jurisdiction on the ground that the actions of the domestic entity under scrutiny in the case were not attributable to Egypt, despite the fact that the entity was wholly owned by the Government of Egypt. While the tribunal found that it did have jurisdiction on other grounds, it nonetheless proceeded to consider the Respondent's challenge and found that the claimant had convincingly demonstrated that the entity in question was "under the close control of the State". In making this finding, it referred to the commentary to article 5 of the State responsibility articles, first by way of acknowledgment that the

> fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State.[423] [12]

Nonetheless, the tribunal noted that "[the domestic entity] was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government" and proceeded to recall article 5 (which is quoted in full) and then held that "[e]ven if [the domestic entity]

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exercising elements of governmental authority, which is covered by article 5 of the International Law Commission articles. These references are accordingly included under this section of the compilation.

[422] [81] London Court of International Arbitration, Case No. UN3481, Award, 3 February 2006, para. 154.

[423] [12] Paragraph (3) of the commentary to article 5.

has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State".[424] [13]

[A/65/76, para. 17]

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[425] [36] The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[426] [37]

[See A/68/72, footnote 55 and para. 32]

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[427] [56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8)".[428] [57] The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[429] [58]

Upon consideration of the relevant law and facts, the tribunal concluded that, under article 5, the entity exercised "elements of governmental authority".[430] [59] Nonetheless, the tribunal indicated that such a conclusion

> in itself clearly does not resolve the issue of attribution … . [F]or an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity. This approach has been followed in national as well as international case law.[431] [60]

In applying article 5 to the particular acts at issue, the tribunal "concentrated on the utilisation of governmental power", and assessed whether the entity in question

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[424] [13] ICSID, Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras. 92 and 93.

[425] [[36] See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

[426] [[37] *Ibid*., paras. 274 and 280.]

[427] [56] See footnote [105] 20 above, para. 172.

[428] [57] *Ibid*.

[429] [58] *Ibid*., paras. 175–177.

[430] [59] *Ibid*., para. 192.

[431] [60] *Ibid*., para. 193.

acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers … . It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.[432] [61]

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[433] [62]

[A/68/72, paras. 45–48]

[*Alpha Projektholding GmbH* v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the ILC Articles".[434] [39] The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[435] [40]

[See A/68/72, footnote 55 and para. 34]]

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 indicated that certain rules on the liability of sponsoring States in UNCLOS

are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[436] [63]

[A/68/72, para. 49]

World Trade Organization Appellate Body

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

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of

[432] [61] *Ibid*., para. 202; see also paras. 255, 266 and 284.

[433] [62] *Ibid*., para. 198.

[434] [[39] See footnote [293] 39, para. 401.]

[435] [[40] *Ibid*., para. 402.]

[436] [63] See footnote [12] 10 above, para. 182.

attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[437] [64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[438] [65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[439] [66]

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[440] [67]

The Appellate Body also indicated that, "despite certain differences between the attribution rules", its interpretation of the term "public body" as found in the SCM Agreement "coincides with the essence of Article 5".[441] [68]

In the light of its determination that article 5 supported, rather than contradicted, its interpretation of the SCM Agreement, and "because the outcome of [its] analysis [did] … not turn on Article 5", the Appellate Body indicated that it was "not necessary … to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law".[442] [69]

[A/68/72, paras. 50–53]

International arbitral tribunal (under UNCITRAL Rules)

[*Sergei Paushok et al.* v. *The Government of Mongolia*

The arbitral tribunal in the *Sergei Paushok et al.* v. *The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[443] [41] While noting that the State responsibility articles "do not contain a definition of what constitutes an organ of the State",[444] [42] the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article's reference to "State organ".[445] [43]

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[437] [64] See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(*c*)).

[438] [65] *Ibid.*, para. 308.

[439] [66] *Ibid.*, para. 309.

[440] [67] *Ibid.*, para. 308; see below, p. 537, for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid.*, para. 314.

[441] [68] *Ibid.*, para. 310.

[442] [69] *Ibid.*, para. 311.

[443] [41 See footnote [299] 41, paras. 576 and 577.]

[444] [42 *Ibid.*, para. 581.]

[445] [43 *Ibid.*, para. 582.]

The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[446] [44]

[See A/68/72, footnote 55 and paras. 35–36]

[*White Industries Australia Limited* v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently … not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[447] [87]

[See A/68/72, footnote 55 and para. 67]]

European Court of Human Rights

Kotov v. *Russia*

In its judgment in *Kotov* v. *Russia*, the European Court of Human Rights referred to the commentary to article 5 as part of its elaboration of the law relevant to the attribution of international responsibility to States.[448] [70] The Court quoted excerpts of the commentary relevant to the determination of which entities, including "parastatal entities", were to be regarded as "governmental" for the purposes of attribution under international law.[449] [71]

[A/68/72, para. 54]

International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic* noted that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[450] [72] Upon consideration of articles 5 and 8, the tribunal determined that, on the basis of the evidence presented, the acts of certain non-State entities and individuals could not be said to have been "carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State".[451] [73]

[A/68/72, para. 55]

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[446] [44 *Ibid*., para. 580.]

[447] [87 See footnote [303] 87 above, para. 8.1.2.]

[448] 70 See footnote [16] 14 above, paras. 31–32 (quoting paras. (3) and (6) of the commentary to article 5).

[449] 71 *Ibid*.

[450] 72 See footnote [305] 46 above, paras. 150–151.

[451] 73 *Ibid*., paras. 156–159; the tribunal added that, "if it were established that a State organ had acted under the influence of [a non-state entity], such acts would be attributable to the State."; see also *ibid*., para. 163.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Ulysseas, Inc. v. *The Republic of Ecuador*

The arbitral tribunal in the *Ulysseas, Inc.* v. *The Republic of Ecuador* case determined that the conduct of certain entities, despite not constituting organs of the Ecuadorian State, "may nonetheless fall within the purview of Article 5 of the ILC Articles and [the relevant] BIT to the extent governmental authority has been delegated to it with the consequence that some of their acts can be attributed to the State, provided that they are 'acting in that capacity in the particular *instance*'."[452] [74]

[A/68/72, para. 56]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise v. *Ukraine*

In its award, the arbitral tribunal in *Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise* v. *Ukraine* relied upon article 5 in its analysis of whether a university's conduct was attributable to Ukraine.

The tribunal considered (1) whether the university was "empowered by the law of Ukraine to exercise elements of governmental authority", and (2) whether "the conduct of the University relates to the exercise of that governmental authority".[453] [75]

With regard to the second aspect of its analysis, the tribunal relied upon the commentary to article 5 in indicating that "the question that falls for determination is whether the University's conduct in entering into and terminating the [relevant contract] can be understood or characterised as a form of 'governmental activity', or as a form of 'commercial activity'".[454] [76]

The tribunal also referred to article 5 as part of its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[455] [77]

[A/68/72, paras. 57–60]

[*Teinver S.A., et al.* v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[456] [99] Nonetheless, the tribunal

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[452] [74] See footnote [308] 49 above, para. 135 (quoting article 5).

[453] [75] See footnote [310] 75 above, para. 164 (citing James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002), p. 100).

[454] [76] *Ibid*., para. 176.

[455] [77] *Ibid*., para. 246. The tribunal stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles".

[456] [99 See footnote [315] 99 above, para. 274.]

accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[457] 100

[See A/68/72, footnote 55 and para. 73]]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Luigiterzo Bosca v. *Lithuania*

The arbitral tribunal in *Luigiterzo Bosca* v. *Lithuania* concluded that "[t]he SPF [State Property Fund] is an entity empowered to exercise governmental authority, as described in Article 5" of the State responsibility articles. The question for the arbitral tribunal was thus "whether the SPF was acting in a sovereign capacity".[458] 70

[A/71/80, para. 56]

EUROPEAN COURT OF HUMAN RIGHTS

Jones and Others v. *the United Kingdom*

The European Court of Human Rights in *Jones and Others* v. *the United Kingdom* referred to article 5 as relevant international law,[459] 71 and noted that the acts of "persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles" could be attributed to the State.[460] 72

[A/71/80, para. 57]

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights referred to article 5 of the State responsibility articles as relevant international law.[461] 73

[A/71/80, para. 58]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that "the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties".[462] 59

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[457] [100 *Ibid*., para. 275.]

[458] 70 See footnote [169] 26 above, para. 127 (misnumbered).

[459] 71 See footnote [323] 49 above, paras. 107–109.

[460] 72 *Ibid*., para. 207.

[461] 73 See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

[462] [59 See footnote [333] 59 above, para. 308]

The arbitral tribunal, relying on article 5, agreed with the investor's contention that even if the Joint Review Panel was not "an integral part of the government apparatus of Canada … it is empowered to exercise elements of Canada's governmental authority".[463] 74

[A/71/80, paras. 49 and 59]

International arbitral tribunal (under the ICSID Convention)

Dan Cake S.A. v. *Hungary*

The arbitral tribunal in *Dan Cake S.A.* v. *Hungary* considered that "it is not relevant to the question whether the *liquidator* is, pursuant to Article 5 of the ILC Draft Articles on State Responsibility, 'a person or entity … which is empowered by the law of [the] State to exercise elements of the governmental authority'".[464] 75

[A/71/80, para. 60]

Inter-American Court of Human Rights

Gonzales Lluy et al. v. *Ecuador*

In *Gonzales Lluy et al.* v. *Ecuador*, the Inter-American Court of Human Rights cited the case of *Ximenes Lopes* v. *Brazil*, noting that in that case the Court had

> indicated that the assumptions of State responsibility for violation of rights established in the Convention may include the conduct described in the Resolution of the International Law Commission, 'of a person or entity that, although not a State body, is authorized by the laws of the State to exercise powers entailing the authority of the State. Such conduct, by either a natural or legal person, must be deemed to be an act of the State, provided that the latter was acting in this capacity'.[465] 76

[A/71/80, para. 61]

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 noted that article 5 "provides a useful guide as to the dividing line between sovereign and commercial acts".[466] 77

[A/71/80, para. 62]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* stated that as regards attribution of the conduct of Emlak to Turkey under

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[463] 74 *Ibid.*

[464] 75 ICSID, Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, para. 158 (quoting article 5).

[465] 76 IACHR, Judgment, 1 September 2015, note 205 (quoting *Case of Ximenes Lopes* v. *Brazil, Merits, Reparations and Costs*, Judgment, 4 July, 2006, para. 86).

[466] 77 See footnote [340] 66 above, para. 324.

article 5 "it must be established both that (1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and (2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority".[467] [78]

[A/71/80, para. 63]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal considered the question

whether CVG FMO [Ferrominera del Orinoco] was empowered by Venezuela to exercise elements of governmental authority, and was so acting in the case of the Supply Contract, and, specifically, the discriminatory supply of pellets, such that its actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles.[468] [79]

[A/71/80, para. 64]

[The arbitral tribunal in *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela* was "mindful of Note 3 of the commentary to Article 5" of the State responsibility articles when rejecting the applicant's submission that "[CVG FMO]'s actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles".[469] [65]

[A/74/83, p. 14]]

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

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[470] [52]

[A/74/83, p. 12]]

Permanent Court of Arbitration (under UNCITRAL Rules)

[*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[471] [38]

[A/74/83, p. 11]]

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[467] [78] See footnotes [210] 40 and [128] 16 above, para. 292.

[468] [79] See footnote [342] 68 above, para. 414.

[469] [[65] ICSID, Case No. ARB/11/26, Award, 29 January 2016, paras. 414–415.]

[470] [[52] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

[471] [[38] PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.]

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal relied on article 5 of the State responsibility articles to find that "the OPA [Ontario Power Authority] was acting in the exercise of delegated governmental authority. Thus, the OPA's acts in ranking and evaluating the FIT Applications are attributable to Canada".[472] 66

[A/74/83, p. 15]

[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".[473] 249

[A/74/83, p. 42]]

Ad hoc committee (under the ICSID Convention)

Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. *République Démocratique du Congo*

In *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud* v. *République Démocratique du Congo*, the committee established to annul the award found that the arbitral tribunal did not exceed its powers because, as its mandate required, it had verified the criteria for attribution of conduct under article 5 of the State responsibility articles.[474] 67

[A/74/83, p. 15]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* found that "the termination of the Lease Agreement was not attributable to Poland under ILC Article 5"[475] 68 after deciding that the Polish Agricultural Property Agency's termination of the Lease Agreement took place in a "purported exercise of contractual powers".

[A/74/83, p. 15]

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

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal noted that

[t]he Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles.[476] 69

[A/74/83, p. 15]

[472] 66 PCA, Case No. 2012–17, Award, 24 March 2016, para. 371.

[473] [249 PCA, Case No. 2012–17, Award, 24 March 2016, paras. 359, 362 and 365.]

[474] 67 ICSID, Case No. ARB/10/4, Decision on Annulment, 29 March 2016, para. 185.

[475] 68 PCA, Case No. 2015–13, Award, 27 June 2016, para. 251.

[476] 69 PCA, Award, IIC 883 (2016), 12 August 2016, para. 439.

International arbitral tribunal (under the ICSID Convention)

Garanti Koza LLP v. *Turkmenistan*

The arbitral tribunal in *Garanti Koza LLP* v. *Turkmenistan*, citing article 5 of the State responsibility articles,

> confirm[ed] that the acts of TAY [State Concern 'Turkmenavtoyollary'] in furtherance of the Contract were attributable to Turkmenistan. Road and bridge construction is in any event a core function of government. Any entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of State.[477] [70]

[A/74/83, p. 15]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal noted that "although PDVSA is a State-owned company with distinct legal personality, its conduct is attributable to [the] Respondent pursuant to Article 5 of the ILC Draft Articles" because "[b]oth in its alleged function as a '*caretaker*' and its capacity as supervisor and promoter of the nationalization of the plant, PDVSA was vested with governmental authority".[478] [71]

[A/74/83, p. 15]

Permanent Court of Arbitration (under UNCITRAL Rules)

WNC Factoring Limited v. *The Czech Republic*

In *WNC Factoring Limited* v. *The Czech Republic*, the arbitral tribunal stated that "[b]ased on the material available to the Tribunal, there are serious issues which arise in attributing the conduct of CEB [Czech Export Bank] and GAP [Export Guarantee and Insurance Corporation] to the Respondent under Article 5 of the ILC Articles".[479] [72]

[A/74/83, p. 16]

International arbitral tribunal (under the ICSID Convention)

Beijing Urban Construction Group Co. Ltd. v. *Yemen*

In *Beijing Urban Construction Group Co. Ltd.* v. *Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[480] [73]

[A/74/83, p. 16]

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[477] [70] ICSID, Case No. ARB/11/20, Award, 19 December 2016, para. 335.

[478] [71] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 457–458.

[479] [72] PCA, Case No. 2014–34, Award, 22 February 2017, para. 376.

[480] [73] ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.

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

The arbitral tribunal in *UAB E Energija (Lithuania)* v. *Republic of Latvia* stated:

> Like Article 4, Article 5 of the ILC Articles merely codifies a well-established rule of international law. […] There are thus three aspects to the analysis: (i) the Regulator must have exercised elements of governmental authority; (ii) it must have been empowered by the Respondent's law to do so; and (iii) it was acting in that capacity in regulating tariffs and granting or revoking licences.[481] 74

The tribunal found that "even if Rēzeknes Siltumtīkli and Rēzeknes Enerģija had been empowered to exercise any element of governmental authority, they were not exercising such authority 'in the particular instance', as Article 5 requires".[482] 75

[A/74/83, p. 16]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* cited article 5 of the State responsibility articles and noted that "[t]he Croatian Fund is an entity empowered by Croatian law to exercise elements of governmental authority, as exemplified above, and there is no suggestion that the Fund acted other than in its professional capacity. The Croatian Fund may thus be considered an entity within the ambit of Article 5."[483] 76 The tribunal concluded that "the Claimants have not made out any wrongful conduct in violation of the BIT on the part of the Croatian Fund that is to be attributed to the Respondent. The principles of attribution, as codified in the ILC Articles, do not otherwise operate in respect of the Croatian Fund".[484] 77

[A/74/83, p. 16]

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

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the arbitral tribunal relied on article 5 of the State responsibility to find that:

> [t]he Tribunal does not consider that the Claimant's case is separately advanced by Article 5 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company]. The Claimant has not established that EGPC or EGAS are 'empowered' by Egyptian law to exercise governmental authority … The Tribunal has not been shown any provision of Egyptian law 'specifically authorising' EGPC to conclude the SPA [Natural Gas Sale and Purchase Agreement] in the exercise of the Respondent's public authority.[485] 78

[A/74/83, p. 16]

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[481] 74 ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 806–807.

[482] 75 *Ibid*., para. 816.

[483] 76 ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 810–811.

[484] 77 *Ibid*., para. 816.

[485] 78 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.114.

Inter-American Court of Human Rights

Women Victims of Sexual Torture in Atenco v. *Mexico*

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco* v. *Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[486] [79]

[A/74/83, p. 17]

International arbitral tribunal (under the ICSID Convention)

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[487] [96]

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

> were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[488] [97]

[A/74/83, p. 20]]

[*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, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[489] [101]

[A/74/83, p. 20]]

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[486] [79] IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 205 and footnote 303.

[487] [[96] ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

[488] [[97] *Ibid*., para. 146.]

[489] [[101] ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[490] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[491] [43]

[A/77/74, p. 11]]

International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal cited the text of article 5 and the commentary thereto,[492] [54] and noted that "jurisprudence consistently indicates that article 5 … imposes two conditions that must both be fulfilled, namely: (i) under national law, the entity in question is authorized to exercise elements of governmental authority, and (ii) the act in question involves the exercise of governmental authority."[493] [55] The tribunal noted that "acts *jure gestionis* of public or private entities cannot be attributed to the State in principle under article 5, since the article concerns precisely the determination of whether the entity in question is exercising the functions, or elements, of governmental authority".[494] [56]

Furthermore, the tribunal noted that, despite the absence in the State responsibility articles of a definition of the term "elements of governmental authority", it took the view that "this involves establishing in each case, in the light of the circumstances and evidence of the effective exercise of elements of sovereign authority, what the situation is",[495] [57] and that the commentary "provides certain criteria that make it possible to identify the scope of governmental authority, such as (i) the content of the powers, (ii) the way they are conferred on an entity, (iii) the purposes for which they are to be exercised and (iv) the extent to which the entity is accountable to government for their exercise".[496] [58]

[A/77/74, p. 12]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State

[490] [42 Final Award, 26 March 2021, para. 72.]

[491] [43 *Ibid*., paras. 72 and 134–135.]

[492] [54] See footnote [381] 32 above, paras. 193 and 195–197.

[493] [55] *Ibid*., para. 194; see also paras. 196–197.

[494] [56] *Ibid*., para. 200.

[495] [57] *Ibid*., para. 201.

[496] [58] *Ibid*., para. 202.

responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[497] [70]

[A/77/74, p. 14]]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

In *Strabag SE* v. *Libya*, the arbitral tribunal analysed whether Libya had entered into a contract with the investor through the conduct of local authorities.[498] [59] The tribunal considered that to interpret "Libya" as only the Government of Libya would fail to take into account that, as noted in the commentary to article 5, "States may operate through 'parastatal entities, which exercise elements of governmental authority in place of State organs …]'. The Tribunal therefore believes that [the text of the treaty] does not mean only the Government of Libya, but may also include other Libyan bodies".[499] [60]

[A/77/74, p. 13]

Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to article 5, noting that "[t]he concept of 'governmental authority' is not defined in the ILC Articles. What, however, is required is that the law of the State authorizes an entity to exercise some aspects of that State's power, that is, public authority".[500] [61]

[A/77/74, p. 13]

International arbitral tribunal (under the ICSID Convention)

Interocean Oil Development Company and Interocean Oil Exploration Company v. *Federal Republic of Nigeria*

In *Interocean Oil Development Company and Interocean Oil Exploration Company* v. *Federal Republic of Nigeria*, the arbitral tribunal recalled that "[i]n principle, State-controlled entities are considered as separate from the State, unless they exercise elements of governmental authority within the meaning of ILC Article 5".[501] [62]

[A/77/74, p. 13]

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[497] [[70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

[498] [59] ICSID (Additional Facility), Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 168.

[499] [60] *Ibid*., para. 170.

[500] [61] See footnote [126] 14 above, para. 198.

[501] [62] ICSID, Case No. ARB/13/20, Award, 6 October 2020, para. 297.

Article 6. Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[502] 130

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[503] 131

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State.

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[502] 130 Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.,* decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[503] 131 See also article 47 and commentary.

The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[504] [132]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[505] [133] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[506] [134] At the relevant time Liechtenstein was not a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed

[504] [132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[505] [133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[506] [134] *X and Y* v. *Switzerland,* application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[507] [135]

(8) A further, long-standing example, of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[508] [136] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[509] [137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

[International arbitral tribunal (under the ICSID Convention)

Swisslion DOO Skopje v. *The Former Yugoslav Republic of Macedonia*

In its award, the arbitral tribunal in *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia* referred to articles 1 and 6 of the State responsibility articles in support of the assertion that, "under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary".[510] [17]

[See A/68/72, footnote 78 and para. 19]]

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[507] [135] See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid*., vol. 108, p. 622.

[508] [136] For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series,* vol. 1216, No. 19617, p. 151).

[509] [137] See, *e.g.*, article 89 of the Rome Statute of the International Criminal Court.

[510] [[17] See footnote [57] 17 above, para. 261, footnote 323.]

European Court of Human Rights

Catan and Others v. *Moldova and Russia*

In its 2012 judgment in the case of *Catan and Others* v. *Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[511] [79]

[A/68/72, para. 61]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

The arbitral tribunal in *Electrabel S.A.* v. *The Republic of Hungary* referred to article 6 in considering the legal effect of a decision of the European Commission. Relying upon article 6 and the commentary thereto, the tribunal determined that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the [relevant treaty], for the purpose of applying Article 6 of the ILC Articles in the present case".[512] [80]

[A/68/72, para. 62]

European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[513] [80] In establishing jurisdiction in respect of the Netherlands, the Court could not find that

> the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility).[514] [81]

[A/71/80, para. 65]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal stated that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet

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[511] [79] ECHR, Grand Chamber, Application Nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012, para. 74.

[512] [80] See footnote [314] 53 above, para. 6.74.

[513] [80] ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.

[514] [81] *Ibid.*, para. 151.

by analogy be so regarded as a Contracting Party to the ECT, for the purpose of applying Article 6 of the ILC Articles in the present case".[515] 82

[A/71/80, para. 66]

European Court of Human Rights

Big Brother Watch and others v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles

would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17).[516] 80

[A/74/83, p. 17]

Big Brother Watch and others v. *United Kingdom*

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 6 would be relevant in a case of interception of communications by foreign intelligence services "if the foreign intelligence services were placed at the disposal of the receiving State and were acting in exercise of elements of the governmental authority of that State".[517] 63

[A/77/74, p. 13]

[International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by

[515] 82 See footnote [22] 10 above, para. 6.74.

[516] 80 ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.

[517] 63 ECHR, Grand Chamber, Applications No. 58170/13, No. 62322/14 and No. 24960/15, Judgment, 25 May 2021, para. 495.

articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[518] [70]

[A/77/74, p. 14]]

[518] [[70] See footnote [381] above, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

Article 7. Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[519] [138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[520] [139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[521] [140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[522] [141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority".[523] [142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would

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[519] [138] See, *e.g.*, the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[520] [139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, *e.g.*, the following cases: "Only Son", Moore, History and Digest, vol. IV, pp. 3404–3405; "William Lee", *ibid.*, p. 3405; and Donougho's, *ibid.*, vol. III, p. 3012. Where the question was expressly examined tribunals did not consistently apply any single principle: see, *e.g.*, the Lewis's case, *ibid.*, p. 3019; the Gadino case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the Lacaze case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the "William Yeaton" case, Moore, History and Digest, vol. III, p. 2944, at p. 2946.

[521] [140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[522] [141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

[523] [142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D. C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[524] [143] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[525] [144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[526] [145] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[527] [146]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[528] [147]

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

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[524] [143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (footnote [221] 104 above), pp. 3 and 17.

[525] [144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* , document C.351(*c*)M.145(*c*).1930.V (footnote [147] 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[526] [145] For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook … 1961*, vol. II, p. 53).

[527] [146] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[528] [147] *Caire* (footnote [242] 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans*, (footnote [234] 117 above); *Mallén, ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote [231] 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States,* 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[529] [148]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[530] [149]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[531] [150] In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[532] [151] Equally, article 7 is not concerned with the admissibility of claims arising from

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[529] [148] *Velásquez Rodríguez* (footnote [84] 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[530] [149] *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[531] [150] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

[532] [151] See *ELSI* (footnote [144] 85 above), especially at pp. 52, 62 and 74.

internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[533] [152]

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether an agent of Iran Air (which was controlled by the Iranian Government) had acted in his official capacity when he had requested an additional amount of money in order to get the claimant's daughter onto a flight for which she had a confirmed ticket, referred to the "widely accepted" principle codified in draft article 10 provisionally adopted by the International Law Commission,[534] [82] and to the commentary to that provision:

> It is widely accepted that the conduct of an organ of a State may be attributable to the State, even if in a particular case the organ exceeded its competence under internal law or contravened instructions concerning its activity. It must have acted in its official capacity as an organ, however. *See* International Law Commission draft article 10. Acts which an organ commits in a purely private capacity, even if it has used the means placed at its disposal by the State for the exercise of its function, are not attributable to the State. *See* commentary on the International Law Commission draft article 10, *Yearbook of the International Law Commission, 1975*, volume II, p. 61.[535] [83]

The tribunal found that, in the said instance, the agent had acted in a private capacity and not in his official capacity as an organ of Iran Air.

[A/62/62, para. 53]

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[533] [152] See further article 44, subparagraph (*b*), and commentary.

[534] [82] This provision was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. Draft article 10 provisionally adopted read as follows:

> Article 10
>
> Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity
>
> The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[535] [83] See footnote [204] 101 above, p. 111, para. 65.

International arbitral tribunal (under the ICSID Convention)

Amco Asia Corporation and Others v. *Republic of Indonesia*

In its 1984 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 10 provisionally adopted by the International Law Commission (as well as draft articles 3 and 5 provisionally adopted), which it quoted in extenso, constituted "an expression of accepted principles of international law". The relevant passage is quoted [on page 25] above.

[A/62/62, para. 54]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals,[536] [84] incidentally referred to draft article 10 adopted by the International Law Commission on first reading,[537] [85] which it considered to be a restatement of "the rules of State responsibility":

> Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[538] [86]

The Appeals Chamber also indicated in this regard that:

> In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity … [I]nternational law renders any State responsible for acts in breach of international law performed … by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*) … [539] [87]

[A/62/62, para. 55]

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[536] [84] For the relevant passage of the Appeals Chamber's judgement, see p. 65 above.

[537] [85] Draft article 10 adopted on first reading was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook … 1996*, vol. II (Part Two), para. 65) was identical to that of draft article 10 provisionally adopted. (See footnote [534] 82 above.)

[538] [86] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 121 (footnotes omitted).

[539] [87] *Ibid*., para. 123.

International arbitral tribunal (under the ICSID Additional Facility Rules)

Metalclad Corporation v. *United Mexican States*

In its 2000 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Metalclad Corporation* v. *Mexico* case, in considering Mexico's responsibility for the conduct of its State and local governments (*i.e.*, the municipality of Guadalcazar and the State of San Luis Potosí) found that the rules of NAFTA accorded "fully with the established position in customary international law", and in particular with draft article 10 adopted by the International Law Commission on first reading, which, "though currently still under consideration, may nonetheless be regarded as an accurate restatement of the present law".[540] [88]

[A/62/62, para. 56]

ADF Group Inc. v. *United States of America*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc.* v. *United States* case, while noting that "even if the United States measures [at issue in the case] were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in article 1105(1)" of NAFTA, stated that "[a]n unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity", thereafter referring in a footnote to article 7 finally adopted by the International Law Commission in 2001.[541] [89]

[A/62/62, para. 57]

Human Rights Committee

Sarma v. *Sri Lanka*

In its 2003 views on communication No. 950/2000 (Sri Lanka), the Human Rights Committee, with regard to the abduction of the son of the author of the communication by an officer of the Sri Lankan Army, noted that "it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer".[542] [90] In a footnote, the Committee referred to article 7 of the articles finally adopted by the International Law Commission, as well as to article 2, paragraph 3, of the International Covenant on Civil and Political Rights.[543] [91] It then concluded that, "in the circumstances, the State party is responsible for the disappearance of the author's son".

[A/62/62, para. 58]

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[540] [88] NAFTA (ICSID Additional Facility), Award, 30 August 2000, para. 73, reproduced in *ILR*, vol. 119, p. 634.

[541] [89] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 190 (and footnote 184), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, p. 283.

[542] [90] CCPR/C/78/D/950/2000, 31 July 2003, para. 9.2.

[543] [91] *Ibid*., para. 9.2, footnote 13.

European Court of Human Rights

Ilaşcu and others v. *Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, in interpreting the term "jurisdiction" in article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[544] [92] examined the issue of State responsibility and referred, *inter alia*, to article 7 finally adopted by the International Law Commission in 2001 in support of its finding that a State may be held responsible where its agents are acting *ultra vires* or contrary to instructions:

A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions. Under the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms], a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (see Ireland v. the United Kingdom, judgement of 18 January 1978, Series A no. 25, p. 64, § 159; see also article 7 of the International Law Commission's draft articles on the responsibility of States for internationally wrongful acts … and the [Caire] case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516).[545] [93]

[A/62/62, para. 59]

International arbitral tribunal (under the ICSID Convention)

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, having found that the acts of a Romanian "institution of public interest" (the State Ownership Fund (SOF), subsequently replaced by the Authority for Privatization and Management of the State Ownership (APAPS)) were attributable to Romania, noted that that conclusion would be the same even if those acts were regarded as *ultra vires*, as established by the "generally recognized rule recorded" in article 7 finally adopted by the International Law Commission in 2001:

Even if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in article 7 of the 2001 International Law Commission draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds it authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.[546] [94]

[A/62/62, para. 60]

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[544] [92] Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

[545] [93] ECHR, Grand Chamber, Application No. 48787/99, Judgment, 8 July 2004, para. 319.

[546] [94] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 81.

Azurix Corp. v. *Argentine Republic*

In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp.* v. *Argentina* case observed that the claimant had argued that "Argentina is responsible for the actions of the [Argentine] Province [of Buenos Aires] under the [1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America] and customary international law". The claimant had referred in particular to "the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission".[547] [95] The tribunal considered, in this regard, that

> [t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.[548] [96]

[A/62/62, para. 61]

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

In its award, the arbitral tribunal in *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* recalled that, during the jurisdictional phase, it had found that, according to article 7, "even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State".[549] [81] The tribunal had concluded that the Republic of Georgia could not avoid the legal effect of its conduct by arguing that it was void *ab initio* under Georgian law.[550] [82]

[A/68/72, para. 63]

Court of Justice of the European Union

European Commission v. Italian Republic

The opinion of Advocate General Kokott in *European Commission* v. *Italian Republic* referred to article 7 in support of the assertion that, "even if it should be found that the [State] officials committed a criminal offence this would not stop their actions being imputable to the State".[551] [83]

[A/68/72, para. 64]

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[547] [95] ICSID, Case No. ARB/01/12, Award, 14 July 2006, para. 46.

[548] [96] *Ibid*., para. 50.

[549] [81] See footnote [288] 36 above, para. 273 (quoting ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 190).

[550] [82] *Ibid*., para. 273 (quoting Decision on Jurisdiction, para. 191).

[551] [83] CJEU, Case C-334/08, Opinion of Advocate General Kokott, 15 April 2010, paras. 29 and 30, and footnote 11.

European Court of Human Rights

El-Masri v. *The Former Yugoslav Republic of Macedonia*

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[552] [84]

[A/68/72, para. 65]

[International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[553] [47]

[A/71/80, para. 40]]

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 referred to article 7 as relevant international law.[554] [84]

[A/71/80, para. 67]

Husayn (Abu Zubaydah) v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[555] [85]

[A/71/80, para. 68]

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[556] [82]

[A/74/83, p. 17]

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[552] [84] ECHR, Grand Chamber, Application No. 39630/09, Judgment, 13 December 2012, para. 97.

[553] [[47] See footnote [17] 5 above, para. 173, footnote 298.]

[554] [84] See footnote [323] 49 above, para. 108.

[555] [85] ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.

[556] [82] ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.

World Trade Organization Panel

United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia

In *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[557] [83]

[A/74/83, p. 17]

International arbitral tribunal (under the ICSID Convention)

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

In *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia*, the arbitral tribunal, referring to article 7 of the State responsibility articles, noted that

> it is not open to the State to plead the patent irregularities of a bankruptcy proceeding overseen and authorised at critical junctures by its own court or the making of an extraordinary loan approved by a senior government minister, which might or might not have been unlawful under Croatian law, in opposition to the BIT claim. Put another way, if this investment was not made in conformity with the legislation of Croatia, on the evidence before this Tribunal, this is due to the acts of organs of the State.[558] [84]

Discussing the question of legitimate expectations to ownership over property by the claimant, the arbitral tribunal held:

> [I]n *Kardassopoulos* the contracting entities were an organ of the State or an entity empowered to exercise elements of the governmental authority, such that their conduct was considered an act of the State under ILC Article 7. The concession was also signed and "ratified" by a ministry of the respondent government. Further, some of the most senior government officials were involved in the negotiation of the agreements. There are no comparable findings on the attribution of conduct to the Respondent in the instant case. For example, the Tribunal finds that the contracting entity was not an entity within the meaning of ILC Article 7, and the Respondent is not a party to the Purchase Agreement or otherwise bound. Further, the actions of the Liquidator are not attributable to the Respondent.[559] [85]

[A/74/83, p. 17]

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[557] [83] WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.

[558] [84] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 384.

[559] [85] *Ibid*., para. 1009, discussing *Ioannis Kardassopoulos* v. *Georgia*, Decision on Jurisdiction (footnote [549] 81 above).

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* discussed article 7, and the commentary thereto, when finding that a judge had acted in his official capacity.[560] [86]

[A/74/83, p. 18]

Inter-American Court of Human Rights

Villamizar Durán et al. v. *Colombia*

In *Villamizar Durán et al.* v. *Colombia*, the Inter-American Court of Human Rights observed that the practice and *opinio juris* of States, as well as the jurisprudence of international courts, had confirmed the existence of an exception to the "general rule" in Article 7, namely when the organ or person was not acting in an official capacity, but rather acting in the capacity of a private entity or person. The Court further referred to the indication in the commentary to the provision that "the problem of drawing the line between unauthorized but still 'official' conduct, on the one hand, and 'private' conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it".[561] [87]

[A/74/83, p. 18]

Women Victims of Sexual Torture in Atenco v. *Mexico*

In *Women Victims of Sexual Torture in Atenco* v. *Mexico*, the Inter-American Court of Human Rights cited Article 7 when discussing the defendant's argument that its agents had acted *ultra vires*.[562] [88]

[A/74/83, p. 18]

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)* noted that even if State agents were acting "*ultra vires* or contrary to their instructions or orders …, this would not preclude them from enjoying immunity *ratione materiae* as long as they continued to act in the name of the State and in their 'official capacity'". The tribunal recalled

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[560] [86] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 8.48.

[561] [87] IACHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 364 (Spanish), Judgment, 20 November 2018, para. 139.

[562] [88] IACHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 165 and footnote 237.

article 7, according to which "conduct by a State organ acting in its official capacity shall be attributable to the State 'even if it exceeds its authority or contravenes instructions'".[563] 64

[A/77/74, p. 14]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

The arbitral tribunal in *Strabag SE* v. *Libya* analysed an argument presented by the respondent State "to the effect that that if damage was inflicted by Libya's military forces, it resulted from unauthorized conduct by forces acting outside of their orders". The tribunal referred to the commentary to article 7, indicating that

> [a]s a matter of international law, the International Law Commission affirms that the responsibility of a State under Article 91 of Geneva Protocol I—that the State 'shall be responsible for all acts [committed] by persons forming part of its armed forces'—'clearly covers acts committed contrary to orders or instructions'.[564] 65

[A/77/74, p. 14]

[International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

> Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[565] 70

[A/77/74, p. 14]]

[563] 64 See footnote [384] 34 above, para. 860.

[564] 65 See footnote [498] 59 above, para. 319.

[565] [70 See footnote [381] above, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[566] [153] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[567] [154] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan opera-

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[566] [153] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[567] [154] See, *e.g.*, the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote [528] 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases): *"Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

tives.[568] [155] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[569] [156]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić* case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[570] [157]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[571] [158] In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitar-

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[568] [155] *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 51, para. 86.

[569] [156] *Ibid*., pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid*., p. 189, para. 17.

[570] [157] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94–1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94–1-T (1997)), see ILR, vol. 112, p. 1.

[571] [158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

ian law.[572] [159] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[573] [160]

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[574] [161] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[575] [162] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[576] [163] On the other hand, where there was evidence that the corporation was exercising public powers,[577] [164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[578] [165] the conduct in question has been attributed to the State.[579] [166]

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text

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[572] [159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[573] [160] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (footnote [204] 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran,* Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid.*, *Preliminary Objections*, *Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[574] [161] *Barcelona Traction* (footnote [46] 52 above), p. 39, paras. 56–58.

[575] [162] For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran*, *ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran*, *ibid.*, vol. 17, p. 153 (1987).

[576] [163] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid.*, vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[577] [164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (footnote [530] 149 above).

[578] [165] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *Ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[579] [166] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom*, *Eur. Court H.R., Series A, No. 44* (1981).

of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(*a*) provisionally adopted by the International Law Commission[580] [97] as a provision codifying a principle "generally accepted in international law":

> … attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State. See ILC draft article 8(*a*).[581] [98]

[A/62/62, para. 62]

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[580] [97] This provision was amended and incorporated in article 8 finally adopted by the International Law Commission in 2001. It provided that: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (*a*) It is established that such person or group of persons was in fact acting on behalf of that State; … ".

[581] [98] See footnote [204] 101 above, p. 103, para. 42.

International Tribunal for the Former Yugoslavia

Prosecutor v. *Ivica Rajić ("Stupni Do")*

In its 1996 review of the indictment pursuant to rule 61 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia in the *Rajić* case, the Trial Chamber considered the issue of when a group of persons may be regarded as the agent of a State with reference to draft article 8 adopted by the International Law Commission on first reading:[582] 99

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 draft articles on State responsibility. Draft article 8 provides in relevant part that the conduct of a person or a group of persons shall 'be considered as an act of the State under international law' if 'it is established that such person or group of persons was in fact acting on behalf of that State'. 1980 II (Part Two) *Yearbook International Law Commission* at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was

> whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 109.)

It found that the United States had financed, organized, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasize that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that

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[582] 99 This provision was amended and incorporated in articles 8 and 9 finally adopted by the International Law Commission in 2001. Draft article 8 adopted on first reading read as follows:

> Article 8
>
> Attribution to the State of the conduct of persons acting in fact on behalf of the State
>
> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> (*a*) It is established that such person or group of persons was in fact acting on behalf of that State
>
> (*b*) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

the 'general control by the [United States] over a force with a high degree of dependency on [the United States]' was not sufficient to establish liability for violations by that force. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 115.) In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats."[583] [100]

[A/62/62, para. 63]

Prosecutor v. *Duško Tadić*

In its 1997 judgement in the *Tadić* case (which was later reviewed on appeal[584] [101]), the Trial Chamber invoked the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) with regard to the attribution to States of acts performed by private individuals. In this context, it reproduced a passage of the separate opinion of Judge Ago in that case, which referred to draft article 8 adopted by the International Law Commission on first reading:

It seems clear to the Trial Chamber that the officers of non-Bosnian Serb extraction were sent as "volunteers" on temporary, if not indefinite, assignment to the VRS [the Bosnian Serb Army]. In that sense, they may well be considered agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). In the *Nicaragua* case, by contrast, no evidence was led to the effect that United States personnel operated with or commanded troops of the contras on Nicaraguan territory. As Judge Ago, formerly the Special Rapporteur to the International Law Commission on State Responsibility, explained in the course of his Separate Opinion in the *Nicaragua* case:

> [T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft [*i.e.*, article 8 read together with article 11]. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States

[583] [100] ICTY, Trial Chamber, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95–12-R61, 13 September 1996, paras. 24–25.

[584] [101] For the relevant part of the judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see [pp. 142–143] below.

authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.[585] [102]

[A/62/62, para. 64]

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, reviewing the judgement of the Trial Chamber referred to above, the Appeals Chamber explained the reasons why it considered that the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) with regard to the attribution to States of acts performed by private individuals "would not seem to be consonant with the logic of the law of State responsibility". In this context, it referred to draft article 8 as adopted by the International Law Commission on first reading, which it considered to reflect the "principles of international law concerning the attribution to States of acts performed by private individuals". Its elaboration on this matter, which was later referred to by the International Law Commission in its commentary to article 8 finally adopted in 2001, read as follows:

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in article 8 of the draft on State responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the International Law Commission Drafting Committee. Under this article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

…

121. … Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States

[585] [102] ICTY, Trial Chamber, Opinion and Judgement, Case No. IT-94–1-T, 7 May 1997, para. 601, reproducing paragraph 16 of the Separate Opinion of Judge Ago in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (footnote [30] 36 above).

entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organized group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organized group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State*. To a large extent the wise words used by the United States-Mexico General Claims Commission in the *Youmans* case with regard to State responsibility for acts of State military officials should hold true for acts of organized groups over which a State exercises overall control.

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organized groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organized groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility."[586] [103]

[A/62/62, para. 65]

World Trade Organization Appellate Body

United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea

In its 2005 report on *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, the Appellate Body noted that the Republic of Korea, in support of its argument that the panel's interpretation of article 1.1(*a*)(1)(iv) of the Agreement on Subsidies and Countervailing Measures—that a private body may be entrusted to take an action even when the action never occurs—was legally and logically incorrect, had referred to article 8 of the articles finally adopted by the International Law Commission in 2001. According to the Appellate Body,

Korea explains that article 8, which is entitled "Conduct directed or controlled by a State", provides that private conduct shall be attributed to a State only "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." Korea finds "striking" the similarity of wording in the reference to "carrying out" a conduct and submits that the requirement of conduct taking place in order to establish State responsibility is a matter of "common sense".[587] [104]

[586] [103] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999 (footnotes omitted).

[587] [104] WTO, Appellate Body Report, WT/DS296/AB/R, 27 June 2005, para. 69 (footnotes omitted).

In interpreting the said provision of the agreement, the Appellate Body subsequently referred, in a footnote, to the commentary by the International Law Commission to article 8:

… the conduct of private bodies is presumptively not attributable to the State. The commentaries to the International Law Commission draft articles explain that "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority". (Commentaries to the International Law Commission draft articles … , article 8, commentary, para. (6) …).[588] [105]

And later, the Appellate Body added, in another footnote:

The commentaries to the International Law Commission draft articles similarly state that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it". (Commentaries to the International Law Commission draft articles … , article 8, commentary, para. (5), … (footnote omitted).[589] [106]

[A/62/62, para. 66]

International arbitral tribunal (under UNCITRAL rules)

Encana Corporation v. *Republic of Ecuador*

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp.* v. *Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, quoted, *inter alia*, article 8 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 103] above.

[A/62/62, para. 67]

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 examining the question whether the massacres committed at Srebrenica were attributable, in whole or in part, to the Respondent, after having found that these acts had not been perpetrated by organs of the latter, went on to examine whether the same acts had been committed under the direction or control of the Respondent. The Court noted, with reference to article 8 finally adopted by the International Law Commission in 2001, that

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility …

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities*

[588] [105] *Ibid*., para. 112, footnote 179.

[589] [106] *Ibid*., para. 116, footnote 188.

in and against Nicaragua (Nicaragua v. *United States of America)* … In that Judgment the Court, … after having rejected the argument that the *contras* were to be equated with organs of the United States because they were 'completely dependent' on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.' (*Ibid*., p. 65.)

400. The test thus formulated differs in two respects from the test [described in paragraphs 390–395 of the judgment] to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has … questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94–1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY [Federal Republic of Yugoslavia] under the law of State responsibility, was that of the 'overall control' exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid*., para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS [the army of the Republika Srpska], without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule

on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining—as the Court is required to do in the present case—when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons—neither State organs nor to be equated with such organs—only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.[590] [6]

The Court concluded thereafter that the relevant acts could not be attributed to the Respondent on this basis.[591] [7]

[A/62/62/Add.1, para. 3]

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[590] [6] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], paras. 398–407.

[591] [7] The Court did consider it necessary to decide whether articles 5, 6, 9 and 11 finally adopted by the International Law Commission in 2001 expressed present customary international law, it being clear that none of them applied in the case ([*ibid.*], para. 414).

[International arbitral tribunal (under the ICSID Convention)

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[592] [56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8)".[593] [57] The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[594] [58]

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[595] [59]

[See A/68/72, footnote 85 and paras. 45–48]]

[World Trade Organization Appellate Body

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

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[596] [64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[597] [65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[598] [66]

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, inso-

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[592] [56 See footnote [105] 20 above, para. 172.]

[593] [57 *Ibid.*]

[594] [58 *Ibid.*, paras. 175–177.]

[595] [59 *Ibid.*, para. 198.]

[596] [64 See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(*c*)).]

[597] [65 *Ibid.*, para. 308.]

[598] [66 *Ibid.*, para. 309.]

far as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[599] 67

[See A/68/72, footnote 85 and paras. 50–51]]

[International arbitral tribunal (under the ICSID Convention)

Alpha Projektholding GmbH v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the ILC Articles".[600] 39

[See A/68/72, footnote 85 and para. 34]]

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 referred to the commentary to article 8 in support of the assertion that, "while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law".[601] 86

[A/68/72, para. 66]

International arbitral tribunal (under UNCITRAL Rules)

White Industries Australia Limited v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[602] 87

The tribunal determined that, under article 8, the salient attribution issue "turn[ed] on whether the facts in the record support a conclusion of whether [the entity] was in

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[599] [67 *Ibid*., para. 308; see below the text accompanying footnote [2156] 203 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid*., para. 314.]

[600] [39 See footnote [293] 39, para. 401.]

[601] 86 See footnote [12] 10 above, para. 112 (citing para. (1) of the commentary to article 8).

[602] 87 See footnote [303] 87 above, para. 8.1.2.

fact acting on the instructions of or under the direction or control of India".[603] [88] The tribunal further noted that the test under article 8 "is a tough one",[604] [89] "involves a high threshold",[605] [90] and "excludes from consideration matters of organisational structure and 'consultation' on operational or policy matters".[606] [91]

In addition, the tribunal took note of the International Court of Justice's "effective control" test, as well as the discussion of the test in the context of state-owned and controlled enterprises in the commentary to article 8.[607] [92] On the basis of that test, the tribunal determined that the claimant had to "show that India had both general control over [the entity] as well as specific control over the particular acts in question".[608] [93]

[A/68/72, paras. 67–69]

European Court of Human Rights

Catan and Others v. *Moldova and Russia*

In its 2012 judgment in the case of *Catan and Others* v. *Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[609] [94]

[A/68/72, para. 70]

[International arbitral tribunal (under the ICSID Convention)

Bosh International, Inc. v. *B & P Ltd. Foreign Investments Enterprise*

In its 2012 award, the arbitral tribunal constituted to hear the *Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise* case referred to article 8 in its analysis of the term "Party" as found in the relevant bilateral investment treaty. The tribunal concluded that, in the BIT provision at issue, the term "Party" refers "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[610] [75]

[See A/68/72, footnote 85 and para. 60]]

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[603] [88] *Ibid*., paras. 8.1.3–8.1.4 and 8.1.7.

[604] [89] *Ibid*., para. 8.1.4.

[605] [90] *Ibid*., para. 8.1.10.

[606] [91] *Ibid*., para. 8.1.8.

[607] [92] *Ibid*., paras. 8.1.11–8.1.15 (quoting ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), *Judgment*, *I.C.J. Reports 1986*, pp. 62, 65, paras. 109 and 115; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Judgment*, *I.C.J. Reports 2007*, p. 208, para. 400, as well as paras. (4) and (6) of the commentary to article 8).

[608] [93] *Ibid*., para. 8.1.18.

[609] [94] See footnote [511] 79 above.

[610] [75] See footnote [310] 75 above, para. 246.]

[International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[611] 46

[See A/68/72, footnote 85 and para. 38]]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

In its decision on jurisdiction, applicable law and liability, the arbitral tribunal in *Electrabel S.A.* v. *The Republic of Hungary* relied upon the State responsibility articles as a codification of the customary international law relevant to attribution.[612] 95 Largely on the basis of article 8 and its accompanying commentary, the tribunal determined that "[a]lthough the conduct of private persons or entities is not attributable to the State under international law as a general principle, factual circumstances could establish a special relationship between the person engaging in the conduct and the State".[613] 96

The tribunal indicated that, as "expressed in the clearest possible terms in the ILC Commentary under Article 8", a State acting "through a State-owned or State controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[614] 97 As a result, the tribunal found that it was required to assess whether the "private entity" at issue was acting either under the instruction or direction and control of the Hungarian Government.[615] 98

[A/68/72, paras. 71–72]

Teinver S.A., et al. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[616] 99 Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[617] 100

[A/68/72, para. 73]

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[611] [46 See footnote [305] 46 above.]

[612] 95 See footnote [314] 53 above, para. 7.60.

[613] 96 *Ibid*., para. 7.71, and paras. 7.64, 7.66 and 7.68.

[614] 97 *Ibid*., para. 7.95.

[615] 98 *Ibid*., paras. 7.64–7.71.

[616] 99 See footnote [315] 99 above, para. 274.

[617] 100 *Ibid*., para. 275.

[European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[618] [80] In establishing jurisdiction in respect of the Netherlands, the Court could not find that "the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility").[619] [81]

[A/71/80, para. 65]]

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* recited the text of article 8 and noted that

> [t]he commentary to Article 8 observes that: 'Questions arise with respect to the conduct of companies or enterprises which are State owned and controlled … The fact that the State initially establishes a corporate entity … is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. … Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority … [and] the instructions, direction or control [of the State] must relate to the conduct which is said to have amounted to an internationally wrongful act'.[620] [87]

[A/71/80, para. 69]

European Court of Human Rights

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights considered article 8, and the commentary thereto, as relevant international law.[621] [88] In assessing whether the conduct of a company could be attributed to the State, the Court held that "[l]a Cour doit examiner de manière effective le contrôle que l'État a excercé dans les circonstances de l'espèce. De l'avis de la Cour, cette approche est conforme tant à sa jurisprudence antérieure … qu'à l'interprétation donnée par la CDI à l'article 8 des articles sur la responsabilité de l'État".[622] [89]

[A/71/80, para. 70]

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[618] [80 ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.]

[619] [81 *Ibid*., para. 151.]

[620] 87 See footnote [19] 7 above, para. 1466 (quoting para. (6) of the commentary to article 8).

[621] 88 See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

[622] 89 *Ibid*., para. 73.

Liseytseva and Maslov v. *Russia*

In *Liseytseva and Maslov* v. *Russia*, the European Court of Human Rights listed article 5 and the text and commentary to article 8, as relevant international law.[623] [90] The Court also observed that the question of the independence of the municipalities was to be determined with regard to the actual factual manner of the control exerted over them by the State in the particular case, noting that "this approach is consistent with the ILC's interpretation of the aforementioned Article 8 of the Articles on State Responsibility".[624] [91]

[A/71/80, para. 71]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Lao Holdings N.V. v. *Lao People's Democratic Republic*

In *Lao Holdings N.V.* v. *Lao People's Democratic Republic*, the arbitral tribunal referred to the commentary to article 8 in support of the proposition that "a minority shareholding in a corporation is not sufficient in international law (as well as domestic law), of itself, to attribute the acts of a corporation to its shareholders. The result is no different where the minority shareholder is a Government".[625] [92] It also partly relied on article 8 in finding that "corporate acts may be attributed to the Government if the Government directs and controls the corporation's activities".[626] [93]

[A/71/80, para. 72]

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 held that the simple encouragement of private persons by the Government, without evidence of a direct order or control, "would not meet the test set out in Article 8".[627] [94]

[A/71/80, para. 73]

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

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal observed that the State responsibility articles "set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the

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[623] [90] See footnote [21] 9 above, para. 128.

[624] [91] *Ibid*., para. 205 (see also para. 130, in which the Court refers to ECHR, Grand Chamber, *Kotov* v. *Russia*, Application No. 54522/00, Judgment, 3 April 2012, paras. 30–32 for a summary of other relevant provisions of the State responsibility articles).

[625] [92] ICSID (Additional Facility), Case No. ARB(AF)/12/6, Decision on the Merits, 10 June 2015, para. 81.

[626] [93] *Ibid*., para. 82.

[627] [94] See footnote [114] 24 above, para. 448.

conduct of a person or entity is closely directed or controlled by the State, although the parameters of imputability on this basis remain the subject of debate".[628] 95

[A/71/80, para. 74]

Electrabel S.A. v. *Republic of Hungary*

The arbitral tribunal in *Electrabel S.A.* v. *Republic of Hungary* relied on the commentary to article 8 to observe that "the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[629] 96 The tribunal stated that an "invitation to negotiate cannot be assimilated to an instruction" in the sense of article 8, which would have allowed for the attribution of conduct of the company in question to Hungary.[630] 97 Referring to article 8, the tribunal also found that Hungary did not use "its ownership interest in or control of a corporation specifically in order to achieve a particular result".[631] 98

[A/71/80, para. 75]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* stated that "[p]lainly, the words 'instructions', 'direction' and 'control' in Art. 8 are to be read disjunctively. Therefore, the arbitral tribunal need only be satisfied that one of those elements is present in order for there to be attribution under Art. 8".[632] 99 The tribunal accepted the respondent's submission that the relevant test was that of "effective control".[633] 100 It confirmed "that it is insufficient for the purposes of attribution under Art 8 to establish merely that Emlak was majority-owned by TOKI, *i.e.*, a part of the State".[634] 101 The tribunal further noted that for attribution of conduct under article 8, there must be "proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests".[635] 102 The *ad hoc* committee subsequently constituted to decide on the annulment of the award confirmed this interpretation with reference to the commentary to article 8.[636] 103

[A/71/80, para. 76]

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[628] 95 See footnote [340] 66 above, footnote 673 (quoting para. (6) of the commentary to article 8) (footnote omitted).

[629] 96 See footnote [22] 10 above, para. 7.95 (see also paras. 7.63–7.71, quoting article 8 and the commentary in detail).

[630] 97 *Ibid*. para. 7.111.

[631] 98 *Ibid*., para. 7.137 (quoting para. (6) of the commentary to article 8).

[632] 99 See footnotes [210] 40 and [128] 16 above, para. 303.

[633] 100 *Ibid*., para. 304.

[634] 101 *Ibid*., para. 306 (quoting para. (6) of the commentary to article 8).

[635] 102 *Ibid*., para. 326.

[636] 103 See footnote [115] 25 above, paras. 187–189.

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

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[637] [52]]

[A/74/83, p. 12]]

[*Beijing Urban Construction Group Co. Ltd.* v. *Yemen*

In *Beijing Urban Construction Group Co. Ltd.* v. *Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[638] [73]

[A/74/83, p. 16]]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, "[h]aving concluded that the OPA [Ontario Power Authority], Hydro One and IESO [Independent Electricity System Operator] are state enterprises and that Article 1503(2) of the NAFTA governs attribution, the Tribunal [could] dispense with reviewing whether their acts are attributable to Canada pursuant to Article 8 of the ILC Articles".[639] [90]

[A/74/83, p. 19]

International arbitral tribunal (under the ICSID Additional Facility Rules)

MNSS B.V. and Recupero Credito Acciaio N.V. v. *Montenegro*

The arbitral tribunal in *MNSS B.V. and Recupero Credito Acciaio N.V.* v. *Montenegro*, observed that mere acts of supervision do not place a private bank "under the Central Bank's control for the purposes of Article 8 of the ILC Articles … It follows, therefore, that the Respondent is not responsible for Prva Banka's actions in this respect".[640] [91]

[A/74/83, p. 19]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* found "no evidence that ANR [Polish Agricultural Property Agency] acted under

[637] [52 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

[638] [73 ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.]

[639] [90] PCA, Case No. 2012–17, Award, 24 March 2016, para. 365.

[640] [91] ICSID (Additional Facility), Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 299.

Poland's instructions, direction or control when terminating the Lease, and correspondingly no basis for attribution under Article 8".[641] 92

[A/74/83, p. 19]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal found that "Antrix's notice of annulment is attributable to the Respondent under Article 8 of the ILC Articles".[642] 93

[A/74/83, p. 19]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "it is a well-established principle under international law that, in general, the conduct of private persons or entities is not attributable to the State. This general principle is clearly reflected, *inter alia*, in Article 8 of the ILC Draft Articles".[643] 94 The tribunal considered that "even though members of the SINPROTRAC union may have actually taken President Chávez '*at his word*,' […] they did not act '*on the instructions of, or under the direction or control of*' President Chávez within the meaning of Article 8 of the ILC Draft Articles".[644] 95

[A/74/83, p. 19]

Ampal-American Israel Corporation and others v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[645] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

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[641] 92 PCA, Case No. 2015–13, Award, 27 June 2016, para. 272.

[642] 93 PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 290.

[643] 94 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para.448.

[644] 95 *Ibid*., para.453.

[645] 96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[646] 97

[A/74/83, p. 20]

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, the arbitral tribunal, observing that the parties had agreed that article 8 of the State responsibility articles was applicable to the facts of the case,[647] 98 disagreed "that the conduct of the unions of which the Claimant complain can be attributed to Respondent".[648] 99 The tribunal further reiterated that the appropriate test to be applied was "effective control" and not "overall control".[649] 100

[A/74/83, p. 20]

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, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[650] 101

[A/74/83, p. 20]

Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. *Bolivarian Republic of Venezuela*

In *Koch Minerals Sàrl and Koch Nitrogen International Sàrl* v. *Bolivarian Republic of Venezuela* the arbitral tribunal determined that

FertiNitro [a series of joint venture companies] remained fully and effectively controlled by the Respondent, whereby FertiNitro was precluded by the Respondent from making any further *ad hoc* sales to KNI [the claimant] from 28 February 2012, just as it had been precluded from performing the Offtake Agreement from 11 October 2010 onwards. Throughout, FertiNitro (with Pequiven) thus acted under the Respondent's 'direction or control' within the meaning of Article 8 of the ILC Articles on State Responsibility.[651] 102

[A/74/83, p. 20]

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[646] 97 *Ibid*., para. 146.

[647] 98 See footnote [355] 45 above, para. 721.

[648] 99 *Ibid*., para. 724.

[649] 100 *Ibid*., paras. 722 and 724.

[650] 101 ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.

[651] 102 ICSID, Case No. ARB/11/19, Award, 30 October 2017, para. 7.46.

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

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal cited article 8 and the commentary thereto when affirming that "the Respondent instructed, directed or controlled Rēzeknes Siltumtīkli's or Rēzeknes Enerģija's bringing of the litigation which resulted in [the claimant's] bank accounts being frozen".[652] [103]

[A/74/83, p. 20]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia*, quoted article 8 and noted that "[a]n 'effective control' test has emerged in international jurisprudence, which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake".[653] [104] The tribunal explained that "due to the change in the control of Holding d.o.o. when the Emergency Board was appointed on 12 July 1991, it is necessary to consider whether the Respondent exercised 'effective control' before and/or after this date"[654] [105] and held that "Holding d.o.o. does not fall within Article 8 of the ILC Articles".[655] [106]

[A/74/83, p. 21]

Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. *Republic of Cyprus*

The tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others* v. *Republic of Cyprus* discussed the relevant case law on article 8 of the State responsibility articles and "note[d] that arbitral jurisprudence has consistently upheld the standard set by the ICJ. The Tribunal sees no reason to depart from this *jurisprudence constante*."[656] [107] The tribunal observed that:

> … Claimants have not demonstrated with evidence that these specific acts that they challenge were directed or controlled by Respondent. The evidence put forward by Claimants attempts to show Respondent's overall control over Laiki, but does not contain instructions or directions emanating from the Cypriot Government that Laiki and/or its Board of Directors adopt a specific conduct. For this reason alone, Claimants' case on attribution under ILC Article 8 must fail.[657] [108]

The tribunal further stated that even if it "were to adopt a less stringent test for attribution under ILC Article 8—a test which this Tribunal does not endorse—this would not assist Claimants' case".[658] [109] In particular, "[t]o the Tribunal, it is not sufficient for the Board of Directors to elect an executive who enjoyed the trust of the regulator in order to

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[652] [103] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 825 and 830.

[653] [104] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 828.

[654] [105] *Ibid*., para. 829.

[655] [106] *Ibid*., para. 831.

[656] [107] ICSID, Case No. ARB/13/27, Award, 26 July 2018, para. 675 (original emphasis).

[657] [108] *Ibid*., para. 679.

[658] [109] *Ibid*., para. 680.

establish attribution under ILC Article 8".[659] [110] Furthermore, "any coordination in strategies between Laiki and Cyprus as regards the financial crisis likewise does not support Claimants' contention that Respondent had complete control over the Bank".[660] [111] Finally,

> the Tribunal recall[ed] that the mere ownership of shares in Laiki by the Cypriot Government, along with the powers that this ownership entails, does not establish attribution under ILC Article 8. Claimants remain bound by the obligation to demonstrate that the challenged conduct was carried out under the instructions, direction or control of Cyprus.[661] [112]

[A/74/83, p. 21]

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

> [u]nder Article 8 of the ILC Articles on State Responsibility, the conduct of a person (not being an organ of the State) shall be considered an act of a State under international law if the person is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. Its application, as the ILC Commentary states, depends upon 'a specific factual relationship' between the person engaging in the conduct and the State … Moreover, there is a distinction to be drawn between the conduct of the State itself and the conduct of a person attributable to the State, as was held by the ICJ in *Nicaragua* v. *USA*.[662] [113]

The tribunal did not consider that the acts of the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were attributable to the respondent "within the meaning of Article 8 of the ILC Articles".[663] [114]

[A/74/83, p. 22]

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal cited article 8,[664] [66] recalling that the commentary thereto clarified that "the three terms 'instructions', 'direction' and 'control' are disjunctive" and that "it is sufficient to establish any one of them".[665] [67] The tribunal analysed the degree of State control required over a company to apply article 8, and considered "that a mere recommendation or encouragement is not sufficient to satisfy the criterion of instruction."[666] [68] Instead, "there are two elements to determining effective control: first, determining whether the entity in question is under the general control of the State, and, second, determining whether the State has exercised specific control during the act whose attribution to the State is being sought".[667] [69]

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[659] [110] *Ibid*., para. 685.

[660] [111] *Ibid*., para. 687.

[661] [112] *Ibid*., para. 691.

[662] [113] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.116.

[663] [114] *Ibid*., paras. 9.117–9.118.

[664] [66] See footnote [381] 32 above, para. 238.

[665] [67] *Ibid*., para. 239.

[666] [68] *Ibid*., para. 242.

[667] [69] *Ibid*., para. 247.

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[668] 70

[A/77/74, p. 14]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited article 8, indicating that

[t]he fact that acts or omissions of private parties 'may involve some element of private choice' does not negate the possibility of those acts or omissions being attributable to a [WTO] Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organ of the Member).[669] 71

[A/77/74, p. 15]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

In analysing whether a contract entered into by local authorities could be considered contracts of the State, the arbitral tribunal in *Strabag SE* v. *Libya* considered, among other factors, the nature of the entities involved and of the contracts, and "the circumstances surrounding the conclusion and implementation of the contracts". It took the view that the entities had "acted at the direction of Libyan State organs" and, therefore, "[a]s confirmed by Article 8 of the ILC Draft Articles, their conduct has to be considered as an act of the Libyan State".[670] 72

[A/77/74, p. 15]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* referred to article 8, noting that the commentary "shows that the mere ownership of shares in a State-owned company is not sufficient in order to establish attri-

[668] 70 *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).

[669] 71 See footnote [385] 35 above, para. 7.51.

[670] 72 See footnote [498] 59 above, para. 176.

bution under ILC Article 8".[671] [73] In that case, no evidence had been adduced "that would demonstrate that Respondent was exercising both a general control over these entities at all relevant times and that it specifically controlled these same entities in connection with specific acts challenged in these proceedings".[672] [74] Instead, the tribunal was unconvinced that the acts and omissions of the entities, which were "not State organs", were "attributable to the State pursuant to Article 8 of the ILC Articles", as it had not been shown that the entities had, "at all relevant times, acted 'on the instructions of, or under the direction or control of, that State in carrying out the conduct'".[673] [75]

[A/77/74, p. 15]

Inter-American Court of Human Rights

Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. *Brazil*

In *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families* v. *Brazil*, the Inter-American Court of Human Rights addressed the attribution of State responsibility for the violation of the rights to life and to personal integrity resulting from especially hazardous activities, including the production of fireworks. It cited article 8, noting that "it is possible to attribute responsibility to the State in the case of … conduct that is under its direction or control".[674] [76] In this case, the Court found, that "[r]egarding this activity, owing to the specific risks that it involved for the life and integrity of the individual, the State had the obligation to regulate, supervise and oversee its exercise, to prevent the violation of the rights of those who were working in this sector".[675] [77]

[A/77/74, p. 15]

European Court of Human Rights

Carter v. *Russia*

In *Carter* v. *Russia*, the European Court of Human Rights referred to article 8, noting that "a factor indicative of State responsibility" for a particular operation would be that the conduct of the individuals involved in that operation "was directed or controlled by any State entity or official".[676] [78]

[A/77/74, p. 16]

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[671] [73] See footnote [128] 16 above, para. 775.

[672] [74] *Ibid*., para. 776.

[673] [75] *Ibid*., para. 777.

[674] [76] IACHR, Series C, No. 407, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 July 2020, para. 121 (footnote 202).

[675] [77] *Ibid*., para. 121.

[676] [78] ECHR, Third Section, Application No. 20914/07, Judgment, 28 February 2022, para. 166.

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, *e.g.* after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[677] [167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

> at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[678] [168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place

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[677] [167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[678] [168] *Yeager* (footnote [204] 101 above), p. 104, para. 43.

is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[679] 169

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[680] 170

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(*b*) provisionally adopted by the International Law Commission:[681] 107

> … attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law … . An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of the official authorities and in cir-

[679] 169 See, *e.g.*, the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote [146] 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a government in exile might be covered by article 9, depending on the circumstances.

[680] 170 See, *e.g.*, the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

[681] 107 This provision was amended and incorporated in article 9 finally adopted by the International Law Commission in 2001. Article 8(*b*) provisionally adopted read as follows: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: … (*b*) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority." (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

cumstances which justified the exercise of those elements of authority. *See* International Law Commission draft article 8(*b*).[682] [108]

[A/62/62, para. 68]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[683] [101]

[A/68/72, para. 74]

African Court of Human Rights and Peoples' Rights

African Commission on Human and Peoples' Rights v. *Libya*

In *African Commission on Human and Peoples' Rights* v. *Libya*, the African Court of Human Rights and Peoples' Rights determined, while expressing "aware[ness] of the volatile political and security situation in Libya" cited article 9 of the State responsibility articles and found that it "is competent *ratione personae* to hear the instant case".[684] [115]

[A/74/83, p. 22]

[682] [108] See footnote [204] 101 above, p. 103, para. 42.

[683] [101] See footnote [299] 41 above, para. 576.

[684] [115] ACHPR, Application No. 002/2013, Judgment on Merits, 3 June 2016, paras. 50 and 52.

Article 10. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[685] [171] and arbitral tribunals[686] [172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[687] [173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by

[685] [171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments,* Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.,* p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[686] [172] See, *e.g.*, *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[687] [173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote [680] 170 above), p. 524.

organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[688] [174]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) Paragraph 1 of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should

[688] [174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (footnote [147] 88 above), p. 108; and *Supplement to Volume III* … (footnote [221] 104 above), pp. 3 and 20.

not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) Paragraph 2 of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[689] [175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State

[689] [175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[690] [176] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, *e.g.* those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

> The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[691] [177]

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[692] [178] In the *Pinson* case, the French-Mexican Claims Commission ruled that:

> if the injuries originated, for example, in requisitions or forced contributions demanded … by revolutionaries before their final success, or if they were caused … by offences committed by successful revolutionary forces, the responsibility of the State … cannot be denied.[693] [179]

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [694] [180] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case the Supreme Court of Namibia went even

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[690] [176] As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[691] [177] UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid*., p. 510, at p. 513 (1903).

[692] [178] *Ibid*., vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid*., vol. IX (Sales No. 59.V.5), p. 119 (1902).

[693] [179] *Ibid*., vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[694] [180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (footnote [147] 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid*., p. 118; reproduced in *Yearbook … 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[695] 181

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Short v. *Islamic Republic of Iran*

In its 1987 award in the *Short* v. *Islamic Republic of Iran* case, the Tribunal, in examining whether the facts invoked by the claimant as having caused his departure from the Iranian territory were attributable to the Islamic Republic of Iran, referred to draft articles 14 and 15 provisionally adopted by the International Law Commission,[696] 109 which it considered a confirmation of principles still valid contained in the previous case law on attribution:

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[695] 181 Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

[696] 109 Those provisions were amended and incorporated in article 10 finally adopted by the ILC in 2001. The text of draft articles 14 and 15 provisionally adopted on first reading was as follows:

Article 14

Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

The Tribunal notes … that it is not infrequent that foreigners have had to leave a country *en masse* by reason of dramatic events that occur within the country. It was often the case during this century, even since 1945. A number of international awards have been issued in cases when foreigners have suffered damages as a consequence of such events … . Although these awards are rather dated, the principles that they have followed in the matter of State international responsibility are still valid and have recently been confirmed by the United Nations International Law Commission in its draft articles on the law of State responsibility. *See* draft articles on state responsibility, adopted by the International Law Commission on first reading, notably articles 11, 14 and 15. *1975 Yearbook International Law Commission*, vol. 2, at 59, United Nations doc. A/CN.4/SER.A/1975/Add.1 (1975).[697] [110]

The Tribunal further noted, with reference to the commentary to the above mentioned draft article 15, that:

Where a revolution leads to the establishment of a new government the State is held responsible for the acts of the overthrown government insofar as the latter maintained control of the situation. The successor government is also held responsible for the acts imputable to the revolutionary movement which established it, even if those acts occurred prior to its establishment, as a consequence of the continuity existing between the new organization of the State and the organization of the revolutionary movement. *See* draft articles on State responsibility, *supra*, commentary on article 15, paras. (3) and (4), *1975 Yearbook International Law Commission,* vol. 2 at 100.[698] [111]

[A/62/62, para. 69]

Rankin v. *Islamic Republic of Iran*

In its 1987 award in the *Rankin* v. *Islamic Republic of Iran* case, the Tribunal, in determining the applicable law with regard to the claim, considered that draft article 15 provisionally adopted by the International Law Commission reflected "an accepted principle of international law". It observed that

… several problems remain even though it is an accepted principle of international law that acts of an insurrectional or revolutionary movement which becomes the new government of a State are attributable to the State. *See* article 15, draft articles on State responsibility … First, when property

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3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15

Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[697] [110] IUSCT, Award No. 312–11135–3, 14 July 1987, Iran-United States Claims Tribunal Reports, vol. 16 (1987-III), p. 83, para. 28. Draft article 11, to which the passage also refers, was deleted by the International Law Commission on second reading (footnote [206] 26 above).

[698] [111] *Ibid*., p. 84, para. 33.

losses are suffered by an alien during a revolution, there may be a question whether the damage resulted from violence which was directed at the alien or his property *per se* or was merely incidental or collateral damage resulting from the presence of the alien's property or property interests during the period of revolutionary unrest. Second, even with respect to some property losses that are not the result of incidental or collateral damage—for example, losses resulting from acts directed by revolutionaries against the alien because of his nationality—a further question of attribution remains, that is, whether those acts are acts of the revolutionary movement itself, rather than acts of unorganized mobs or of individuals that are not attributable to the movement.[699] 112

In the same award, the Tribunal further referred to draft article 15 in determining that a number of statements made by the leaders of the Revolution, which it found to be inconsistent with the requirements of the Treaty of Amity between Iran and the United States and customary international law to accord protection and security to foreigners and their property, were "clearly … attributable to the Revolutionary Movement and thereby to the Iranian State".[700] 113

[A/62/62, para. 70]

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. *Serbia)*

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* the International Court of Justice

consider[ed] that, even if Article 10(2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles.[701] 104

[A/71/80, para. 77]

[699] 112 IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 143–144, para. 25.

[700] 113 *Ibid*., p. 147, para. 30.

[701] 104 See footnote [181] 38 above, para. 104.

Article 11. Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[702] [182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[703] [183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

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[702] [182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[703] [183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[704] [184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[705] [185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[706] [186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[707] [187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[708] [188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[709] [189] These were sufficient in

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[704] [184] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 35, para. 74.

[705] [185] *Ibid.*, pp. 31–33, paras. 63–68.

[706] [186] *Lighthouses* arbitration (footnote [702] 182 above), pp. 197–198.

[707] [187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[708] [188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[709] [189] See footnote [80] 59 above.

the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. *Dragan Nikolić ("Sušica Camp")*

In its 2002 decision on the 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 [had] arrested the Accused in the territory of the FRY [Federal Republic of Yugoslavia] and [had] brought him across the border with Bosnia

and Herzegovina and into the custody of SFOR".[710] [114] In this respect, the Trial Chamber used the principles laid down in the articles finally adopted by the International Law Commission in 2001, and in particular article 11 and the commentary thereto, "as *general* legal guidance … insofar as they may be helpful for determining the issue at hand":[711] [115]

60. In determining the question as to whether the illegal conduct of the individuals can somehow be attributed to SFOR, the Trial Chamber refers to the principles laid down in the draft articles of the International Law Commission on the issue of 'responsibilities of States for internationally wrongful acts'. These draft articles were adopted by the International Law Commission at its fifty-third session in 2001. The Trial Chamber is however aware of the fact that any use of this source should be made with caution. The draft articles were prepared by the International Law Commission and are still subject to debate amongst States. They do not have the status of treaty law and are not binding on States. Furthermore, as can be deduced from its title, the draft articles are primarily directed at the responsibilities of States and not at those of international organizations or entities. As draft article 57 emphasizes,

> [t]hese 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.

61. In the present context, the focus should first be on the possible attribution of the acts of the unknown individuals to SFOR. As indicated in article I of Annex 1-A to the Dayton Agreement, IFOR (SFOR) is a multinational military force. It 'may be composed of ground, air and maritime units from NATO and non-NATO nations' and 'will operate under the authority and subject to the direction and political control of the North Atlantic Council.' For the purposes of deciding upon the motions pending in the present case, the Chamber does not deem it necessary to determine the exact legal status of SFOR under international law. Purely as *general* legal guidance, it will use the principles laid down in the draft articles [on State responsibility] insofar as they may be helpful for determining the issue at hand.

62. Article 11 of the draft articles [on State responsibility] relates to 'Conduct acknowledged and adopted by a State as its own' and states the following:

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

63. The report of the International Law Commission on the work of its fifty-third session sheds light on the meaning of the article:

> Article 11 (…) provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own. (…), article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes 'nevertheless' that conduct is to be considered as an act of State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'.

Furthermore, in this report a distinction is drawn between concepts such as 'acknowledgement' and 'adoption' from concepts such as 'support' or 'endorsement'. The International Law Commission argues that

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[710] [114] ICTY, Trial Chamber II, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, Case No. IT-94–2-PT, para. 57.

[711] [115] *Ibid*., para. 61.

> [a]s a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption', on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct."[712] 116

The Trial Chamber observed that both parties in the case had used the same and similar criteria of "acknowledgement", "adoption", "recognition", "approval" and "ratification", as used by the ILC.[713] 117 After having examined the facts of the case, it concluded that SFOR and the Prosecution had become the "mere beneficiary" of the fortuitous rendition of the accused to Bosnia, which did not amount to an "adoption" or "acknowledgement" of the illegal conduct "as their own".[714] 118

[A/62/62, para. 71]

[International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[715] 36 The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[716] 37

[See A/68/72, footnote 102 and para. 32]]

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 indicated that certain rules on the liability of sponsoring States in the United Nations Convention on the Law of the Sea

> are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[717] 103

[A/68/72, para. 75]

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[712] 116 *Ibid*., paras. 60–63 (footnotes omitted).

[713] 117 *Ibid*., para. 64.

[714] 118 *Ibid*., paras. 66–67.

[715] [36 See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

[716] [37 *Ibid*., paras. 274 and 280.]

[717] 103 See footnote [12] 10 above, para. 182.

Permanent Court of Arbitration (under UNCITRAL Rules)

Luigiterzo Bosca v. *Lithuania*

In *Luigiterzo Bosca* v. *Lithuania*, the arbitral tribunal, paraphrasing article 11, stated that "[i]n other words, where the State endorses the act, as here, the State is subject to international responsibility under international law".[718] [105]

[A/71/80, para. 78]

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

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the tribunal found that "[o]n the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP [Joint Review Panel] were not one of its organs".[719] [106] The arbitral tribunal specified that "[t]here is no indication in the evidence of a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the JRP".[720] [107]

[A/71/80, para. 79]

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 did not find that article 11 of the State responsibility articles was applicable in the case.[721] [108]

[A/71/80, para. 80]

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[722] [96]

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[718] [105] See footnote [169] 26 above, footnote 114.

[719] [106] See footnote [333] 59 above, paras. 321–322.

[720] [107] *Ibid*., para. 323.

[721] [108] See footnote [114] 24 above, para. 449.

[722] [96] ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

> were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[723] 97

[A/74/83, p. 20]]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal found that:

> by means of its conduct after the plant takeover of 15 May 2010 carried out by the members of the SINPROTRAC union, PDVSA [Gas S.A.] acknowledged and adopted the union's actions as its own. On the basis of the applicable principles of customary international law on State responsibility as reflected in Article 11 of the ILC Draft Articles, the plant takeover on 15 May 2010 therefore has to be considered as an act of Respondent. In any event, PDVSA took effective control over the plant and started the expropriation process shortly after 15 May 2010, as confirmed by its internal memoranda and reports of early June 2010.[724] 117

Relying on the commentary to article 11, the arbitral tribunal also explained: "In contrast to cases of mere State support, endorsement or general acknowledgment of a factual situation created by private individuals, attribution under this rule requires that the State clearly and unequivocally '*identifies the conduct in question and makes it its own*'".[725] 118

[A/74/83, p. 22]

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

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal quoted article 11 of the State responsibility articles and the commentary thereto, based on the claimant's arguments, but did "not consider that Article 11 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company] separately advances the Claimant's case".[726] 119

[A/74/83, p. 23]

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[723] [97 *Ibid*., para. 146.]

[724] 117 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 456.

[725] 118 *Ibid*., para. 461 (original emphasis).

[726] 119 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 9.120–9.121.

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[727] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[728] [43]

[A/77/74, p. 11]]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited the text of article 11, which

> provides that '[c]onduct which is not attributable to a State … shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own'. By its terms, the principle only applies to conduct that is not otherwise attributable to a State.[729] [79]

[A/77/74. p. 16]

European Court of Human Rights

Makuchyan and Minasyan v. *Azerbaijan and Hungary*

In *Makuchyan and Minasyan* v. *Azerbaijan and Hungary*, the European Court of Human Rights referred to article 11 in considering whether the conduct of an individual who was not a State agent could be attributable to Azerbaijan. The Court took the view that the current standard under international law, which stemmed from article 11 and the commentary thereto, set

> a very high threshold for State responsibility for an act otherwise non-attributable to a State at the time of its commission. That threshold is not limited to the mere 'approval' and 'endorsement' of the act in question … Article 11 of the Draft Articles explicitly and categorically requires the 'acknowledgment' and 'adoption' of that act.[730] [80]

The Court determined that, for State responsibility for the impugned acts to have been established, international law would have required "that the Azerbaijani authorities 'acknowledge' and 'adopt' them as acts perpetrated by the State of Azerbaijan—thus directly and categorically assuming responsibility for the killing of G.M. and the preparations for the murder of the first applicant.[731] [81]

[A/77/74. p. 16]

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[727] [42 Final Award, 26 March 2021, para. 72.]

[728] [43 *Ibid*., paras. 72 and 134–135.]

[729] [79] See footnote [385] 35 above, para. 7.161.

[730] [80] ECHR, Fourth Section, Application No. 17247/13, Judgment, 12 October 2020, para. 112.

[731] [81] *Ibid*., para. 113.

Chapter III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it, or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[732] [190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, *etc.* There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, *i.e.* the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, *i.e.* where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[733] [191]

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[732] [190] See paragraphs (2) to (4) of the general commentary.

[733] [191] See, *e.g.*, the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

Article 12. Existence of a breach of an international obligation

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[741] [199] *"Rainbow Warrior"* (footnote [40] 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote [46] 52 above), p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[742] [200] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[743] [201] *"Rainbow Warrior"* (footnote [40] 46 above), p. 251, para. 75.

[744] [202] See Part Three, chapter II and commentary; see also article 48 and commentary.

[745] [203] See articles 40 and 41 and commentaries.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[746] [204] derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject matter of the obligation breached.[747] [205] Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus PCIJ stated in its first judgment, in the *S.S. "Wimbledon"* case, that "the right of entering into international engagements is an attribute of State sovereignty".[748] [206] That proposition has often been endorsed.[749] [207]

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.[750] [208]

Thus the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its …

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[746] [204] According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[747] [205] See, *e.g.*, *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above); *Case concerning the Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote [32] 38 above). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote [33] 39 above), p. 228.

[748] [206] *S.S. "Wimbledon"* (footnote [28] 34 above), p. 25.

[749] [207] See, *e.g.*, *Nottebohm, Second Phase*, *Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 131, para. 259.

[750] [208] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

character". In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[751] [209] and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

> The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved … For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" … must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.[752] [210]

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.[753] [211] But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather, it examined what more Italy could have done to make the applicant's right "effective".[754] [212] The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.[755] [213]

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented

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[751] [209] Cf. *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

[752] [210] *Colozza* v. *Italy, Eur. Court H.R., Series A, No. 89* (1985), pp. 15–16, para. 30, citing *De Cubber* v. *Belgium*, *ibid.*, *No. 86* (1984), p. 20, para. 35.

[753] [211] Cf. *Plattform "Ärzte für das Leben"* v. *Austria*, in which the Court gave the following interpretation of article 11:

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used … In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (footnote [752] 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

[754] [212] *Colozza* case (footnote [752] 210 above), para. 28.

[755] [213] See also *The Islamic Republic of Iran* v. *The United States of America,* cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.[756] [214] Certain obligations may be breached by the mere passage of incompatible legislation.[757] [215] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[758] [216] In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[759] [217] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[760] [218]

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Ad hoc committee (under the ICSID Convention)

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

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

[A/62/62, para. 72]

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

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

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

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

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

International arbitral tribunal (under the ICSID Convention)

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

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

[A/71/80, para. 81]

Special Tribunal for Lebanon

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

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

[A/71/80, para. 82]

Caribbean Court of Justice

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

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

[A/74/83, p. 23]

African Commission on Human and Peoples' Rights

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

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

[A/74/83, p. 23]

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[761] 109 See footnote [18] 6 above, para. 289, footnote 308.

[762] 110 STL, STL-11–01, Decision on Updated Request for a Finding of Non-Compliance, 27 March 2015, paras. 43–45.

[763] 120 CCJ, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.

[764] 121 African Commission on Human and Peoples' Rights, Communication No. 355/07, Decision, 28 April 2018, para. 124.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[765] [82]

[A/77/74, p. 17]

[765] [82] See footnote [126] 14 above, para. 155.

Article 13. International obligation in force for a State

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

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

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

[A/62/62, para. 73]

European Court of Human Rights

Blečić v. *Croatia*

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

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

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

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

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

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

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

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

[A/62/62, para. 74]

Šilih v. *Slovenia*

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

[A/65/76, para. 18]

International Court of Justice

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

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

[A/68/72, para. 76]

International arbitral tribunal (under the ICSID Convention)

Railroad Development Corporation v. *Republic of Guatemala*

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

[A/68/72, para. 77]

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

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

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

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

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

African Commission on Human and Peoples' Rights

Al-Asad v. *Djibouti*

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

[A/71/80, para. 83]

International arbitral tribunal (under the ICSID Convention)

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

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

[A/71/80, para. 84]

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

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

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

[A/71/80, para. 85]

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

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

[A/71/80, para. 86]

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

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

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

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

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

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

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

[A/74/83, p. 23]

Renco Group v. *Republic of Peru*

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

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

[A/77/74, p. 17]

Permanent Court of Arbitration (under UNCITRAL Rules)

Spółdzielnia Pracy Muszynianka v. *Slovak Republic*

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

[A/77/74, p. 17]

International arbitral tribunal (under the ICSID Convention)

Astrida Benita Carrizosa v. *Republic of Colombia*

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

[A/77/74, p. 17]

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

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

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

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

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

OOO Manolium Processing v. *Republic of Belarus*

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

[A/77/74, p. 17]

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

Article 14. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[800] [236] and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

(3) In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obliga-

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[800] [236] See, *e.g.*, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote [28] 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote [749] 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker* v. *Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland* v. *The United Kingdom*, *Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others* v. *Greece*, *ibid.*, *No. 260–B*, para. 40 (1993); and *Agrotexim and Others* v. *Greece*, *ibid.*, *No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", RGDIP, vol. 95, p. 881 (1991).

tion during that period.[801] [237] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[802] [238] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.[803] [239] Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.[804] [240]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[805] [241] It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consu-*

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[801] [237] See article 13 and commentary, especially para. (2).

[802] [238] *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[803] [239] *Papamichalopoulos* (footnote [800] 236 above).

[804] [240] *Loizidou*, *Merits* (footnote [573] 160 above), p. 2216.

[805] [241] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

lar Staff in Tehran case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[806] [242]

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *"Rainbow Warrior"* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[807] [243]

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[808] [244]

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[809] [245]

(10) In the *Loizidou* case,[810] [246] similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic and of Turkish troops in denying the applicant access to her property continued after Turkey's

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[806] [242] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 37, para. 80. See also *ibid*., pages 36–37, paras. 78–79.

[807] [243] *"Rainbow Warrior"* (footnote [40] 46 above), p. 264, para. 101.

[808] [244] *Ibid*., pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid*., pp. 279–284.

[809] [245] See footnote [800] 236 above.

[810] [246] *Loizidou, Merits* (footnote [573] 160 above), p. 2216.

acceptance of the Court's jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time.[811] 247

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

> not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol … In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status … at the time of her marriage in 1970 …
>
> The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.[812] 248

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[813] 249 incitement or attempt,[814] 250 in which case the threat, incitement or attempt is itself a

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[811] 247 *Ibid*., pp. 2230–2232, 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote [573] 160 above), pp. 33–34, paras. 102–105; and *Cyprus* v. *Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

[812] 248 *Lovelace* v. *Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

[813] 249 Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", AJIL, vol. 82, No. 2 (April 1988), p. 239.

[814] 250 A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Con-

wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—*e.g.* the diversion of an international river—mere preparatory conduct is not necessarily wrongful.[815] [251] In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. It noted:

> that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.
>
> Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act". [816] [252]

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

(14) Paragraph *3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter*

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vention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

[815] [251] In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, *e.g.* by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid*., p. 494 (German law). There appears to be no equivalent in international law, but article 60, paragraph 3 (*a*), of the 1969 Vienna Convention defines a material breach as including "a repudiation … not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

[816] [252] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

arbitration,[817] [253] was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[818] [254] If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[819] [255] Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

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 determined that France had committed a material breach of its obligations to New Zealand, referred to the distinction made by the International Law Commission between an instantaneous breach and a breach having a continuing character, as it appeared in draft article 24 and draft article 25, paragraph 1,[820] [123] provisionally adopted:

In its codification of the law of State responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commis-

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[817] [253] *Trail Smelter*, UNRIAA, (vol. III Sales No. 1949.V.2), p. 1905 (1938, 1941).

[818] [254] An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

[819] [255] See the *"Rainbow Warrior"* case (footnote [40] 46 above), p. 266.

[820] [123] These provisions were amended and incorporated in article 14 finally adopted by the International Law Commission in 2001. Draft article 24 provisionally adopted [in 1980] read as follows:

> Article 24
>
> Moment and duration of the breach of an international obligation by an act of the State not extending in time
>
> The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently. (Yearbook … *1980*, vol. II (Part Two), para. 34.)
>
> Paragraph 1 of draft article 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time) provisionally adopted read as follows:
>
> 1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

sion distinguishes the breach which does not extend in time, or instantaneous breach, defined in article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents [Major Mafart and Captain Prieur, as provided for under the agreement between the Parties,] has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[821] [124]

The arbitral tribunal again referred to draft article 25 provisionally adopted in the context of the determination of the time of commission of the breach by France. It noted that, in the case of breaches extending or continuing in time,

[a]ccording to article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. [It thus followed that] France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.[822] [125]

[A/62/62, para. 75]

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 moment when the unlawful act was performed for the purposes of deciding the scope of the damages due, found that Burundi's violation in that case was of a continuing nature and thereafter referred to paragraph 1 of draft article 25 provisionally adopted by the International Law Commission,[823] [126] which was quoted in the award.[824] [127]

[A/62/62, para. 76]

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[821] [124] *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*, Arbitral Award, 30 April 1990, para. 101, reproduced in UNRIAA, vol. XX, pp. 263–264.

[822] [125] *Ibid*., pp. 265–266, para. 105.

[823] [126] This provision was amended and incorporated in article 14, paragraph 2, finally adopted by the International Law Commission in 2001. For the text of this provision, see footnote [820] 123 above.

[824] [127] Arbitral Award of 4 March 1991, para. 66 (English version in: *International Law Reports*, vol. 96, pp. 323–324).

INTERNATIONAL COURT OF JUSTICE

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court referred to the commentary to draft article 41, as adopted by the International Law Commission on first reading:[825] 128

> A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the commentary on article 41 of the draft articles on State responsibility, … *Yearbook of the International Law Commission, 1993*, vol. II (Part Two), p. 57, para. 14).[826] 129

[A/62/62, para. 77]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

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

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case referred to article 14, paragraph 1, finally adopted by the International Law Commission in 2001 in support of its statement that "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage".[827] 130

[A/62/62, para. 78]

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred in a footnote to the commentary to articles 14 and 15 finally adopted by the International Law Commission to support the statement that "[w]hether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused".[828] 131

[A/62/62, para. 79]

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[825] 128 The extract of the commentary to draft article 41 (Cessation of wrongful conduct) by the International Law Commission referred to by the Court in the quoted passage was not retained in the commentary to article 30 (Cessation and non-repetition) as finally adopted in 2001. However, the International Law Commission included a citation of this passage of the Court's judgment in its commentary to article 14 finally adopted in 2001. For this reason, the said passage is hereby reproduced with reference to article 14.

[826] 129 See footnote [31] 37 above, p. 54, para. 79.

[827] 130 NAFTA (ICSID Additional Facility), Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 58 and footnote 9, reproduced in *ILR*, vol. 125, p. 128.

[828] 131 ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 62, footnote 26 (unofficial English translation of the Spanish original). The passages of the commentaries to articles 14 and 15 referred to can be found in [*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77.

European Court of Human Rights

Ilaşcu and others v. *Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, after having observed that the principle of "State responsibility for the breach of an international obligation" was a "recognized principle of international law", referred in particular to the commentary to article 14, paragraph 2, and to article 15, paragraph 2, as finally adopted by the International Law Commission in 2001:

320. Another recognized principle of international law is that of State responsibility for the breach of an international obligation, as evidenced by the work of the International Law Commission.

321. A wrongful act may be described as continuing if it extends over the entire period during which the relevant conduct continues and remains at variance with the international obligation (see the commentary on draft article 14 § 2 … of the work of the International Law Commission).

In addition, the Court considers that, in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see also draft article 15 § 2 of the work of the International Law Commission).[829] [132]

[A/62/62, para. 80]

International arbitral tribunal (under the ICSID Convention)

Impregilo S.p.A. v. *Islamic Republic of Pakistan*

In its 2005 decision on jurisdiction, the arbitral tribunal constituted to hear the *Impregilo* v. *Pakistan* case noted that Impregilo had invoked article 14 finally adopted by the International Law Commission in 2001, "which, in its opinion, reflects customary international law", to allege that Pakistan's acts previous to the date of entry into force of the bilateral investment treaty had to conform to the provisions of that treaty. According to the tribunal, "[w]hether or not this article does in fact reflect customary international law need not be addressed for present purposes": the case before the tribunal was not covered by article 14, since the acts in question had no "continuing character" within the meaning of that provision.[830] [133]

[A/62/62, para. 81]

European Court of Human Rights

Blečić v. *Croatia*

In its 2006 judgement in the *Blečić* v. *Croatia* case, the European Court, sitting as a Grand Chamber, quoted, *inter alia*, the text of article 14 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 192] above.

[A/62/62, para. 82]

[829] [132] ECHR, Grand Chamber, Application No. 48787/99, Judgment, 8 July 2004, paras. 320–321.

[830] [133] ICSID, Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 312.

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 examining whether the Respondent had complied with its obligations to prevent genocide under article I of the Genocide Convention, referred to the "general rule of the law of State responsibility" stated in article 14, paragraph 3, finally adopted by the International Law Commission in 2001:

> a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility: …
>
> This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent."[831] [8]

[A/62/62/Add.1, para. 4]

European Court of Human Rights

Šilih v. *Slovenia*

In the *Šilih* v. *Slovenia* case, the European Court of Human Rights referred to article 14 of the State responsibility articles as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the court.[832] [15]

[A/65/76, para. 19]

Varnava and Others v. *Turkey*

In the *Varnava and Others* v. *Turkey* case, the European Court of Human Rights, in a case involving alleged disappearance of individuals 15 years prior to the initiation of the case, had to consider the applicability of the six-month time limit for the bringing of a complaint under the Convention of an alleged continuing violation. The Court maintained that "[n]ot all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake … [and] where disappearances are con-

[831] [8] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 431.

[832] [15] [ECHR, Grand Chamber, Application No. 71463/01, Judgment, 9 April 2009], para. 108.

cerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay".[833] [16] It proceeded to hold, nonetheless, that the "applicants had acted, in the special circumstances of their cases, with reasonable expedition for the purposes of … the [European Convention on Human Rights]".[834] [17]

[A/65/76, para. 20]

Inter-American Court of Human Rights

Radilla Pacheco v. *United Mexican States*

In the 2009 *Radilla Pacheco* v. *Mexico* case, the Inter-American Court of Human Rights cited article 14, paragraph 2, of the State responsibility articles (which it quoted) when distinguishing between instantaneous acts and those of a continuing or permanent nature.[835] [18]

[A/65/76, para. 21]

Gomes Lund et al. ("Guerrilha do Araguaia") v. *Brazil*

In its judgment in *Gomes Lund et al. ("Guerrilha do Araguaia")* v. *Brazil*, the Inter-American Court of Human Rights referred to article 14 in support of the assertion that "acts of a continuous or permanent nature extend throughout time wherein the event continues, maintaining a lack of conformity with international obligations".[836] [107]

[A/68/72, para. 78]

[International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to the commentary to articles 14 and 15 dealing with continuing and composite acts, and determined that certain negotiations did not constitute continuing or composite acts or omissions.[837] [117]

[See A/68/72, footnote 106 and para. 84]]

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[833] [16] ECHR, Grand Chamber, Application Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment, 18 September 2009, para. 161.

[834] [17] *Ibid*., para. 170.

[835] [18] IACHR, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 23 November 2009, para. 22.

[836] [107] IACHR, Judgment, Series C, No. 219, 24 November 2010, para. 17, footnote 24.

[837] [[117] See footnote [299] 41 above, paras. 496–500.]

World Trade Organization Appellate Body

European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft

In its report in *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, the Appellate Body referred to article 14 in determining that, under the SCM Agreement, it is the causing of "adverse effects to the interests of other Members … that is relevant … and the conclusion as to retroactivity will hinge on whether that situation continues or has been completed, rather than on when the act of granting a subsidy occurred".[838] [108] While agreeing that, on the basis of article 14, "it is important to distinguish between an act and its effects", the tribunal indicated that "the SCM Agreement is concerned, however, with a situation that continues over time, rather than with specific 'acts'".[839] [109]

[A/68/72, para. 79]

International arbitral tribunal (under the ICSID Convention)

Pac Rim Cayman LLC v. *The Republic of El Salvador*

The arbitral tribunal constituted to hear the *Pac Rim Cayman LLC* v. *The Republic of El Salvador* case considered the "well-established distinctions under customary international law" recognized in the commentary to articles 14 and 15 between a "one-time act", a "continuous act" and a "composite act".[840] [110] Upon consideration of the commentary to articles 14 and 15, as well as the factual circumstances of the dispute,[841] [111] the tribunal determined that the alleged measure "should be considered as a continuing act under international law … ".[842] [112]

[A/68/72, para. 80]

Inter-American Court of Human Rights

Castillo González et al. v. Venezuela

In its 2012 judgment in *Castillo González et al.* v. *Venezuela*, the Inter-American Court of Human Rights cited article 14(3) in holding that "international responsibility of the State may arise from human rights violations committed by individuals or third parties, in the context of the State's obligations to ensure respect for human rights among individuals".[843] [113]

[A/68/72, para. 81]

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[838] [108] WTO, Appellate Body Report, WT/DS316/AB/R, 18 May 2011, para. 684.

[839] [109] *Ibid*., para. 685 (internal quotations omitted).

[840] [110] ICSID, Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.65–2.74.

[841] [111] *Ibid*., paras. 2.65–2.93.

[842] [112] *Ibid*, para. 2.94.

[843] [113] See footnote [108] 51 above, para. 111, footnote 53 (quoting article 14.3 of the State responsibility articles).

European Court of Human Rights

El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[844] 114

[A/68/72, para. 82]

[*Husayn (Abu Zubaydah)* v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[845] 85

[A/71/80, para. 68]]

Inter-American Court of Human Rights

Case of Osorio Rivera and Family Members v. *Peru*

In *Case of Osorio Rivera and Family Members* v. *Peru*, the Inter-American Court of Human Rights cited article 14 in support of the statement that "[o]wing to their characteristics, once the treaty enters into force, those continuing or permanent acts which persist after that date can generate international obligations for the State party, without this signifying a violation of the principle of the non-retroactivity of treaties".[846] 118 The Court continued by explaining that it

> ha[d] already established that it is competent to examine violations of a continuing or permanent nature that commenced before the defendant State had accepted the Court's contentious jurisdiction, and that persist following this acceptance, because they continue to be committed and, thus, the principle of non-retroactivity is not infringed.[847] 119

[A/71/80, para. 87]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Cervin Investissements S.A. and Rhone Investissements* v. *Republic of Costa Rica* referred to article 14 in support of its assertion that "[l]a responsabilidad internacional del Estado debe en efecto apreciarse a la fecha en la cual ha sido cometido el hecho generador de su responsabilidad".[848] 120

[A/71/80, para. 88]

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[844] 114 See footnote [552] 84 above.

[845] [85 ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

[846] 118 IACHR, Judgment, 26 November 2013, para. 30.

[847] 119 *Ibid*., para. 32, referring to IACHR, *Case of the Serrano Cruz Sisters* v. *El Salvador, Preliminary objections*, Judgment, 23 November 2004, paras. 65–66, and IACHR, *Case of Radilla Pacheco* v. *Mexico, Preliminary Objections, merits, reparations and costs*, Judgment, 23 November 2009, para. 24.

[848] 120 ICSID, Case No. ARB/13/2, Decision on Jurisdiction 15 December 2014, para. 278.

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 relied on the commentary to article 14 as supporting the view that "[a]n act does not have a continuing character merely because its effects or consequences extend in time".[849] [121]

[A/71/80, para. 89]

[EUROPEAN COURT OF HUMAN RIGHTS

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[850] [82]

[A/74/83, p. 17]]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Resolute Forest Products Inc. v. *Government of Canada*

In *Resolute Forest Products Inc.* v. *Government of Canada*, the arbitral tribunal explained, after quoting article 14, paragraph 2, of the State responsibility articles on a breach having a continuing character, that "the breach nonetheless occurs when the State act is first perfected and can be definitely characterized as a breach of the relevant obligation".[851] [124]

[A/74/83, p. 23]

[*Renco Group* v. *Republic of Peru*

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

> the general principle that the lawfulness of State conduct must be assessed contemporaneously with that conduct. Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force.[852] [83]

[A/77/74, p. 17]]

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[849] [121] See footnote [340] 66 above, para. 417, footnote 850 (quoting para. (6) of the commentary to article 14).

[850] [82 ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

[851] [124] PCA, Case No. 2016–13, Decision on Jurisdiction and Admissibility, 30 January 2018, para. 179.

[852] [83 PCA, Case No. 2019–46, Decision on Expedited Preliminary Objections, 30 June 2020, paras. 141–142.]

Committee on Economic, Social and Cultural Rights

S.C. and G.P. v. *Italy*

In *S.C. and G.P.* v. *Italy*, the Committee on Economic, Social and Cultural Rights referred to article 14 in analysing the admissibility of the communication, noting that

> an act that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time. Therefore, when the facts constituting a violation of the Covenant occurred before the entry into force of the Optional Protocol for the State party concerned, the mere fact that their consequences or effects have not been extinguished, after the entry into force, is not sufficient grounds for declaring a communication admissible *ratione temporis*.[853] [88]

[A/77/74, p. 18]

International arbitral tribunal (under the ICSID Convention)

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal referred to article 14, according to which "a simple internationally wrongful act is one that does not have a continuing character and, as such, 'occurs at the moment when the act is performed, even if its effects continue'."[854] [89] In contrast, "a continuing wrongful act extends over the period during which the violative act maintains the state of noncompliance with a particular obligation. The breach ceases once the effects of the act cease or the primary obligation no longer exists".[855] [90] The arbitral tribunal emphasized that pursuant to article 14,

> determining whether a wrongful act is simple or continuing depends primarily on the content of the primary obligation, which indicates whether the obligation can be breached continuously (for example, during the illegal detention of a foreign public official) or not (for example, in an isolated instance of the unlawful use of force).[856] [91]

[A/77/74, p. 18]

Infinito Gold Ltd. v. *Republic of Costa Rica*

The arbitral tribunal in *Infinito Gold Ltd.* v. *Republic of Costa Rica* referred to article 14 and the commentary thereto in establishing that it must "determine the point in time in which an act is capable of constituting an international wrong".[857] [92] In particular, the tribunal cited paragraph (13) of the commentary in distinguishing preparatory conduct for an act from the act itself.[858] [93] The tribunal concluded "that a simple act 'occurs' when it has been 'performed' or 'completed'; that the concept of 'completion' relates to the point

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[853] [88] CESCR, Communication No. E/C.12/65/D/22/2017, 7 March 2019, para. 6.5, referring to *Merino Sierra and Marino Sierra* v. *Spain*, Communication No. E/C.12/59/D/4/2014, 29 September 2016, para. 6.7, and *Alarcón Flores et al.* v. *Ecuador,* Communication No. E/C.12/62/D/14/2016, 4 October 2017, para. 9.7.

[854] [89] See footnote [386] 36 above, para. 187.

[855] [90] *Ibid*., para. 200.

[856] [91] *Ibid*.

[857] [92] ICSID, Case No. ARB/14/5, Award, 3 June 2021, para. 231; see also paras. 232–234.

[858] [93] *Ibid*., para. 234.

in time at which the act is capable of constituting a breach, which depends on the content of the primary obligation; and that a breach need not be completed in a single act".[859] 94

[A/77/74, p. 18]

[*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 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.[860] 132

[A/77/74, p. 25]]

[859] 94 *Ibid*., para. 235.

[860] [132 ICSID, Case No. ARB/98/2[, Decision on Annulment, 8 January 2020], para. 681.]

Article 15. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, *etc.* Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[861] 256

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,[862] 257 may be taken as an illustration of a "composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (*a*), of the Convention, the prime case of genocide is "[k]illing members of the [national, ethnical, racial or religious] group" with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group "as such". Genocide is not committed until there has been an accumulation of acts of killing, causing harm, *etc.*, committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[863] 258

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[861] 256 See further J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, vol. 28 (1982), p. 709.

[862] 257 See, *e.g.*, article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

[863] 258 The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, *i.e.* where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland* v. *United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, and to call for its cessation. As the Court said:

> A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches …*
>
> The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications … in the same way as it does to "individual' applications" … On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.[864] 259

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,[865] 260 even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (footnote [48] 54 above), p. 617, para. 34.

[864] 259 *Ireland* v. *The United Kingdom* (footnote [800] 236 above), p. 64, para. 159; see also *ibid*., page 63, para. 157. See further the United States counterclaim in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

[865] 260 See, *e.g.*, article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, *i.e.* an act defined in aggregate as wrongful.

(8) Paragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (*e.g.* in order to establish a factual basis for the later breaches or to provide evidence of intent).

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred to a text taken from the commentary to article 15 finally adopted by the International Law Commission. The relevant passage is quoted [on page 203] above.

[A/62/62, para. 83]

European Court of Human Rights

Ilaşcu and others v. *Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, referred *inter alia* to the commentary to article 15, paragraph 2 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 204] above.

[A/62/62, para. 84]

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*

The arbitral tribunal constituted to hear the *Gemplus S.A. et al.* v. *The United Mexican States* and *Talsud S.A.* v. *The United Mexican States* cases relied upon article 15 and its accompanying commentary to determine the relevant date for the assessment of compensation.[866] [116]

[A/68/72, para. 83]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to the commentary to articles 14 and 15 dealing with continuing and composite acts, and determined that certain negotiations did not constitute continuing or composite acts or omissions.[867] [117]

[A/68/72, para. 84]

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[866] [116] ICSID, Case Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Award, 16 June 2010, paras. 12–44, 12–45.

[867] [117] See footnote [299] 41 above, paras. 496–500.

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* referred to article 15 in finding that a series of measures taken by the Government of Argentina amounted to a "composite act".[868] 118

[A/68/72, para. 85]

[*Pac Rim Cayman LLC* v. *The Republic of El Salvador*

The arbitral tribunal constituted to hear the *Pac Rim Cayman LLC* v. *The Republic of El Salvador* case considered the "well-established distinctions under customary international law" recognized in the commentary to articles 14 and 15 between a "one-time act", a "continuous act" and a "composite act".[869] 110 Upon consideration of the commentary to articles 14 and 15, as well as the factual circumstances of the dispute,[870] 111 the tribunal determined that the alleged measure "should be considered as a continuing act under international law … ".[871] 112

[See A/68/72, footnote 115 and para. 80]]

European Court of Human Rights

El-Masri v. *The Former Yugoslav Republic of Macedonia*

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[872] 119

[A/68/72, para. 86]

[*Husayn (Abu Zubaydah)* v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[873] 85

[A/71/80, para. 68]]

Ad hoc committee (under the ICSID Convention)

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

The *ad hoc* committee in *El Paso Energy International Company* v. *The Argentine Republic*, noted that the arbitral tribunal, basing itself, *inter alia*, on article 15, had exposed

[868] 118 See footnote [56] 16 above, para. 516.

[869] [110 See footnote [840] 110, paras. 2.65–2.74.]

[870] [111 *Ibid*., paras. 2.65–2.93.]

[871] [112 *Ibid*., para. 2.94.]

[872] 119 See footnote [552] 84 above.

[873] [85 ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

the substance of the problem that led to its reasoning and decision, namely "that the cumulative effect of a series of measures which might be inoffensive and legal one by one may alter the global situation and the legal framework in a way that the investor could not have legitimately expected".[874] 123

[A/71/80, para. 90]

[European Court of Human Rights

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[875] 82

[A/74/83, p. 17]]

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* explained that "State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC's Articles on State Responsibility".[876] 126

[A/74/83, p. 24]

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

In *Rusoro Mining Limited* v. *The Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "the general thrust of the ILC Articles regarding composite acts is clear, the Articles do not address every single question, and in particular do not solve how time bar affects a string of acts which gives rise to a composite breach of a treaty".[877] 127 The tribunal considered "the better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately".[878] 128

[A/74/83, p. 24]

International arbitral tribunal (under the ICSID Convention)

Blusun A.A., Jean-Pierre Lecorcier and Michael Stein v. *Italian Republic*

The arbitral tribunal in *Blusun A.A., Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic* stated that "Article 15 only applies to a breach 'through a series of acts or omis-

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[874] 123 ICSID, Case No. ARB/03/15 Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 284.

[875] [82 ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

[876] 126 ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 669.

[877] 127 ICSID (Additional Facility), Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 227.

[878] 128 *Ibid*., para. 231.

sions defined in aggregate as wrongful'—for example, genocide. The first two sentences of ECT Article 10(1) do not define an aggregate of acts as wrongful in the way that Article 1 of the Genocide Convention does".[879] 129

[A/74/83, p. 24]

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal noted that "[t]he cases relied upon by Burlington are inapposite since they deal with breaches consisting of composite acts, as set out in Article 15 of the ILC Articles … In the present case, the Tribunal excluded the hypothesis of creeping expropriation".[880] 130

[A/74/83, p. 24]

Hydro S.r.l. et al. v. *Republic of Albania*

The arbitral tribunal in *Hydro S.r.l. et al.* v. *Republic of Albania* cited article 15, noting that the principle of non-retroactivity "does not exclude the application of treaty obligations where the series of acts result in an aggregate breach after the claimant acquires its investment".[881] 96 The tribunal noted that "a composite act 'crystallizes' or 'takes place at a time when the last of these acts occurs and violates (in aggregate) the applicable rule'".[882] 97

[A/77/74, p. 19]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

Duzgit Integrity Arbitration (Republic of Malta v. *Democratic Republic of Sao Tome and Principe)*

The arbitral tribunal in the *Duzgit Integrity Arbitration (Republic of Malta* v. *Democratic Republic of Sao Tome and Principe)* recalled that, under article 15, paragraph 2, the breach of an international obligation by way of a composite act "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation". Analysing the facts, the tribunal concluded that a series of actions by Sao Tome and Principe, beginning with certain administrative proceedings and extending until the release of the vessel, were incompatible with the United Nations Convention on the Law of the Sea and therefore internationally wrongful for the entire period concerned.[883] 98

[A/77/74, p. 19]

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[879] 129 ICSID, Case No. ARB/14/3, Award, 27 December 2016, para. 361.

[880] 130 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 452.

[881] 96 ICSID, Case No. ARB/15/28, Award, 24 April 2019, paras. 557–558.

[882] 97 *Ibid*., para. 558, citing *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID, Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.74.

[883] 98 PCA, Case No. 2014–07, Award on Reparation, 18 December 2019, para. 86.

International arbitral tribunal (under the ICSID Convention)

Global Telecom Holding S.A.E. v. *Canada*

In *Global Telecom Holding S.A.E.* v. *Canada*, the arbitral tribunal referred to article 15 and the commentary thereto, noting that, particularly in the case of a composite act, "[i]t is only when the last of the actions or omissions necessary to constitute the wrongful act occurs (which, as the ILC noted, is not necessarily the last act in the series), that the investor can acquire knowledge of the loss caused by that wrongful act".[884] [99]

[A/77/74, p. 19]

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal referred to article 15 and the commentary thereto, noting that

> a composite wrongful act is one that results from a series of actions or omissions of the State which, when considered in aggregate, are enough to constitute a breach an international obligation, regardless of whether each individual action or omission of the series might also be considered to constitute a wrongful act in respect of a different obligation.[885] [100]

The tribunal went on:

> In the case of composite wrongful acts, there is a State action which, considered together with the acts that precede it, crosses the threshold to constitute the breach of an obligation. It is this action that determines the moment at which an affected subject is able to become aware of the breach and the damage resulting from it. The fact that other later actions and omissions may aggravate the composite wrongful act whose threshold has already been crossed is irrelevant for the purposes of identifying a violation and the resulting damage.[886] [101]

[A/77/74, p. 19]

Infinito Gold Ltd. v. *Republic of Costa Rica*

The arbitral tribunal in *Infinito Gold Ltd.* v. *Republic of Costa Rica* noted that the commentary to article 15 "makes it clear that, to amount to a composite breach, the various acts must not separately amount to the same breach as the composite act (although they could separately amount to different breaches). It also clarifies that the breach cannot 'occur' with the first of the acts in the series".[887] [102]

[A/77/74, p. 20]

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[884] [99] ICSID, Case No. ARB/16/16, Award, 27 March 2020, para. 411.

[885] [100] See footnote [386] 36 above, para. 189.

[886] [101] *Ibid*., para. 190.

[887] [102] See footnote [857] 92 above, para. 230.

Permanent Court of Arbitration (under UNCITRAL Rules)

OOO Manolium Processing v. *Republic of Belarus*

The arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* noted that while "Art. 15.1 defines the moment when a composite breach is deemed to occur and Art. 15.2 the date and extension in time of the breach",[888] [103] those provisions "do not solve the issue of how the entry into force of a treaty affects the string of acts, where some acts have occurred before and others after the entry into force of that treaty".[889] [104] The tribunal found that "[t]he appropriate solution is to break down the composite claim into individual claims related to measures prior to the Effective Date and claims related to measures after the Effective Date—the Tribunal only having jurisdiction to adjudicate those claims arising out of measures which occurred after the Effective Date".[890] [105]

[A/77/74, p. 20]

[*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 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.[891] [132]

[A/77/74, p. 25]]

[888] [103] See footnote [799] 86 above, para. 277.

[889] [104] *Ibid*., para. 280.

[890] [105] *Ibid*., para. 281.

[891] [[132] See footnote [860] 132 above, para. 681.]

Chapter IV

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 16. Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[904] [273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material

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[904] [273] See, *e.g.*, the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[905] [274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[906] [275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[907] [276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory

[905] [274] *The New York Times*, 6 March 1984, p. A1.

[906] [275] *Ibid.*, 5 March 1984, p. A3.

[907] [276] *Ibid.*, 26 August 1998, p. A8.

in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[908] [277] Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.[909] [278] The Libyan Arab Jamahiriya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[910][279] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.[911] [280] A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[912] [281]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council[913] [282] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[914] [283] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be

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[908] [277] For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

[909] [278] See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

[910] [279] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

[911] [280] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates,* 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL*, 1986*, vol. 57, pp. 637–638.

[912] [281] General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

[913] [282] See, *e.g.*, Report by President Clinton*,* AJIL, vol. 91, No. 4 (October 1997), p. 709.

[914] [283] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

concurrently attributed to the assisting and the acting State.[915] [284] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[916] [285] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[917] [286] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

Turkey—Restrictions on Imports of Textile and Clothing Products

In its 1999 report on *Turkey—Restrictions on Imports of Textile and Clothing Products*, the panel, in examining the Turkish argument according to which the measures at issue had been taken by a separate entity (*i.e.* the Turkey-European Communities customs union or the European Communities), concluded that the said measures were attributable to Turkey, since they had been adopted by the Turkish Government or had at least been implemented, applied and monitored by Turkey. In this regard, the panel found that, in any event, "in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey-EC cus-

[915] [284] For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

[916] [285] *East Timor* (footnote [48] 54 above), p. 105, para. 35.

[917] [286] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 261, para. 55.

toms union",[918] [134] on the basis of the principle reflected in draft article 27 adopted on first reading by the International Law Commission.[919] [135] In the report, the panel reproduced a passage of the commentary of the Commission to that provision.[920] [136]

[A/62/62, para. 85]

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 examining whether the Respondent was responsible for "complicity in genocide" under article III, paragraph (*e*), of the Genocide Convention, referred to article 16 finally adopted by the International Law Commission in 2001, which it considered as reflecting a customary rule:

> In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule …
>
> Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (*e*), of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16—setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for 'complicity in genocide' within the meaning of Article III, paragraph (*e*), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility."[921] [9]

[A/62/62/Add.1, para. 5]

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[918] [134] WTO, Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, para. 9.42.

[919] [135] This provision was amended and incorporated in article 16 finally adopted by the International Law Commission in 2001. The text of draft article 27 was the following:

> Article 27
>
> Aid or assistance by a State to another State for the commission of an internationally wrongful act
>
> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

[920] [136] WTO, Panel Report, WT/DS34/R, 31 May 1999, para. 9.43, where the panel quoted a passage taken from paragraph (2) of the commentary to draft article 27 provisionally adopted (*Yearbook … 1996*, vol. II (Part Two), p. 99).

[921] [9] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 420.

European Court of Human Rights

El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[922] [120]

[A/68/72, para. 87]

[*Husayn (Abu Zubaydah)* v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[923] [85]

[A/71/80, para. 68]]

Al Nashiri v. *Poland*

In *Al Nashiri* v. *Poland*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 as relevant international law.[924] [125]

[A/71/80, para. 91]

[*Big Brother Watch and others* v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles

> would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17).[925] [80]

[A/74/83, p. 17]]

[*Nasr et Ghali* v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[926] [82]

[A/74/83, p. 17]]

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[922] [120] See footnote [552] 84 above.

[923] [[85] ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

[924] [125] ECHR, Former Fourth Section, Application No. 28761/11, Judgment, 24 July 2014, para. 207.

[925] [[80] ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.]

[926] [[82] ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

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 article 16 under "principal legal and other texts",[927] [132] and noted that "[a]s the International Court of Justice decided in the Bosnia Genocide Case (2007), Article 16 of the State responsibility articles reflects a rule of customary international law".[928] [133]

[A/74/83, p. 25]

European Court of Human Rights

Big Brother Watch and others v. *United Kingdom*

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 16 would be relevant in a case of interception of communications by foreign intelligence services

> if the receiving State aided or assisted the foreign intelligence services in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the services, the receiving State was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the receiving State.[929] [106]

[A/77/74, p. 20]

[927] [132] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 3.33.

[928] [133] *Ibid*., para. 9.10.

[929] [106] See footnote [517] 63 above, para. 495.

Article 17. Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16 a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,[930] [287] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[931] [288] and the case proceeded on that basis.[932] [289] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds … from the fact that the protecting State alone represents the protected territory in its

[930] [287] *Rights of Nationals of the United States of America in Morocco* (footnote [225] 108 above), p. 176.

[931] [288] *Ibid*., *I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid*., p. 434.

[932] [289] See *Rights of Nationals of the United States of America in Morocco* (footnote [225] 108 above), p. 179.

international relations",[933] [290] and that the protecting State is answerable "in place of the protected State".[934] [291] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[935] [292] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other State: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.[936] [293]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[937] [294] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what

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[933] [290] *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 649.

[934] [291] *Ibid.*, p. 648.

[935] [292] *Ibid.*

[936] [293] See, *e.g.*, *LaGrand, Provisional Measures* (footnote [150] 91 above).

[937] [294] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

would be required to make her responsible for the wrong inflicted upon Brown."[938] [295] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way".[939] [296] Accordingly, the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of". [940] [297] In the *Heirs of the Duc de Guise* case, the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather, the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees". [941] [298] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[942] [299]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence

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[938] [295] *Robert E. Brown (United States)* v. *Great Britain,* UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

[939] [296] *Ibid*., p. 131.

[940] [297] *Ibid*.

[941] [298] *Heirs of the Duc de Guise* (footnote [232] 115 above). See also, in another context, *Drozd and Janousek* v. *France and Spain* (footnote [507] 135 above); see also *Iribarne Pérez* v. *France*, *Eur. Court H.R., Series A*, *No. 325–C*, pp. 62–63, paras. 29–31 (1995).

[942] [299] It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, *e.g. force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

European Court of Human Rights

Big Brother Watch and others v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights referred to article 17 of the State responsibility articles.[943] 134

[A/74/83, pp. 17–25]

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 17 would be relevant in a case of interception of communications by foreign intelligence services "if the receiving State exercised direction or control over the foreign Government".[944] 107

[A/77/74, p. 21]

[943] 134 See the text accompanying footnote [516] 80.

[944] [107 See footnote [517] 63 above, para. 495.]

Article 18. Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) the coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[945] [300] As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, *e.g.* because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, *i.e.* coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[946] [301] However, coercion could possibly take other forms, *e.g.* serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (*a*) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internation-

[945] [300] P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

[946] [301] See article 49, para. 2, and commentary.

ally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (*b*) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally."[947] [302] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause".[948] [303] The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[949] [304]

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[947] [302] Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote [523] 142 above), p. 702.

[948] [303] Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

[949] [304] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", AJIL, vol. 6, No. 2 (April 1912), p. 389.

Article 19. Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Commentary

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase "under other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[950] [305] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that … it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[951] [306]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[952] [307]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while

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[950] [305] For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[951] [306] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 39, para. 48.

[952] [307] *Yearbook … 1959*, vol. II, p. 41, document A/CN.4/120.

it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[953] [308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[954] [309]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of discussion,[955][310] it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[956] [311] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[957] [312] and the performance of treaties.[958] [313] In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[959] [314] It is a matter for the law on State responsibility.

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[953] [308] *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[954] [309] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 101; see also *ibid*., page 38, para. 47.

[955] [310] *Yearbook … 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[956] [311] *Ibid*., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[957] [312] *Yearbook … 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook … 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook … 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[958] [313] See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 44–47, and his comments, *ibid*., pp. 63–74.

[959] [314] See article 73 of the Convention.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, *i.e.* those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[960] [315] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[961] [316] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[962] [317] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[963][318] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[964] [319]

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[960] [315] See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[961] [316] For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[962] [317] Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70,* p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law,* vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[963] [318] See, *e.g.*, *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 67, para. 110.

[964] [319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the

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 observed that France had alleged, "citing the report of the International Law Commission", [that] the reasons which may be invoked to justify non-execution of a treaty are a part of the general subject matter of the international responsibility of States".[965] [137] Having considered that, *inter alia*, the determination of the circumstances that may exclude wrongfulness was a subject that belonged to the customary law of State responsibility, the tribunal referred to the set of rules provisionally adopted by the International Law Commission under the title "circumstances precluding wrongfulness" (draft articles 29 to 35), and in particular to draft articles 31, 32 and 33, which it considered to be relevant to the decision on that case.[966] [138]

[A/62/62, para. 86]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

In the matter of an Arbitration Between Guyana and Suriname

In its 2007 award in the *Guyana* v. *Suriname* case, involving the delimitation of a maritime boundary between the two States, the arbitral tribunal constituted to hear the case considered a challenge by Suriname to the admissibility of the proceedings on the grounds of lack of good faith and clean hands. In dismissing such challenge, the tribunal maintained that "[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law", and noted that "the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms".[967] [19]

[A/65/76, para. 22]

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dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), pp. 392–394.

[965] [137] See footnote [40] 46 above, para. 74.

[966] [138] *Ibid*., pp. 251–252, paras. 75–76.

[967] [19] *In the matter of an Arbitration Between Guyana and Suriname*, Award, 17 September 2007, para. 418 (footnote omitted), referring to paragraph (9) of the general commentary to Part One, Chapter V ("Circumstance precluding wrongfulness").

Article 20. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[968] [320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[969] [321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

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[968] [320] 1969 Vienna Convention, art. 54 (*b*).

[969] [321] See, *e.g.*, the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences—October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[970] [322] In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[971] [323]

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[972] [324] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[973] [325]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State

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[970] [322] This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[971] [323] See paragraph (6) of the commentary to article 26.

[972] [324] UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[973] [325] Vienna Convention on Diplomatic Relations, art. 22, para. 1.

will not preclude wrongfulness in relation to another.[974] [326] Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[975][327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[976] [328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization Appellate Body

Peru—Additional Duty on Imports of Certain Agricultural Products

In *Peru—Additional Duty on Imports of Certain Agricultural Products*, the Appellate Body of the WTO noted that "without reaching the questions of whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties' within the meaning of Article 31(3)(*c*) of the Vienna Convention …, we disagree with Peru

[974] [326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

[975] [327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[976] [328] See, *e.g.*, International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

that the … ILC Articles 20 and 45 are 'relevant' rules of international law within the meaning of Article 31(3)(*c*)".[977] [126] The Appellate Body thus found that

> [h]aving concluded that the … ILC Articles 20 and 45 are not 'relevant' to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(*b*) of the GATT 1994 within the meaning of Article 31(3)(*c*) of the Vienna Convention …, there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention.[978] [127]

[A/71/80, para. 92]

[The Appellate Body … indicated that "there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention".[979] [234]

[A/71/80, para. 157]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[980] [82]

[A/77/74, p. 17]]

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[977] [126] WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.104 (as restated in paras. 5.118 and 6.4).

[978] [127] *Ibid*., para. 5.105 (as restated in paras. 5.118 and 6.4).

[979] [234] [WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.105 (as restated in paras. 5.118 and 6.4).]

[980] [[82] See footnote [126] 14 above, para. 155.]

Article 21. Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.[981] [329]

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[982] [330] In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[983] [331] The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty … from the outbreak of hostilities between States".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[984] [332] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

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[981] [329] Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[982] [330] See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[983] [331] In *Oil Platforms, Preliminary Objection* (footnote [750] 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[984] [332] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79, "they constitute intransgressible principles of international customary law". On the relationship between human rights and humanitarian law in times of armed conflict, see page 240, para. 25.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

> [T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[985] 333

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[986] 334

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

> [A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.[987] 335

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

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[985] 333 *Ibid.*, p. 242, para. 30.

[986] 334 See, *e.g.*, the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[987] 335 See footnote [48] 54 above, p. 261, para. 89.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[988] [82]

[A/77/74, p. 17]]

[988] [[82] See footnote [126] 14 above, para. 155.]

Article 22. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[989] [336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[990] [337] *"Cysne"*,[991] [338] and *Air Service Agreement*[992] [339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[993] [340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the

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[989] [336] *Gabčíkovo-Nagymaros Project* (see footnote [31] 37 above), p. 55, para. 83.

[990] [337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[991] [338] *Ibid*., p. 1035, at p. 1052 (1930).

[992] [[339] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415.]

[993] [340] *Ibid*., especially pp. 443–446, paras. 80–98.

extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[994] 341

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[995] 342

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[996] 343 For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[997] 344 Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

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[994] 341 *"Cysne"* (footnote [991] 338 above), pp. 1056–1057.

[995] 342 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 83.

[996] 343 For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[997] 344 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

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* cited article 22 of the State responsibility articles in support of its assertion that:

> Countermeasures may constitute a valid defence against a breach of Chapter Eleven [of NAFTA] insofar as the Respondent State proves that the measure in question meets each of the conditions required by customary international law, as applied to the facts of the case.[998] 20

The tribunal provided further that

> [it] took as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice [in the *Gabčíkovo-Nagymaros* case], as confirmed by [articles 22 and 49 of] the ILC Articles.[999] 21

[A/65/76, para. 23]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc. v. *The United Mexican States*

In its 2008 Decision on Responsibility, the tribunal established to hear the case of *Corn Products International Inc.* v. *Mexico* held that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of the taking of lawful countermeasures in the case before it which involved alleged violations of obligations under NAFTA. The tribunal explained that

> … the fact that the tax violated Mexico's obligations under the GATT [did not] mean that it could not constitute a countermeasure which operated to preclude wrongfulness under the NAFTA. It is a feature of countermeasures that they may operate to preclude wrongfulness in respect of one obligation of the State which takes them, while not affecting another obligation of that State. This is apparent from the text of Article 50 of the ILC Articles on State Responsibility … [which] appears to contemplate that a measure which is contrary to one of [the obligations referred to in article 50, paragraph 1,] will entail a breach of *that* obligation by the State which undertakes it but may nevertheless preclude the wrongfulness in relation to another obligation of the State which does not fall within paragraphs (*a*) to (*d*).[1000] 22

Nonetheless, the tribunal subsequently held that, since NAFTA conferred upon investors substantive rights separate and distinct from those of the State of which they are nationals, a countermeasure ostensibly taken against the United States could not deprive investors of such rights, and accordingly could not be raised as a circumstance precluding

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[998] 20 See footnote [3] 4 above, para. 121.

[999] 21 *Ibid*., para. 125.

[1000] 22 See footnote [4] 5 above, para. 158, emphasis in the original.

wrongfulness in relation to a violation of the investor's rights.[1001] [23] The tribunal also held that the defence of the taking of lawful countermeasures could not be upheld because the Respondent had failed to establish the existence of a prior breach of international law by the United States, in response to which the Respondent was taking the countermeasure. As the United States was not a party to the proceedings, the tribunal held that it did not have the jurisdiction to evaluate such a claim. [1002] [24]

[A/65/76, para. 24]

International Court of Justice

Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. *Greece)*

In its judgment in the *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia* v. *Greece)*, the International Court of Justice referred to the State responsibility articles when rejecting the respondent's claim that "its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO".[1003] [121]

[A/68/72, para. 88]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1004] [82]

[A/77/74, p. 17]]

[1001] [23] *Ibid*., paras. 167 and 176. See also article 49.

[1002] [24] *Ibid*., paras. 182–189. See also article 49.

[1003] [121] ICJ, Judgment, 5 December 2011, *I.C.J. Reports 2011*, p. 644, at p. 692, para. 164.

[1004] [82 See footnote [126] 14 above, para. 155.]

Article 23. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[1005] [345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (*e.g.* stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (*e.g.* loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic

[1005] [345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,[1006] [346] even if the resulting injury itself was accidental and unintended.[1007] [347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[1008] [348] The same view was taken at the United Nations Conference on the Law of Treaties.[1009] [349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

> Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties … Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.[1010] [350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, *e.g.* where a State aircraft is forced, due to damage or loss of control of the aircraft

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[1006] [346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[1007] [347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

M. M. Whiteman, *Damages in International Law* (Washington, D. C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote [1005] 345 above), para. 130.

[1008] [348] *Yearbook … 1966*, vol. II, p. 255.

[1009] [349] See, *e.g.*, the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[1010] [350] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 102.

owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[1011] 351

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[1012] 352 In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[1013] 353 In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[1014] 354 *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.[1015] 355 More recently, in the *"Rainbow Warrior"* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

[1011] 351 See, *e.g.*, the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote [1005] 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D. C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[1012] 352 See, *e.g.*, the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote [1005] 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote [234] 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[1013] 353 *Lighthouses* arbitration (footnote [702] 182 above), pp. 219–220.

[1014] 354 UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[1015] 355 *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[1016] 356

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[1017] 357

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State … "[1018]358 Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, paragraph 2 (*a*) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) Paragraph 2 (*b*) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[1019] 359 Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

[1016] 356 *"Rainbow Warrior"* (footnote [40] 46 above), p. 253.

[1017] 357 On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, *e.g.*, case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[1018] 358 ILR, vol. 96 (1994), p. 318, para. 55.

[1019] 359 As the study prepared by the Secretariat (footnote [1005] 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

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 referred to the text of draft article 31 provisionally adopted by the International Law Commission,[1020] 139 as well as to the commentary thereto, and concluded that France could not invoke the excuse of *force majeure* to preclude the wrongfulness of the removal of Major Mafart from the island of Hao for health reasons, in violation of the agreement between the Parties. Having quoted paragraph 1 of draft article 31, the tribunal stated the following:

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (*Yearbook … 1979*, vol. II, p. 122, para. 2, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*ibid*., p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means … The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation … the Commission has sought to emphasize that the State must not have had any option in that regard (*Yearbook … 1979*, vol. II, p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because

[1020] 139 The part of this provision concerning *force majeure* was amended and incorporated in article 23 finally adopted by the International Law Commission in 2001. Draft article 31 provisionally adopted read as follows:

> Article 31
> *Force majeure* and fortuitous event
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
>
> 2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.[1021] 140

[A/62/62, para. 87]

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 stated that the defence by Burundi according to which it was objectively impossible for the shareholder, Libyan Arab Foreign Investment company (LAFICO), to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1022] 141 was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility". The tribunal first referred to the exception of *force majeure*, and in this regard quoted in extenso draft article 31 provisionally adopted by the International Law Commission. The tribunal found that it was "not possible to apply this provision to the case … because the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi".[1023] 142

[A/62/62, para. 88]

International arbitral tribunal (under the ICSID Convention)

Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. *Bolivarian Republic of Venezuela*

In its 2003 award, the arbitral tribunal constituted to hear the *Aucoven* v. *Venezuela* case, in examining whether Venezuela's failure to increase the toll rates (as provided by the relevant concession agreement) was excused by the civil unrest existing in the country in 1997, considered that *force majeure* was "a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law".[1024] 143 It then referred, *inter alia*, to the International Law Commission articles on State responsibility in general (and implicitly to article 23 finally adopted in 2001) to support its finding that international law did not impose a standard which would displace the application of Venezuela's national law referring to *force majeure*:

… the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular *General Dynamics Telephone Sys. Ctr.* v. *The Islamic Republic of Iran*,

[1021] 140 See footnote [40] 46 above, pp. 252–253.

[1022] 141 In this case, LAFICO had contended that the expulsion from Burundi of Libyan managers of HALB and one of its subsidiaries, and the prohibition against LAFICO carrying out any activities in Burundi constituted an infringement by Burundi of its shareholder rights and had prevented HALB from realizing its objectives (*i.e.* to invest in companies operating within certain sectors of the Burundi economy), thereby violating *inter alia* the 1973 Technical and Economic Cooperation Agreement between the Libyan Arab Republic and the Republic of Burundi.

[1023] 142 See footnote [824] 127, para. 55 (English version in: *International Law Reports*, vol. 96, p. 318).

[1024] 143 ICSID, Case No. ARB/00/5, Award, 23 September 2003, para. 108.

Award No. 192–285–2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also *Gould Marketing, Inc.* v. *Ministry of Defense of Iran*, Award No. ITL 24–49–2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and *Sylvania Tech. Sys., Inc.* v. *Iran*, Award No. 180–64–1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the draft articles on State Responsibility of the International Law Commission, and the legal arguments of the parties.[1025] 144

[A/62/62, para. 89]

Sempra Energy International v. Argentine Republic

In its 2007 award, the arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, which arose under the 1991 bilateral investment treaty between the United States and Argentina, was faced with a claim arising out of changes in the regulatory framework for private investments made in the wake of the economic crisis in Argentina in the late 1990s. The tribunal was presented, *inter alia*, with an argument on the part of the respondent that "the theory of 'imprévision' has been incorporated into Argentine law", to which the tribunal responded:

Insofar as the theory of 'imprévision' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation. In the commentary to this article, it is stated that '[*f*]*orce majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.[1026] 25

[A/65/76, para. 25]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

In *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic*, the *ad hoc* committee upheld the arbitral tribunal's rejection of the applicability of the principle of "*imprevisión*" under Argentine law, as well as the tribunal's comparison with article 23 of the State responsibility articles, made in support of its decision, to the extent that "the theory of 'imprevisión' is expressed in the concept of *force majeure*".[1027] 122

[A/68/72, para. 89]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

[1025] 144 *Ibid.*, para. 123.

[1026] 25 ICSID, Case No. ARB/02/16, Award, 28 September 2007, para. 246.

[1027] 122 ICSID, Case No. ARB/01/13, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 287.

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1028] [82]

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar* cited article 23, indicating that "under the law, *force majeure* occurs when a wrongful act is due to 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'."[1029] [108] However, the tribunal concluded that in the facts of the case, there was nothing to indicate that it had been materially impossible for the State to perform its obligation.

[A/77/74, p. 21]

[1028] [[82] See footnote [126] 14 above, para. 155.]

[1029] [108] ICSID, Case No. ARB/17/18, Award, 17 April 2020, para. 347.

Article 24. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[1030] [360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[1031] [361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[1032] [362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

[1030] [360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, *e.g.*, O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[1031] [361] See the study prepared by the Secretariat (footnote [1005] 345 above), paras. 141–142 and 252.

[1032] [362] United States of America, *Department of State Bulletin* (footnote [1011] 351 above), reproduced in the study prepared by the Secretariat (footnote [1005] 345 above), para. 144.

I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[1033] 363

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[1034] 364 Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[1035] 365 The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[1036] 366 The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

(2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

(3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.[1037] 367

In fact the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

[1033] 363 Study prepared by the Secretariat (footnote [1005] 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[1034] 364 *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote [1005] 345 above), para. 136.

[1035] 365 There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, *e.g.*, the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote [1005] 345 above), para. 121.

[1036] 366 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 254–255, para. 78.

[1037] 367 *Ibid*., p. 255, para. 79.

[C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[1038] [368]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[1039] [369] Similar provisions appear in the international conventions on the prevention of pollution at sea.[1040] [370]

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), *e.g.* the requirement to notify

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[1038] [368] *Ibid.*, p. 263, para. 99.

[1039] [369] See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[1040] [370] See, *e.g.*, the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*), of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1, of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat." See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[1041] 371

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under paragraph 2 (*a*), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[1042] 372

(10) Distress can only preclude wrongfulness where the interests sought to be protected (*e.g.* the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Paragraph 2 (*b*) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

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 referred to draft article 32 provisionally adopted by the International Law Commission,[1043] 145 as well as to the

[1041] 371 See *Cashin and Lewis* v. *The King*, *Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the *"May"* v. *The King*, *Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King*, *ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[1042] 372 See paragraph (9) of the commentary to article 23.

[1043] 145 This provision was amended and incorporated in article 24 finally adopted by the International Law Commission in 2001. Draft article 32 provisionally adopted read as follows:

> Article 32
> Distress
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of

commentary thereto, to determine whether the wrongfulness of France's behaviour could be excluded on the basis of distress. The tribunal also clarified, in this context, the difference between this ground of justification and, first, that of *force majeure*, and, second, that of state of necessity, dealt with under draft article 33 provisionally adopted by the Commission:[1044] 146

> Article 32 of the articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the 'distress' of the author of the conduct which constitutes the act of State whose wrongfulness is in question.
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> …
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> The commentary of the International Law Commission explains that '"distress" means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question' (*Yearbook … 1979*, p. 133, para. 1).
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> The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, 'has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster' (*ibid*., p. 134, para. 4). Yet the Commission found that 'the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases' (*ibid*., p. 135, para. 8).
>
> The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: 'in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand' (*Yearbook … 1979*, p. 122, para. 3). But 'this choice is not a "real choice" or "free choice" as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the "possibility" of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress' (*Yearbook … 1979*, p. 133, para. 2).
>
> The report adds that the situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State' (*Yearbook … 1979*, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

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that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[1044] 146 This provision was amended and incorporated in article 25 finally adopted in 2001. The text of that provision was identical to that of draft article 33 adopted on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65) and is contained in the passage of the judgement of the ICJ in the *Gabčíkovo-Nagymaros Project* case reproduced [on pp. 278–280] below.

The report also distinguishes with precision the ground of justification of article 32 from the controversial doctrine of the state of necessity dealt with in article 33. Under article 32, on distress, what is 'involved is situations of necessity' with respect to the actual person of the State organs or of persons entrusted to his care, 'and not any real "necessity" of the State'.

On the other hand, article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of article 32 and at the same time the controversial character of the proposal in article 33 on state of necessity.

It has been stated in this connection that there is no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed … in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated … In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.[1045] 147

The arbitral tribunal then examined France's behaviour in accordance with these legal considerations. It concluded that

the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart [from the island of Hao] without obtaining New Zealand's consent [as provided for by the agreement between the Parties], but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared).[1046] 148

[A/62/62, para. 90]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1047] 82

[A/77/74, p. 17]]

[1045] 147 See footnote [40] 46 above.

[1046] 148 *Ibid*., p. 263, para. 99.

[1047] [82 See footnote [126] 14 above, para. 155.]

International arbitral tribunal (under the ICSID Convention)

(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 quoted article 24, noting that, in a situation of distress, "the author of a wrongful act … 'has no other reasonable way … of saving the author's life or the lives of other persons entrusted to the author's care.' Again, as already indicated, it is not clear how inaction by law enforcement could have been the only way to save lives".[1048] [109]

[A/77/74, p. 21]

[1048] [109] [ICSID, Case No. ARB/17/18, Award, 17 April 2020], para. 349.

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) the international obligation in question excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

Commentary

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[1049]373

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged

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[1049] 373 Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

> the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.
>
> The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[1050] 374

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[1051]375 Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[1052] 376 In his message to Congress of 7 December 1841, President Tyler reiterated that:

> This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[1053] 377

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."[1054] 378

[1050] 374 Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, *Peace*, p. 232.

[1051] 375 See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D. C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote [1050] 374 above), p. 221, at p. 228.

[1052] 376 *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[1053] 377 *Ibid.*, 1841–1842, vol. 30, p. 194.

[1054] 378 *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[1055] [379] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits … that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is … *self-destructive*".[1056] [380]

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[1057] [381]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[1058] [382]

(8) In *Société commerciale de Belgique*,[1059] [383] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its inter-

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[1055] [379] *Ibid., 1893–1894* (London, H. M. Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (footnote [1005] 345 above), para. 155.

[1056] [380] See footnote [1014] 354 above; see also the study prepared by the Secretariat (footnote [1005] 345 above), para. 394.

[1057] [381] *Ibid.*

[1058] [382] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

[1059] [383] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78,* p. 160.

national obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[1060] [384] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[1061] [385]

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[1062] [386] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[1063] [387]

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[1064] [388]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers … that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words …

[1060] [384] *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote [1005] 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[1061] [385] See footnote [1059] 383 above; and the study prepared by the Secretariat (footnote [1005] 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote [1015] 355 above); the *French Company of Venezuelan Railroads* case (footnote [692] 178 above) p. 353; and the study prepared by the Secretariat (footnote [1005] 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[1062] [386] *The "Torrey Canyon"*, Cmnd. 3246 (London, H. M. Stationery Office, 1967).

[1063] [387] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[1064] [388] *"Rainbow Warrior"* (footnote [40] 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (footnote [1018] 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

… In the present case, the following basic conditions … are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law. [1065] 389

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[1066] 390 Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".[1067] 391 Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[1068] 392 The Court held that it had no jurisdiction over the case.[1069] 393

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers,

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[1065] 389 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 40–41, paras. 51–52.

[1066] 390 *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[1067] 391 *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[1068] 392 *Fisheries Jurisdiction* (footnote [1066] 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote [1067] 391 above), paras. 17–45.

[1069] 393 By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Conservation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

subject to strict conditions.[1070] [394] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[1071] [395]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[1072] [396] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[1073] [397] In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[1074] [398]

(15) The first condition, set out in paragraph 1 (*a*), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave,

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[1070] [394] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D. C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 *et seq.*; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D. C., Carnegie Institution, 1916), vol. III, p. 149.

[1071] [395] For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[1072] [396] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[1073] [397] This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (footnote [31] 37 above), p. 40, para. 51.

[1074] [398] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude … that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[1075] 399

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[1076] 400 The word "ways" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[1077] 401 but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in paragraph 1 (*b*), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[1078] 402

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of

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[1075] 399 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 42, para. 54.

[1076] 400 *Ibid.*, pp. 42–43, para. 55.

[1077] 401 *Ibid.*, p. 40, para. 51.

[1078] 402 In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (footnote [31] 37 above), p. 46, para. 58.

norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[1079] [403] and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[1080] [404]

(19) Over and above the conditions in paragraph 1, paragraph 2 lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". Paragraph 2 (*a*) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to paragraph 2 (*b*), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[1081] [405] For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[1082] [406] The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.[1083] [407]

[1079] [403] *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

[1080] [404] See, *e.g.*, third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages,; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[1081] [405] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 46, para. 57.

[1082] [406] For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year,* 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 *et seq.* and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; 879th meeting, 21–22 July 1960, paras. 80 *et seq.* and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[1083] [407] See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[1084] [408] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[1085] [409]

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 stated that the defence by Burundi according to which it was objectively impossible for the shareholder LAFICO to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1086] [149] was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility".[1087] [150] The tribunal, after excluding the exception of *force majeure*, then considered "whether it [was] possible to apply the notion of 'state of necessity' elaborated in article 33 of the draft articles", as provisionally adopted by the International Law Commission. After having quoted in extenso the said provision, the tribunal stated:

> It is not desired here to express a view on the appropriateness of seeking to codify rules on "state of necessity" and the adequacy of the concrete proposals made by the International Law Commission, which has been a matter of debate in the doctrine.[1088] [151]

[1084] [408] See, *e.g.*, article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[1085] [409] See, *e.g.*, M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

[1086] [149] See footnote [1023] 142 above.

[1087] [150] See footnote [824] 127 above, para. 55.

[1088] [151] *Ibid.*, p. 319, para. 56.

The tribunal found that "the various measures taken by [Burundi] against the rights of the shareholder LAFICO [did] not appear to the Tribunal to have been the only means of safeguarding an essential interest of Burundi against a grave and imminent peril".[1089] 152

[A/62/62, para. 91]

International Court of Justice

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court examined "the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments".[1090] 153 In this respect, relying on draft article 33 (State of necessity) as adopted by the International Law Commission on first reading, which it quoted, it considered that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation":

> 50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in article 33 of the draft articles on the international responsibility of States that it adopted on first reading. That provision is worded as follows:
>
> > Article 33. State of necessity
> >
> > 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
> >
> > (*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
> >
> > (*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.
> >
> > 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
> >
> > (*a*) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
> >
> > (*b*) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
> >
> > (*c*) if the State in question has contributed to the occurrence of the state of necessity. (*Yearbook of the International Law Commission, 1980*, vol. II, Part Two, p. 34.)

[1089] 152 *Ibid.*

[1090] 153 ICJ, Judgment, *I.C.J. Reports 1997*, p. 39, para. 49.

In its Commentary, the Commission defined the 'state of necessity' as being

> 'the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State' (*ibid*., para. 1).

It concluded that 'the notion of state of necessity is … deeply rooted in general legal thinking' (*ibid*., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in article 33 of its draft

> 'in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception—and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness … ' (*ibid*., p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.[1091] [154]

The Court later referred to the commentary by the International Law Commission when examining the meaning given to some terms used in the said draft provision. With regard to the expression "essential interest", the Court noted:

The Commission, in its Commentary, indicated that one should not, in that context, reduce an 'essential interest' to a matter only of the 'existence' of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, 'a grave danger to … the ecological preservation of all or some of [the] territory [of a State]' (*ibid*., p. 35, para. 3); and specified, with reference to State practice, that 'It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States.' (*ibid*., p. 39, para. 14).[1092] [155]

With regard to the terms "grave and imminent peril", the Court stated that:

As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (*Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[1093] [156]

In its conclusion on the issue of the existence of a "state of necessity", the Court referred again to the commentary of the International Law Commission:

[1091] [154] *Ibid*., pp. 39–40, paras. 50–51.

[1092] [155] *Ibid*., p. 41, para. 53.

[1093] [156] *Ibid*., p. 42, para. 54.

The Court concludes from the foregoing that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation 'characterized so aptly by the maxim *summum jus summa injuria*' (*Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 31).[1094] 157

[A/62/62, para. 92]

International Tribunal for the Law of the Sea

The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal referred to draft article 33 adopted by the International Law Commission on first reading, as well as to the earlier judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case,[1095] 158 to identify the conditions for the defence based on the "state of necessity" under customary international law. In the context of its examination of the issue whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone could be justified under general international law by Guinea's appeal to "state of necessity",[1096] 159 the Tribunal stated the following:

133. In the Case Concerning the *Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 40 and 41, paras. 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on 'state of necessity' which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission's draft articles on State responsibility, are:

> (*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> (*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.

134. In endorsing these conditions, the Court stated that they 'must be cumulatively satisfied' and that they 'reflect customary international law'.[1097] 160

[A/62/62, para. 93]

International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

In its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court reaffirmed its earlier finding in the

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[1094] 157 *Ibid.*, p. 45, para. 57.

[1095] 158 See above [pp. 278–280].

[1096] 159 ITLOS, Judgment, *ITLOS Reports*, p. 65, para. 170 (1999), para. 132.

[1097] 160 *Ibid.*, paras. 133–134.

Gabčíkovo-Nagymaros Project case on the state of necessity (see [pages 278–280] above), by reference to article 25 finally adopted by the International Law Commission in 2001:

The Court has … considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance [*i.e.* conventions on international humanitarian law and human rights law] include qualifying clauses of the rights guaranteed or provisions for derogation … Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (article 25 of the International Law Commission's articles on responsibility of States for internationally wrongful acts; see also former article 33 of the draft articles on the international responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.[1098] 161

[A/62/62, para. 94]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case[1099] 162 examined the respondent's subsidiary argument according to which Argentina should be exempted from liability for its alleged breach of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic in light of the existence of a state of necessity or state of emergency due to the severe economic, social and political crisis in the country as of 2000. Argentina having based its argument on article 25 finally adopted by the International Law Commission in 2001 and the pronouncement of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case (see [pages 278–280] above), the tribunal noted in particular that the said provision "adequately reflect[ed] the state of customary international law on the question of necessity":

315. The Tribunal, like the parties themselves, considers that article 25 of the articles on State responsibility adequately reflects the state of customary international law on the question of necessity. This article, in turn, is based on a number of relevant historical cases discussed in the Commentary, with particular reference to the *Caroline*, the *Russian Indemnity, Société Commerciale de Belgique*, the *Torrey Canyon* and the *Gabcíkovo-Nagymaros* cases.

[1098] 161 ICJ, Advisory Opinion, 9 July 2004, p. 136, para. 140.

[1099] 162 It should be noted that, on 8 September 2005, Argentina filed an application requesting the annulment of this award on the grounds that the tribunal had allegedly manifestly exceeded its powers and that the award had allegedly failed to state the reasons on which it is based. […]

316. Article 25 reads as follows:

…

317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgement on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

…

324. The International Law Commission's comment to the effect that the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,' is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by article 26 of the articles.

326. In addition to the basic conditions set out under paragraph 1 of article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the commentary, the use of the expression 'in any case' in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The commentary clarifies that this contribution must be 'sufficiently substantial and not merely incidental or peripheral'. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administra-

tion and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcíkovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be 'cumulatively' satisfied.

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."[1100] 163

The tribunal then turned to the discussion on necessity and emergency under article XI of the bilateral treaty[1101] 164 and noted *inter alia* in this context that the consequences stemming from Argentina's economic crisis "while not excusing liability or precluding wrongfulness from the legal point of view … ought nevertheless to be considered by the Tribunal when determining compensation".[1102] 165

[A/62/62, para. 95]

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

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* found that Argentina was excused, under article XI of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, from liability for any breaches of that treaty between 1 December 2001 and 26 April 2003, given that it was under a state of necessity. The tribunal then underlined that its conclusion was supported by "the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility)" and gave a lengthy commentary on the conditions thereon:

245. … The concept of excusing a State for the responsibility for violation of its international obligations during what is called a 'state of necessity' or 'state of emergency' also exists in international law. While the Tribunal considers that the protections afforded by article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility) supports the Tribunal's conclusion.

246. In international law, a state of necessity is marked by certain characteristics that must be present in order for a State to invoke this defense. As articulated by Roberto Ago, one of the mentors of the draft articles on State responsibility, a state of necessity is identified by those conditions in which

[1100] 163 ICSID, Case No. ARB/01/8, Award, 12 May 2005, paras. 315–331 (footnotes omitted).

[1101] 164 The said provision read as follows: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

[1102] 165 See footnote [1100] 163 above, para. 356.

a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory. In other words, the State must be dealing with interests that are essential or particularly important.

247. The United Nations Organization has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it.

248. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its draft articles on State responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.

…

250. Taking each element in turn, article 25 requires first that the act must be the only means available to the State in order to protect an interest …

251. The interest subject to protection also must be essential for the State. What qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests …

…

253. The interest must be threatened by a serious and imminent danger …

254. The action taken by the State may not seriously impair another State's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action. The idea is to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest.

255. The international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a bilateral investment treaty constitutes the acceptance, in the relations between States, of the possibility that one of them may invoke the state of necessity.

…

258. While this analysis concerning article 25 of the draft articles on State responsibility alone does not establish Argentina's defence, it supports the Tribunal's analysis with regard to the meaning of article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.

259. Having found that the requirements for invoking the state of necessity were satisfied, the Tribunal considers that it is the factor excluding the State from its liability *vis-à-vis* the damage caused as a result of the measures adopted by Argentina in response to the severe crisis suffered by the country.

…

261. Following this interpretation the Tribunal considers that article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, *i.e.* certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately."[1103] 166

[A/62/62, para. 96]

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentine Republic* case, in its 2007 award, dealt with a plea, raised by the respondent, of the existence of a state of necessity. In considering the assertions of the parties as to the customary international law status of article 25 of the State responsibility articles, the tribunal

… share[d] the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period of time.

…

345. There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity 'may not be invoked' unless such conditions are met … [1104] 27

In applying article 25, the tribunal held that while the economic crisis which Argentina faced in the late 1990s was severe, it nonetheless did not find the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, to be convincing.[1105] 28 Furthermore, the tribunal referred to the requirement in article 25 that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity, which it understood to be a mere "expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault".[1106] 29 On an analysis of the facts, the tribunal held that there had to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore could not be claimed that the burden fell entirely on exogenous factors.[1107] 30 Finally, the tribunal recalled the decision of the International Court of Justice in the *Gabčíkovo-Nagymaros* case[1108] 31 in which the Court referred to the work of the International Law Commission and held that the conditions in the predecessor provision to article 25 were to be cumulatively met. Since that was not

[1103] 166 ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 245–259 and 261 (footnotes omitted).

[1104] 27 See footnote [1026] 25 above, paras. 344 and 345.

[1105] 28 *Ibid*., para. 348.

[1106] 29 *Ibid*., para. 353.

[1107] 30 *Ibid*., para. 354.

[1108] 31 See footnote [31] 37 above, p. 7.

the case on the facts before it, the tribunal concluded that "the requirements for a state of necessity under customary international law ha[d] not been fully met".[1109] [32] The tribunal further considered the interplay between the State responsibility articles, operating at the level of secondary rules, and the bilateral treaty between the parties in the context of an invocation by the respondent of the state of necessity under article XI of the treaty, which envisaged either party taking measures for the "protection of its own essential security interests". In considering what was meant by "essential security interest", the tribunal explained that "the requirements for a state of necessity under customary international law, as outlined … in connection with their expression in Article 25 of the State responsibility articles, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case."[1110] [33] Furthermore, the tribunal confirmed that it did not "believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle."[1111] [34] As the Tribunal found that the crisis invoked did not meet the customary law requirements of Article 25, it likewise concluded that it was not necessary to undertake further judicial review under Article XI given that the article did not set out conditions different from customary law.[1112] [35]

[A/65/76, para. 26]

Special Court for Sierra Leone

Prosecutor v. *Fofana and Kondewa (CDF Case)*

A Trial Chamber of the Special Court for Sierra Leone, in *Prosecutor* v. *Fofana and Kondewa (CDF Case)*, Case No. SCSL-04–14-T, in a judgment handed down on 2 August 2007, made an indirect reference, at para. 84, to the predecessor article to draft article 25 of the 2001 articles on responsibility of States for internationally wrongful acts (namely, draft article 33, as adopted on first reading) by referring to the 1997 judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, as "clearly express[ing] the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts".

[A/65/76, footnote 26]

[1109] [32] See footnote [1026] 25 above, para. 355.

[1110] [33] *Ibid*., para. 375.

[1111] [34] *Ibid*., para. 378.

[1112] [35] *Ibid*., para. 388.

Ad hoc committee (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The *ad hoc* committee in *Sempra Energy International* v. *Argentine Republic*, while acknowledging the customary international law status of article 25, indicated that "[i]t does not follow, however, that customary law … establishes a peremptory 'definition of necessity and the conditions for its operation'. While some norms of customary law are peremptory (*jus cogens*), others are not, and States may contract otherwise … ".[1113] [123]

The committee highlighted the differences between article 25 and article XI of the bilateral investment treaty in question, in the following terms:

> 200. … Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State'. Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'. Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful'. Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to 'define necessity and the conditions for its operation' for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.[1114] [124]

[A/68/72, paras. 90–91]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

The *ad hoc* committee in *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic* treated article 25 as reflecting the "principle of necessity under customary international law".[1115] [125] Following an in-depth analysis[1116] [126] of the "only way" requirement in article 25, paragraph 1(*a*), the committee observed that the arbitral tribunal had been required "to determine whether, on the proper construction of Article 25(1)(*a*) of the ILC Articles, the 'only way' requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis".[1117] [127] It concluded that "the Tribunal did not in fact apply Article 25(1)(*a*) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue".[1118] [128] The committee further found the tribunal's treatment of the requirement that the measures adopted by Argentina "seriously impair[ed] an essential interest of the State or States towards which the obligation exists, or of the international community as a

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[1113] [123] See footnote [6] 4 above, para. 197.

[1114] [124] *Ibid*., para. 200.

[1115] [125] See footnote [1027] 122 above, para. 349.

[1116] [126] *Ibid*., paras. 368–376.

[1117] [127] *Ibid*., para. 377.

[1118] [128] *Ibid*.

whole",[1119] [129] within the meaning of paragraph 1(*b*), to be obscure.[1120] [130] The committee also analysed, and found shortcomings with, the tribunal's consideration of the aspect of "contribution to the situation of necessity", in paragraph 2(*b*).[1121] [131] The committee found fault with the tribunal's reliance on an expert opinion on an economic issue. It held that:

> [t]he Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the [expert opinion]. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(*b*) to the facts as found (having if necessary made legal findings as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "*contributed to the situation of necessity*" within the meaning of Article 25(2)(*b*). For the Tribunal to leap from the first step to the third without undertaking the second amount[ed] in the Committee's view to a failure to apply the applicable law.[1122] [132]

[A/68/72, para. 92]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A. v. *The Argentine Republic*

In *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, the arbitral tribunal, upon consideration of the plea of necessity raised by the respondent, noted that:

> [t]he severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations. The customary international law, as restated by Article 25 of the ILC Articles … imposes additional strict conditions. The reason of course is that given the frequency of crises and emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations … .[1123] [133]

[A/68/72, para. 93]

Total S.A. v. *Argentine Republic*

The arbitral tribunal in *Total S.A.* v. *Argentine Republic* "recall[ed] that customary international law impose[d] strict conditions in order for a State to successfully avail itself of the defence of necessity" and continued that "Article 25 of the ILC Articles on State Responsibility [was] generally considered as having codified customary international law in the matter … ".[1124] [134]

[A/68/72, para. 94]

[1119] [129] *Ibid*., para. 379 (emphasis omitted).

[1120] [130] *Ibid*. paras. 380–384.

[1121] [131] *Ibid*., paras. 385–392.

[1122] [132] *Ibid*., para. 393.

[1123] [133] ICSID, Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 236.

[1124] [134] See footnote [164] 29 above, para. 220.

Impregilo S.p.A. v. *Argentine Republic*

In *Impregilo S.p.A.* v. *Argentine Republic*, the arbitral tribunal, in considering a case arising from the 2001 Argentine financial crisis, evaluated *in extenso*,

> … Argentina's necessity plea under the standard set by customary international law, which the Parties agree has been codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts", and determined that the applicable standard "by definition is stringent and difficult to satisfy.[1125] 135

[A/68/72, para. 95]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* rejected the applicant's claim that the arbitral tribunal had failed to address its arguments in connection with "continuing post-'state of necessity' period loss" on the basis that it had not been a major argument in the proceedings before the tribunal.[1126] 136 In reaching such conclusion, the committee recalled the "differences between Article XI of the BIT and the principle of necessity".[1127] 137

[A/68/72, para. 96]

International arbitral tribunal (under the ICSID Convention)

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

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal analysed the differences between article XI of the treaty in question (which it deemed to be the *lex specialis*), and article 25 of the State responsibility articles (the *lex generalis*),[1128] 138 and referred to the reasoning of the Decision on Annulment in *Continental Casualty Company* v. *The Argentine Republic*.[1129] 139 Notwithstanding such differences, it considered, *inter alia*, the rule on "contributory behaviour", contained in article 25(2)(*b*), to be a "rule of general international law[] applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the [BIT]".[1130] 140

[A/68/72, para. 97]

[1125] 135 ICSID, Case No. ARB/07/17, Award, 21 June 2011, paras. 344, 345–359.

[1126] 136 ICSID, Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 128.

[1127] 137 *Ibid*., paras. 116, 117–124.

[1128] 138 See footnote [56] 16 above, paras. 553–555.

[1129] 139 See footnote [1126] 136 above.

[1130] 140 See footnote [56] 16 above, para. 621.

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic*, upon considering the state of necessity defence as articulated in the State responsibility articles, found that the respondent had failed to meet its burden to demonstrate certain key elements as required by article 25, particularly that the wrongful act had been the only way to safeguard its essential interest, and that the respondent had not contributed to the situation of necessity. The Tribunal concluded that "[n]ecessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult".[1131] [141]

[A/68/72, para. 98]

Ad hoc committee (under the ICSID Convention)

Impregilo S.p.A. v. *Argentine Republic*

In *Impregilo S.p.A.* v. *Argentine Republic*, the *ad hoc* committee constituted to hear Argentina's application for annulment of the award found that, in considering, *inter alia*, article 25 of the State responsibility articles, the arbitral tribunal had "based its decision on several solid sources".[1132] [128]

[A/71/80, para. 93]

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

The *ad hoc* committee in *El Paso Energy International Company* v. *The Argentine Republic*, noted that "[i]n paragraphs 621 to 623 [the arbitral tribunal] stated what other rules of the ILC's Draft Articles and the Unidroit Principles provide on the exclusion of liability and the degree of contribution to a state of necessity",[1133] [129] and concluded that the arbitral tribunal's analysis "was clear …; it stated reasons and explained amply the decisions taken on this issue".[1134] [130]

[A/71/80, para. 94]

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 stated that "the international law analysis [under Article 25 of the ILC Articles] is not affected by the domestic test which gives rise to a state of emergency. Accordingly, a domestic declaration of a state of emergency can only serve as evidence of a state of emergency that may give rise to a necessity defence under international law".[1135] [131]

[A/71/80, para. 95]

[1131] [141] See footnote [167] 31 above, para. 1171.

[1132] [128] ICSID, Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, 24 January 2014, para. 203.

[1133] [129] See footnote [874] 123 above, para. 254 (emphasis omitted).

[1134] [130] *Ibid*., para. 256.

[1135] [131] See footnote [114] 24 above, para. 624.

Ad hoc committee (under the ICSID Convention)

Total S.A. v. *Argentine Republic*

In *Total S.A.* v. *Argentine Republic*, the *ad hoc* committee constituted to hear Argentina's application for annulment of the award considered, *inter alia*, article 25 of the State responsibility articles when concluding that "Argentina is not correct in claiming that the Tribunal never specified the legal standards to be met in relation to the necessity of protection of essential interest and the 'only way' requirement".[1136] 136

[A/74/83, p. 25]

EDF International SA and ors v. *Argentina*

The *ad hoc* committee constituted to decide on the annulment of the award in *EDF International SA and ors* v. *Argentina*, did:

> not consider that the Tribunal can be faulted for having taken the provisions of ILC Article 25 as its point of reference. It is true that Argentina questioned whether all of the detail of Article 25 reflected customary international law and disputed what it described as the Claimants' propensity to 'refer to each of the paragraphs of Article 25 as though it were the final text of a treaty in full force and effect'. At no point, however, did Argentina indicate what aspects of Article 25 it considered did not reflect customary international law. Nor, more importantly, did it at any stage advance a positive case in favour of a standard of necessity materially different from that set out in Article 25.

The committee "therefore conclude[d] that the Tribunal was correct in stating that 'neither side has argued for application of a standard more favourable to host states than the norms of Article 25' and committed no annullable error in treating Article 25 as a statement of the applicable customary international law".[1137] 137

[A/74/83, p. 25]

Permanent Court of Arbitration (under UNCITRAL Rules)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal, referring to article 25 of the State responsibility articles, determined "that the conditions attached to the state of necessity defence under customary international law are not applicable in the present situation".[1138] 138

[A/74/83, p. 26]

[1136] 136 ICSID, Case No. ARB/04/01, Decision on Annulment, 1 February 2016, para. 238.

[1137] 137 ICSID, Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para. 319.

[1138] 138 PCA, Case No. 2013–09, Award on Jurisdiction and the Merits, 25 July 2016, para. 256.

Ad hoc committee (under the ICSID Convention)

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

The *ad hoc* committee constituted to decide on the annulment of the award in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic* determined that, although both the "only way" and the "noncontribution" requirements under article 25 were "susceptible to a certain degree of interpretation",[1139] 139 "[r]egardless of the merits of the interpretation adopted by the Tribunal, which is not for this Committee to re-consider, the Committee is of the view that the Tribunal thereby sufficiently established the standard it was going to apply to the facts of the case".[1140] 140

[A/74/83, p. 26]

International arbitral tribunal (under the ICSID Convention)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic* found that "it is not necessary for the Tribunal to consider Respondent's defense of necessity or Claimants' specific arguments opposing that defense" under article 25 of the State responsibility articles because it had previously dismissed the claims that the defendant had breached the relevant obligations.[1141] 141

[A/74/83, p. 26]

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

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal, while addressing the defence of necessity under customary international law,[1142] 142 quoted article 25 and:

> decide[d] that the Respondent bears the legal burden of proving its defence of 'necessity' under customary international law, as a positive allegation. Moreover, the elements of that defence, as listed in Article 25 of the ILC Articles, are cumulative. In other words, it is for the Respondent to prove each of the relevant elements and not for the Claimant to disprove any of them. That is clear from the negative formulation of Article 25(1) and 25(2) ('may not be invoked', 'unless' and 'if"), together with elements that fall almost exclusively within the actual knowledge of the State invoking the defence of 'necessity.' This approach also accords with the ILC's Commentary applicable to Article 25 of the ILC Articles.[1143] 143

[A/74/83, p. 26]

[1139] 139 ICSID, Case No. ARB/03/19, Decision on Argentina's Application for Annulment, 5 May 2017, para. 290.

[1140] 140 *Ibid*., para. 295.

[1141] 141 See footnote [355] 45 above, paras. 1045–1046.

[1142] 142 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 8.2–8.3.

[1143] 143 *Ibid*., paras. 8.38 *et seq*.

Ad hoc committee (under the ICSID Convention)

Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. *Republic of Zimbabwe*

In *Bernhard Friedrich Arnd Rüdiger von Pezold et al.* v. *Republic of Zimbabwe*, the *ad hoc* committee constituted to hear Zimbabwe's application for annulment of the award noted that:

> Zimbabwe raised its necessity defense in the arbitration proceedings primarily in terms of Article 25 of the ILC Articles, and that the Tribunal devoted a significant part of the Award to this issue. Having analyzed the issue extensively, the Tribunal eventually dismissed the defense, concluding that Zimbabwe had not satisfied the requirements of Article 25. Consequently, the Tribunal did apply international law rather than Zimbabwean law when determining Zimbabwe's necessity defense.[1144] 144

[A/74/83, p. 27]

Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A. v. *Argentine Republic*

In *Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A.* v. *Argentine Republic*, the *ad hoc* committee, discussing the arbitral tribunals application of article 25, found that the tribunal had not manifestly exceeded its powers or failed to state reasons when applying the necessity defence under article 25 of the State responsibility articles.[1145] 145

[A/74/83, p. 27]

[International arbitral tribunal (under the ICSID Convention)

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1146] 148

[A/74/83, p. 27]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

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[1144] 144 ICSID, Case No. ARB/10/15, Decision on Annulment, 21 November 2018, paras. 278–279.

[1145] 145 ICSID, Case No. ARB/03/17, Decision on Annulment, 14 December 2018, paras. 182–190.

[1146] [148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.]

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1147] [82]

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

(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 25, explaining that, in a situation of necessity,

> a State is exempted from its responsibility for acting contrary to its international obligations if its conduct is 'the only way for the State to safeguard an essential interest against a grave and imminent peril'. This means that, in this case, the inaction of Malagasy law enforcement on the ground … would have had to be this 'only way'. It is sufficient to articulate the hypothesis to see that it has no basis.[1148] [110]

[A/77/74, p. 21]

[1147] [82 See footnote [126] 14 above, para. 155.]

[1148] [110 [ICSID, Case No. ARB/17/18, Award, 17 April 2020], para. 348.

Article 26. Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremptory norm becomes void and terminates.[1149] [410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility …
>
> The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.[1150] [411]

The Commission did not, however, propose any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[1151] [412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not

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[1149] [410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[1150] [411] Fourth report on the law of treaties, *Yearbook … 1959* (footnote [952] 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[1151] [412] For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[1152]413 The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[1153] 414

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[1154] 415 Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[1155] 416

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, *e.g.* in relation to genocide or torture, whether by treaty or otherwise.[1156] 417 But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[1157] 418

[1152] 413 As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[1153] 414 For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[1154] 415 See, *e.g.*, the decisions of the International Tribunal for the Former Yugoslavia in case IT-95–17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others,* ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

[1155] 416 Cf. *East Timor* (footnote [48] 54 above).

[1156] 417 See paragraph (4) of the commentary to article 45.

[1157] 418 See paragraphs (4) to (7) of the commentary to article 20.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1158] [167] in the context of its examination of Argentina's defence based on state of necessity,[1159] [168] made incidental reference to article 26, as finally adopted by the International Law Commission in 2001, noting that there did not appear "that a peremptory norm of international law might have been compromised [by Argentina's conduct], a situation governed by article 26 of the articles".[1160] [169]

[A/62/62, para. 97]

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

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal found that "Zimbabwe's violation of its obligation *erga omnes* means that it has breached ILC Article 26 and is therefore precluded from raising the necessity defence in relation to any events upon which the FTLRP [Fast Track Land Reform Programme] policy touches".[1161] [132]

[A/71/80, para. 96]

European Court of Human Rights

Al-Dulimi and Montana Management Inc. Switzerland

In *Al-Dulimi and Montana Management Inc. Switzerland*, the European Court of Human Rights referred to article 26 and the commentary thereto as relevant international law.[1162] [146]

[A/74/83, p. 27]

Inter-American Court of Human Rights

Herzog et al. v. *Brazil*

In *Herzog et al.* v. *Brazil*, the Inter-American Court of Human Rights, citing the commentary to article 26 of the State responsibility articles, recalled that the Commission had confirmed that the prohibition on crimes against humanity was clearly accepted and recognized as a peremptory norm of international law.[1163] [147]

[A/74/83, p. 27]

[1158] [167] See footnote [1100] 163 above.

[1159] [168] See [pp. 281–283] above.

[1160] [169] See footnote [1100] 163 above, para. 325.

[1161] [132] See footnote [114] 24 above, para. 657.

[1162] [146] ECHR, Grand Chamber, Application No. 5809/08, Judgment, 21 June 2016, para. 57.

[1163] [147] IACHR, Preliminary Objections, Merits, Reparations and Costs. Series C No. 353 (Spanish), Judgment, 15 March 2018.

Committee on the Elimination of Racial Discrimination

State of Palestine v. *Israel*

In its decision on jurisdiction regarding the inter-State communication *State of Palestine* v. *Israel*, the Committee on the Elimination of Racial Discrimination cited the commentary to article 26, noting that "several international bodies have recognized the essential character of the principle of the prohibition of racial discrimination for the international community as a whole", and emphasizing that "the International Law Commission has stated that the peremptory norms (*jus cogens*) that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[1164] [111]

[A/77/74, p. 22]

[1164] [111] Decision on jurisdiction, CERD/C/100/5, 12 December 2019, para. 40.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (*a*) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[1165]419 and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[1166] 420 It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

[1165] 419 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[1166] 420 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para 101; see also *ibid*., page 38, para. 47.

(4) Subparagraph (*b*) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[1167] [421].

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina case*,[1168] [170] after having concluded its examination of Argentina's defence based on state of necessity and article XI of the relevant bilateral treaty,[1169] [171] stated that it was "also mindful" of the rule embodied in subparagraph (*a*) of article 27, as finally adopted by the International Law Commission in 2001 (which it quoted), adding thereafter:

> 380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the *Rainbow Warrior* and *Gabcíkovo Nagymaros* cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'.
>
> …

[1167] [421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid.*, p. 81, paras. 152–153).

[1168] [170] See footnote [1100] 163 above.

[1169] [171] See [pp. 281–283] above.

382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.[1170] 172

The tribunal then quoted subparagraph (*b*) of article 27 finally adopted by the International Law Commission, observing that it found support again in the *Gabcíkovo Nagymaros Project* case, as well as in earlier decisions such as the *Compagnie générale de l'Orinoco*, the *Properties of the Bulgarian Minorities in Greece* and *Orr & Laubenheimer* cases (in the latter cases, the tribunal noted, "the concept of damages appears to have been broader than that of material loss in article 27"). After having described the positions of the parties on this issue, the tribunal continued as follows:

390. The Tribunal is satisfied that article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.

391. The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of article XI and the plea of necessity.

392. The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.

393. The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's commentary to article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.

394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.[1171] 173

[A/62/62, para. 98]

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

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp.*, *LG&E Capital Corp.*, *LG&E International Inc.* v. *Argentina*, having found that Argentina was under a state of necessity that excused it from liability for any breaches of the 1991 bilateral investment treaty under article XI of that treaty,[1172] 174 responded to the claimants argument, based on article 27 finally adopted by the International Law Commission in 2001, that Argentina should compensate them for losses incurred as a result of the government's actions:

With regard to article 27 of the United Nations draft articles alleged by Claimants, the Tribunal opines that the article at issue does not specifically refer to the compensation for one or all the losses incurred

[1170] 172 See footnote [1100] 163 above, paras. 379, 380 and 382.

[1171] 173 *Ibid.*, paras. 390–394 (footnotes omitted).

[1172] 174 See [pp. 283–285] above.

by an investor as a result of the measures adopted by a State during a state of necessity. The commentary introduced by the Special Rapporteur establishes that article 27 "does not attempt to specify in what circumstances compensation would be payable". The rule does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations. In this case, this Tribunal's interpretation of article XI of the Treaty provides the answer.[1173] 175

The tribunal later added that:

Article 27 of the International Law Commission's draft articles, as well as article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, … this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.[1174] 176

[A/62/62, para. 99]

Ad hoc committee (under the ICSID Convention)

Patrick Mitchell v. *Democratic Republic of the Congo*

In its 2006 decision on the application for annulment of the award rendered on 9 February 2004 in the *Patrick Mitchell* v. *Democratic Republic of the Congo* case, the *ad hoc* committee noted that even if the arbitral tribunal had concluded that the measures at issue were not wrongful by reason of the state of war in the Congo, "this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation". The *ad hoc* committee thereafter quoted in a footnote the text of article 27 finally adopted by the International Law Commission in 2001, "bearing witness to the existence of a principle of international law in this regard".[1175] 177

[A/62/62, para. 100]

International arbitral tribunal (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, in its 2007 award, noted that the requirement of temporality in subparagraph (*a*) of article 27 was not disputed by the parties, even though "the continuing extension of the emergency … [did] not seem to be easily reconciled with the requirement of temporality". That in turn resulted in "uncertainty as to what will be the legal consequences of the Emergency Law's conclusion",[1176] 36 which related to the application of subparagraph (*b*) of article 27. In the face of an interpretation of subparagraph (*b*), offered by the respondent, that the provision would require compensation only for the damage arising after the emer-

[1173] 175 ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 260 (footnote omitted).

[1174] 176 *Ibid.*, para. 264.

[1175] 177 ICSID, *Ad Hoc* Committee, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57, footnote 30.

[1176] 36 See footnote [1026] 25 above, para. 392.

gency was over, and not for that taking place during the emergency period, the tribunal expressed the following view:

> Although [Article 27] does not specify the circumstances in which compensation should be payable because of the range of possible scenarios, it has also been considered that this is a matter to be agreed with the affected party. The Article thus does not exclude the possibility of an eventual compensation for past events. The 2007 agreements between the Respondent and the Licensees appear to confirm this interpretation … [1177] 37

[A/65/76, para. 27]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* noted that the applicant's claim relied primarily on article 27 of the State responsibility articles. The committee recalled that the "Tribunal [had] expressly found … that the effect of the application of Article XI of the BIT [was] different to the effect of the application of Article 25 (and by logical implication, of Article 27) of the ILC Articles".[1178] 142

[A/68/72, para. 99]

International arbitral tribunal (under the ICSID Convention)

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic* found that the respondent had failed to demonstrate, as required under article 27, that it had "return[ed] to the pre-necessity *status quo* when possible, or compensate[d] Claimants for damage suffered as a result of the relevant measures".[1179] 143

[A/68/72, para. 100]

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1180] 148

[A/74/83, p. 27]

[1177] 37 *Ibid*., para. 394 (footnote omitted).

[1178] 142 See footnote [1126] 136 above, para. 127.

[1179] 143 See footnote [167] 31 above, para. 1171.

[1180] 148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.

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

The tribunal in *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, referred to the commentary of Article 27 and stated that "the defence of necessity under international law lapses 'if and to the extent that the circumstance precluding wrongfulness no longer exists'".[1181] [149]

[A/74/83, p. 28]

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

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to articles 27, under which the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, and to article 36.[1182] [112] The tribunal therefore determined that under the applicable investment treaty, "whilst a State may adopt or enforce a measure pursuant to the stated objectives" in the treaty, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[1183] [113]

[A/77/74, p. 22]

[1181] [149] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 8.47.

[1182] [112] See footnote [401] 51 above, para. 835.

[1183] [113] *Ibid*., para. 830.

Part Two

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.[1184] [422] The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or in part.[1185] [423] In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

> (*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (*c*), while Part Two does the same for subparagraph (*d*).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

[1184] [422] 1969 Vienna Convention [on the Law of Treaties], art. 60.

[1185] [423] On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

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).
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> 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).
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> …
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> 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.
>
> …
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> 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]
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> [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

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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 Ingeniería IDC S.A. v. *Bolivarian Republic of Venezuela*

In *Flughafen Zurich A.G. and Gestión Ingeniería 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.

Chapter II

REPARATION FOR INJURY

Commentary

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 indicated that "[t]he approach of customary international law to reparation is founded in *Factory at Chorzów*, which is reflected in the ILC Articles on State Responsibility".[1437] [170]

[A/71/80, para. 120]

[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",[1438] [150] which were relevant with regard to the parties' claims for relief.[1439] [151]

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

[1437] [170] See footnote [114] 24 above, para. 761.

[1438] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1439] [[151] *Ibid*., para. 9.9.]

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[1440] [485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[1441] [486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (*e.g.* injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[1442] [487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

[1440] [485] See paragraphs (4) to (14) of the commentary to article 31.

[1441] [486] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1442] [487] Thus, in the judgment in the *LaGrand* case (footnote [236] 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[1443] [488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[1444] [489] Satisfaction must "not be out of proportion to the injury".[1445] [490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[1446] [491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Law of the Sea

M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal referred to paragraph 1 of draft article 42 (Reparation), as adopted by the International Law Commission on first reading,[1447] [188] to determine the reparation which Saint Vincent and the Grenadines was entitled to obtain for damage suffered directly by it as well as for damage or other loss suffered by the Saiga oil tanker:

Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" (article 42, paragraph 1, of the draft articles of the International Law Commission on State responsibility). Reparation may take the form of monetary compensation for economically quantifiable

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[1443] [488] See article 35 (*b*) and commentary.

[1444] [489] See article 31 and commentary.

[1445] [490] See article 37, paragraph 3, and commentary.

[1446] [491] For example, the *Mélanie Lachenal* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

[1447] [188] This provision was amended and partially incorporated in article 34, as finally adopted by the International Law Commission in 2001. The text of paragraph 1 of draft article 42 (Reparation) adopted on first reading was as follows: "The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination". (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.[1448] 189

[A/62/62, para. 106]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1449] 190 in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 34, the tribunal considered it "broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction".[1450] 191

[A/62/62, para. 107]

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, in the context of an analysis of article 2 of the State responsibility articles, held that where there had been "substantial interference with an investor's rights, so as to amount to an expropriation … there may be scope for a non-compensatory remedy for the expropriation (*e.g.* injunctive, declaratory or restitutionary relief)".[1451] 51

[A/65/76, para. 34]

Caribbean Court of Justice

Trinidad Cement Limited and TCL Guyana Incorporated v. *The State of the Co-Operative Republic of Guyana*

In the *Trinidad Cement Limited and TCL Guyana Incorporated* v. *Guyana* case, the Caribbean Court of Justice referred to a passage in the commentary to the State responsibility articles confirming that "[i]n accordance with article 34, the function of damages is essentially compensatory".[1452] 52

[A/65/76, para. 35]

[1448] 189 See footnote [1096] 160 above, para. 171.

[1449] 190 See footnote [1100] 163 above.

[1450] 191 *Ibid.*, para. 399 and footnote 211.

[1451] 51 *Biwater Gauff* (footnote [5] 6 above), para. 466. See article 2 above.

[1452] 52 CCJ, Case No. [2009] CCJ 5 (OJ), Judgment, 20 August 2009, para. 38, reference to paragraph (5) of the introductory commentary to Part Two, Chapter III. See further Part Two, Chapter III.

INTERNATIONAL COURT OF JUSTICE

Case Concerning Pulp Mills on the River Uruguay (Argentina v. *Uruguay)*

In its 2010 judgment in the *Pulp Mills on the River Uruguay* case, the International Court of Justice, citing, *inter alia*, the State responsibility articles, recalled that

> customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.[1453] 53

[A/65/76, para. 36]

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 referred, with approval, to article 34 of the State responsibility articles.[1454] 165 It further expressed the view that "the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*".[1455] 166

[A/68/72, para. 116]

[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.[1456] 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 consid-

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[1453] 53 ICJ, Judgment, 20 April 2010, para. 273.

[1454] 165 See footnote [12] 10 above, para. 196.

[1455] 166 *Ibid*., para. 197.

[1456] [152 PCA, Case No. 2010–18, Award, 19 December 2014, paras. 287–291.]

ers that this logic leads to the application of the regular rate of interest under the contract, rather than the penalty rate".[1457] [153]

[A/71/80, para. 110]]

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[1458] [172] as relevant for the analysis regarding the award of reparation.

[A/71/80, para. 121]

Ioan Micula and others v. *Romania*

In *Ioan Micula and others* v. *Romania*, the arbitral tribunal referred to articles 34 and 36 in acknowledging that the obligation to make full reparation "[i]n most cases … involves the payment of compensation".[1459] [173] It further noted that "the commentary to the ILC Articles limits compensation to 'damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote'".[1460] [174]

[A/71/80, para. 122]

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

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, the arbitral tribunal cited article 34 as authority for the principle that reparation for injury "shall take the form of restitution, compensation and satisfaction, either singly or in combination".[1461] [175]

[A/71/80, para. 123]

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*

The African Court on Human and Peoples' Rights in *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe*

[1457] [153 *Ibid*., para. 299.]

[1458] [172] See footnote [320] 46 above, para. 560.

[1459] [173] See footnote [1188] 133 above, para. 917.

[1460] [174] *Ibid*., para. 1009 (quoting para. (5) of the commentary to article 34).

[1461] [175] See footnote [63] 16 above, para. 27, footnote 16 (quoting article 34).

Human and Peoples' Rights Movement v. *Burkina Faso*, cited the text of article 34 in support of the view that "reparation may take several forms".[1462] [176]

[A/71/80, para. 124]

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 referred to article 34 of the State responsibility articles as expanding on the principle contained in article 31.[1463] [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".[1464] [178]

[A/71/80, para. 125]

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

The arbitral tribunal in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia* noted that "Article 34 of the ILC Articles includes satisfaction as a form of reparation".[1465] [179]

[A/71/80, para. 126]

[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",[1466] [150] which were relevant with regard to the parties' claims for relief.[1467] [151]

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

[1462] [176] See footnote [1314] 155 above, para. 29.

[1463] [177] See footnote [114] 24 above, para. 684.

[1464] [178] *Ibid*., para. 686 (quoting para. (2) of the commentary to article 34).

[1465] [179] See footnote [65] 18 above, para. 554 and footnote 701.

[1466] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1467] [[151] *Ibid*., para. 9.9.]

International arbitral tribunal (under the ICSID Convention)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, after summarizing the parties' arguments regarding articles 28, 31, 34, 35 and 36 of the State responsibility articles,[1468] [189] the arbitral tribunal stated:

The adoption of the ILC Articles, which clearly articulate a State's obligation to provide full reparation in the event of a breach of an international obligation, and the practice of States in paying reparations in these circumstances, suggest that States accept this obligation. This is not to say that the general principle of international law that a State that has been found to have breached an international obligation must make full reparation for any damages caused by its breach has any impact on a State's right to expropriate a foreigner's property at international law. A State's right to do so exists at international law and, so long as the property is lawfully expropriated, there is an obligation to compensate the owner, but not to make full reparation. The State's obligation to make full reparation is related to its breach of international law. Respondent's concerns about the obligation to make full reparation leading to disproportionate compensation are dealt with in the limiting factors that the Parties agree are principles relating to damages in international law.[1469] [190]

[A/74/83, p. 33]

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].[1470] [191]

[A/74/83, p. 34]

[European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1471] [213]

[A/74/83, p. 37]]

[1468] [189] See footnote [355] 45 above, paras. 1077–1088.

[1469] [190] *Ibid.*, para. 1089.

[1470] [191] ICSID, Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, para. 1085.

[1471] [213] ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and footnote 6.]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[1472] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[1473] [43]

[A/77/74, p. 11]]

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 "[t]he forms of reparation recognized under customary international law as ways of satisfying a responsible State's obligation to make full reparation include … restitution in kind and compensation".[1474] [166] The Tribunal recalled in particular the texts of articles 34 and 35.[1475] [167]

[A/77/74, p. 29]

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 cited article 34, noting that full reparation "shall take the form of restitution, compensation and satisfaction, either singly or in combination".[1476] [168] Following an analysis of the provision, the tribunal determined that the appropriate restitution would include the withdrawal of a tax demand by the Respondent, thus releasing the investor from any obligation to pay it.[1477] [169]

[A/77/74, p. 30]

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 customary law, as codified in article 31, requires full reparation, and that "[a]dditional guidance is provided by Art. 34" on the forms that such full reparation for the injury caused may take.[1478] [170]

[A/77/74, p. 30]

[1472] [42] [Final Award, 26 March 2021, para. 72.]

[1473] [43] [*Ibid*., paras. 72 and 134–135.]

[1474] [166] See footnote [380] 31 above, paras. 1788–1789.

[1475] [167] *Ibid*., paras. 1789 and 1847.

[1476] [168] See footnote [1392] 142 above, para. 1872.

[1477] [169] *Ibid*., paras. 1874 and 1877.

[1478] [170] See footnote [1402] 152 above, paras. 623–625.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, *i.e.* the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible". The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[1479] [492] It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[1480] [493] Despite the difficulties restitution

[1479] [492] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 48.

[1480] [493] See, *e.g.*, *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7

may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[1481] [494] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, *e.g.* because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[1482] [495] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[1483] [496]

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[1484] [497] the restitution of ships[1485] [498] or other types of property,[1486] [499] including documents, works of art, share certificates, *etc.*[1487] [500] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment

(1920); *Walter Fletcher Smith*, *ibid*., vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

[1481] [494] See articles 43 and 45 and commentaries.

[1482] [495] *Walter Fletcher Smith* (footnote [1480] 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons" (see J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", BYBIL*, 1964*, vol. 40, p. 216, at p. 221).

[1483] [496] *Government of Kuwait* v. *American Independent Oil Company (Aminoil),* ILR, vol. 66, p. 519, at p. 533 (1982).

[1484] [497] Examples of material restitution involving persons include the *"Trent"* (1861) and *"Florida"* (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (footnote [80] 59 above), pp. 44–45.

[1485] [498] See, *e.g.*, the "*Giaffarieh*" incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, Società Italiana per l'Organizzazione Internazionale—Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, N. Y., Oceana, 1970), vol. II, pp. 901–902.

[1486] [499] For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid*., p. 240 (1950); and the *Hénon* case, *ibid*., p. 248 (1951).

[1487] [500] In the *Bužau-Nehoiași Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[1488] [501] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[1489] [502] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[1490] [503] In some cases, both material and juridical restitution may be involved.[1491] [504] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[1492] [505] The term "restitution" in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[1493] [506] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

[1488] [501] For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

[1489] [502] For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

[1490] [503] In the *Bryan-Chamorro Treaty* case (*Costa Rica* v. *Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action" (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also *ibid*., page 683.

[1491] [504] Thus, PCIJ held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*Appeal from a judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* (footnote [1417] 481 above)).

[1492] [505] In the *Legal Status of Eastern Greenland* case, PCIJ decided that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (footnote [138] 79 above), the Court decided that France "must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL*, 1976–1977*, vol. 48, p. 1, at pp. 5–8.

[1493] [506] See above, paragraph (8) of the commentary to article 30.

(8) Under article 35, subparagraph (*a*), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[1494] [507] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[1495] [508] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, subparagraph (*b*), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[1496] [509] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

[1494] [507] *Forests of Central Rhodopia* (footnote [1058] 382 above), p. 1432.

[1495] [508] For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, *ibid*., p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic ibid*., vol. 62, p. 141, at p. 200 (1977).

[1496] [509] See, *e.g.*, J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook … 1969*, vol. II, p. 149.

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,[1497] [192] the Panel of Commissioners of the United Nations Compensation Commission referred *inter alia* to article 35 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on pages 325–326] above.

[A/62/62, para. 108]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1498] [193] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 35, the tribunal observed that "[r]estitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation".[1499] [194]

[A/62/62, para. 109]

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, noted that article 35 finally adopted by the International Law Commission in 2001 provided that "restitution in kind is the preferred remedy for an internationally wrongful act".[1500] [195]

[A/62/62, para. 110]

European Court of Human Rights

Verein Gegen Tierfabriken Schweiz (VgT) v. *Switzerland*

In the *Verein Gegen Tierfabriken Schweiz (VgT)* v. *Switzerland (No. 2)* case, the European Court of Human Rights referred to article 35 of the State responsibility articles as reflecting "principles of international law". The Court alluded to the qualifications in the provision, *i.e.* that the obligation to make restitution was subject to such restitution not being "materially

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[1497] [192] "F3" claims before the UNCC are claims filed by the Government of Kuwait, excluding environmental claims.

[1498] [193] See footnote [1100] 163 above.

[1499] [194] *Ibid.*, para. 400 and footnote 212.

[1500] [195] ICSID, Case No. ARB/03/16, Award, 2 October 2006, paras. 494 and 495.

impossible" and not involving "a burden out of all proportion to the benefit derived from restitution instead of compensation", which it interpreted as meaning that "while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain".[1501] 54

[A/65/76, para. 37]

Guiso-Gallisay v. *Italy*

In the *Guiso-Gallisay* v. *Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 35 of the State responsibility articles (which it considered to be relevant international law) as reiterating the principle of *restitutio in integrum*.[1502] 55

[A/65/76, para. 38]

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, citing article 35, observed that "[t]he ILC Articles contemplate restitution as the principal remedy for internationally wrongful conduct", and recalled that "[t]he goal of restitution [was] to restore the investor to his position before the wrongful conduct" and that "[t]his remedy, however, should not be granted where its implementation is materially impossible … If such case, the ILC Articles would envisage a claim for damages as the available alternative".[1503] 167

[A/68/72, para. 117]

European Court of Human Rights

Laska and Lika v. *Albania*

In *Laska and Lika* v. *Albania*, the European Court of Human Rights considered article 35 as reflecting international law relevant to the case.[1504] 168 It observed that:

> in the instant case, a retrial or the reopening of the case, if requested by the applicant, represented in principle an appropriate way of redressing the violation … This also reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts …).[1505] 169

[A/68/72, para. 118]

[1501] 54 ECHR, Grand Chamber, *Verein Gegen Tierfabriken Schweiz (VgT)* v. *Switzerland (No. 2)*, Application No. 32772/02, Judgment, 30 June 2009, para. 86.

[1502] 55 ECHR, Grand Chamber, Application No. 58858/00, Judgment (Just satisfaction), 22 December 2009, para. 53.

[1503] 167 See footnote [1198] 144 above, para. 52.

[1504] 168 ECHR, Fourth Section, Application Nos. 12315/04 and 17605/04, Judgment, 20 July 2010, para. 35.

[1505] 169 *Ibid*., para. 75 (internal citation omitted).

INTERNATIONAL COURT OF JUSTICE

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

In the *Jurisdictional Immunities of the State (Germany* v. *Italy*) case, the International Court of Justice recalled that:

> [a]ccording to general international law on the responsibility of States for internationally wrongful acts … even if the [wrongful] act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.[1506] [170]

[A/68/72, para. 119]

[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.[1507] [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.[1508] [153]

[A/71/80, para. 110]]

[INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[1509] [172] as relevant for the analysis regarding the award of reparation.

[A/71/80, para. 121]]

[1506] [170] See footnote [788] 104 above, para. 137.

[1507] [[152] PCA, Case No. 2010–18, Award, 19 December 2014, paras. 287–291.]

[1508] [[153] *Ibid*., para. 299.]

[1509] [[172] See footnote [320] 46 above, para. 560.]

European Court of Human Rights

Savriddin Dzhurayev v. *Russia*

In *Savriddin Dzhurayev* v. *Russia*, the European Court of Human Rights referred to article 35 in finding that, in line with the relevant principles of international law, the primary aim of the individual measures to be taken in response to the judgment was to "put an end to the breach of the Convention and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".[1510] [181] It also referenced article 35 in support of the statement that "while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain".[1511] [182]

[A/71/80, para. 127]

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*, found

> that the principles on the reparation for injury as expressed in the ILC Articles on State Responsibility are relevant in this regard. According to Article 35 of the ILC Articles, a State responsible for an illegal expropriation is in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place. This obligation of restitution applies as of the date when a decision is rendered. Only to the extent where it is not possible to make good the damage caused by restitution is the State under an obligation to compensate pursuant to Article 36 of the ILC Articles on State Responsibility.[1512] [183]

[A/71/80, para. 128]

European Court of Human Rights

Davydov v. *Russia*

In *Davydov* v. *Russia*, the European Court of Human Rights reiterated, with reference to article 35, that

> a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach … . This obligation reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation that existed before the wrongful act was committed, provided that restitution is not 'materially impossible' and 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'.[1513] [184]

[A/71/80, para. 129]

[1510] [181] ECHR, First Section, Application No. 71386/10, Judgment, 25 April 2013, para. 248.

[1511] [182] *Ibid*., para. 248.

[1512] [183] See footnote [19] 7 above, para. 1766.

[1513] [184] ECHR, First Section, Application No. 18967/07, Judgment (Merits and Just Satisfaction), 30 October 2014, para. 25 (quoting article 35).

Kudeshkina v. *Russia (No. 2)*

In *Kudeshkina* v. *Russia (No. 2)*, the European Court of Human Rights stated, with reference to article 35, that "[t]he States should organise their legal systems and judicial procedures so that this result [of *restitutio in integrum*] may be achieved".[1514] [185] The Court also relied on article 35 in reiterating that "while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain".[1515] [186]

[A/71/80, para. 130]

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 the State responsibility articles "confirm restitution as the principal form of reparation in international law".[1516] [187] It acknowledged, quoting the commentary to article 35, that "restitution restores 'the situation that existed prior to the occurrence of the wrongful act'".[1517] [188] Referring to article 2, the tribunal explained that the "[b]reach of a peremptory norm could also justify restitution".[1518] [189] The tribunal also observed, with reference to the articles, that restitution "may take, in practice, a wide range of forms",[1519] [190] "encompassing any action that needs to be taken by the responsible State to restore the situation".[1520] [191]

[A/71/80, para. 131]

In relation to the limitations on restitution as provided for in subparagraphs (*a*) and (*b*), the arbitral tribunal noted that, in determining material impossibility as per article 35, subparagraph (*a*), "[t]he standard is high".[1521] [192] Pursuant to the commentary to article 35, "restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these".[1522] [193] Citing the second limitation in subparagraph (*b*), the tribunal found that "[i]t is not disproportionate to award title to lands unlawfully expropriated".[1523] [194]

[A/71/80, para. 132]

[1514] [185] ECHR, First Section, Application No. 28727/11, Decision, 17 February 2015, para. 55.

[1515] [186] *Ibid*., para. 55.

[1516] [187] See footnote [114] 24 above, para. 684.

[1517] [188] *Ibid*., para. 686 (quoting para. (2) of the commentary to article 35).

[1518] [189] See footnote [114] 24 above, para. 722.

[1519] [190] *Ibid*., para. 687.

[1520] [191] *Ibid*., para. 740.

[1521] [192] *Ibid*., para. 725.

[1522] [193] *Ibid*., para. 725 (quoting para. (8) of the commentary to article 35).

[1523] [194] *Ibid*., paras. 734–735 (quoting article 35(*b*)).

[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",[1524] [150] which were relevant with regard to the parties' claims for relief.[1525] [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.[1526] [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.[1527] [158]

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

[*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".[1528] [176]

[A/74/83, p. 31]]

European Court of Human Rights

Ryabkin and Volokitin v. *Russia*

In *Ryabkin and Volokitin* v. *Russia*, the European Court of Human Rights considered articles 35 and 36 of the State responsibility articles as relevant international law.[1529] [193]

[A/74/83, p. 34]

Guja v. *The Republic of Moldova (No. 2)*

The European Court of Human Rights in *Guja* v. *The Republic of Moldova (No. 2)* cited article 35, as relevant international law and observed, with reference to article 35, that

[1524] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1525] [151 *Ibid*., para. 9.9.]

[1526] [157 ICSID, Case No. ARB/13/7, Award, 12 January 2016, para. 222.]

[1527] [158 *Ibid*., paras. 223–224.]

[1528] [176 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 663.]

[1529] [193] ECHR, Third Section, Application Nos. 52166/08 and 8526/09, Judgment, 28 June 2016, para. 30.

"[t]he States should organise their legal systems and judicial procedures so that this result [of restitution] may be achieved".[1530] 194

[A/74/83, p. 34]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* stated that "[p]ursuant to Article 35 of the ILC Articles, restitution is the primary remedy for reparation of wrongful acts under international law".[1531] 195 However, the tribunal held that "juridical restitution should not be granted", stating that "Article 35(*b*) of the ILC Articles exempts responsible States from their primary obligation to make restitution when restitution is disproportionately burdensome compared to the benefit which would be gained".[1532] 196

[A/74/83, p. 34]

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

The arbitral tribunal in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *The Kingdom of Spain* considered the order of restitution sought by the claimants based on article 35 of the State responsibility articles "disproportional to its interference with the sovereignty of the State compared to monetary compensation".[1533] 197

[A/74/83, p. 35]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, referred to articles 35 and 36 of the State responsibility articles in support of its view that "the fair market value also reflects the compensation standard under customary international law".[1534] 206

[A/74/83, p. 36]]

[European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State

[1530] 194 ECHR, Second Section, Application No. 1085/10, Judgment, 15 March 2018, paras. 26 and 31.

[1531] 195 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 558.

[1532] 196 *Ibid*., para. 562.

[1533] 197 ICSID, Case No. ARB/13/31, Award, 15 June 2018, para. 636.

[1534] [206 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 627 and 711.]

responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1535] [213]

[A/74/83, p. 37]]

European Court of Human Rights

Ilgar Mammadov v. *Azerbaijan*

In *Ilgar Mammadov* v. *Azerbaijan*, the Grand Chamber of European Court of Human Rights cited article 35, which encompassed "the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, … provided that restitution is not 'materially impossible' and 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'".[1536] [172] The Court also cited articles 30 to 32 and 34 to 37.[1537] [173]

[A/77/74, p. 30]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Glencore International A.G. and C.I. Prodeco S.A.* v. *Republic of Colombia* cited article 35, explaining that pursuant to that article, "restitution—as opposed to compensation—is the first of the forms of reparation available to a party injured by an internationally wrongful act".[1538] [174] The tribunal noted that "the two factors which exclude the possibility of restitution" pursuant to the articles were whether restitution was materially impossible and whether it imposed a disproportionate burden on the party in breach.[1539] [175] Referring to article 36, the tribunal noted that, "[i]n certain cases, to ensure full reparation restitution must be completed by compensation".[1540] [176]

[A/77/74, p. 30]

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

[1535] [213 ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and note 6.]

[1536] [172] ECHR, Grand Chamber, Application No. 15172/13, Judgment, 29 May 2019, para. 151.

[1537] [173] *Ibid*., paras. 84–88.

[1538] [174] See footnote [1375] 125 above, para. 1572.

[1539] [175] *Ibid*., para. 1576.

[1540] [176] *Ibid*., para. 1577.

[t]he forms of reparation recognized under customary international law as ways of satisfying a responsible State's obligation to make full reparation include … restitution in kind and compensation".[1541] [166] The Tribunal recalled in particular the texts of articles 34 and 35. [1542] [167]

… the Iran-United States Claims Tribunal cited article 35, recalling "that restitution is the primary form of reparation for injury caused by an internationally wrongful act".[1543] [177] The Tribunal therefore concluded that, in that case, "ordering the United States to arrange for the transfer of the Stradivarius constitutes the proper remedy, so as to put Iran in the situation [in which] it would have been had the breach by the United States not occurred.[1544] [178]

[A/77/74, pp. 29–30]

International arbitral tribunal (under the ICSID Convention)

(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 cited articles 35, 36 and 38, noting that "in investment law, full reparation may take the form of restitution or compensation", plus interest.[1545] [179]

[A/77/74, p. 31]

[1541] [[166] See footnote [380] 31 above, paras. 1788–1789.]

[1542] [[167] *Ibid.*, paras. 1789 and 1847.]

[1543] [177] *Ibid.*, para. 1789.

[1544] [178] *Ibid.*, para. 1849.

[1545] [179] See footnote [1029] 108 above, para. 396.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.[1546] [510] Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, *i.e.* the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[1547] [511] It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[1548] [512]

(3) The relationship with restitution is clarified by the final phrase of article 36 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[1549] [513] As the Umpire said in the *"Lusitania"* case:

> The fundamental concept of "damages" is … reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[1550] [514]

[1546] [510] See paragraphs (5) to (6) and (8) of the commentary to article 31.

[1547] [511] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 81, para. 152. See also the statement by the Permanent Court of International Justice in *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity" (p. 27).

[1548] [512] *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above); *Fisheries Jurisdiction* (footnote [1206] 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 142.

[1549] [513] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), pp. 47–48.

[1550] [514] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

Likewise, the role of compensation was articulated by PCIJ in the following terms:

> 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.[1551] 515

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[1552] 516 Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[1553] 517

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[1554] 518 The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

[1551] 515 *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)* (footnote [1096] 160 above). See also *Papamichalopoulos and Others* v. *Greece (article 50), Eur. Court H.R., Series A, No. 330–B*, para. 36 (1995); *Velásquez Rodríguez* (footnote [84] 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

[1552] 516 In the *Velásquez Rodriguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D. C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, "A reappraisal of punitive damages in international law", BYBIL, *1997*, vol. 68, pp. 247–266; and S. Wittich, "Awe of the gods and fear of the priests: punitive damages in the law of State responsibility", *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

[1553] 517 See paragraph (3) of the commentary to article 37.

[1554] 518 For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[1555] [519] the Iran-United States Claims Tribunal,[1556] [520] human rights courts and other bodies,[1557] [521] and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[1558] [522] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[1559] [523] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[1560] [524] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

[1555] [519] For example, the *M/V "Saiga"* case (footnote [1096] 160 above), paras. 170–177.

[1556] [520] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal's jurisprudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote [1017] 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, "Compensable claims before the Tribunal: expropriation claims", *The Iran-United States Claims Tribunal*: *Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid*., pp. 325–385.

[1557] [521] For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

[1558] [522] ICSID, tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, *e.g.*, *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

[1559] [523] See, *e.g.*, *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), and for the Court's order of discontinuance following the settlement, *ibid., Order* (footnote [779] 232 above); *Passage through the Great Belt (Finland* v. *Denmark)*, *Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996,* p. 9 (order of discontinuance following settlement).

[1560] [524] See Aldrich, *op. cit.* (footnote [1017] 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote [1241] 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote [1206] 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Milan, Giuffrè, 1990).

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *"Volage"*, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer *"Volage"*, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £ 50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, *etc.*".[1561] 525

(10) In the *M/V "Saiga" (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the *"Saiga"*, and its crew. ITLOS awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *"Saiga"*; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[1562] 526 Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[1563] 527

(11) In a number of cases payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[1564] 528 Similar payments have been negotiated where damage is caused to aircraft of a State, such as the "full and final settlement" agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[1565] 529

[1561] 525 *Corfu Channel, Assessment of Compensation* (footnote [1260] 473 above), p. 249.

[1562] 526 The *M/V "Saiga"* case (footnote [1096] 159 above), para. 176.

[1563] 527 *Ibid*., para. 177.

[1564] 528 See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid*., p. 562), and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

[1565] 529 *Aerial Incident of 3 July 1988* (footnote [1559] 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Cer-

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[1566] [530] or injury to its personnel.[1567] [531] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[1568] [532] In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.[1569] [533]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (*a*) the relevant international agreements … and (*b*) general principles of international law".[1570] [534] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[1571] [535] The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can$ 3 million (about 50 per cent of the amount claimed).[1572] [536]

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq's liability under international law "for any direct loss, damage—including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[1573] [537] The UNCC Governing Council decision 7

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tain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

[1566] [530] See, *e.g.*, the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, H. M. Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

[1567] [531] See, *e.g.*, Claim of Consul *Henry R. Myers (United States* v. *Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote [1007] 347 above), pp. 80–81.

[1568] [532] For examples, see Whiteman, *Damages in International Law* (footnote [1007] 347 above), p. 81.

[1569] [533] See, *e.g.*, the United States-China agreement providing for an *ex gratia* payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

[1570] [534] The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (footnote [1246] 459 above), pp. 899 and 905.

[1571] [535] *Ibid*., p. 907.

[1572] [536] Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite "Cosmos 954" (Moscow, 2 April 1981), United Nations, *Treaty Series,* vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

[1573] [537] Security Council resolution 687 (1991), para. 16 (footnote [1248] 461 above).

specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[1574] 538

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[1575] 539 However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, *etc.*—sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[1576] 540 The umpire considered that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated … "[1577] 541

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case,[1578] 542 the tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

[1574] 538 Decision 7 of 16 March 1992, Criteria for additional categories of claims, (S/AC.26/1991/7/Rev.1), para 35.

[1575] 539 See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote [817] 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

[1576] 540 See footnote [1550] 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote [505] 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid*., vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid*., p. 55 (1903).

[1577] 541 *"Lusitania"* (see footnote [1550] 514 above), p. 40.

[1578] 542 See footnote [1096] 159 above.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case:

> Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[1579] 543

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[1580] 544 Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[1581] 545

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, *etc.*) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[1582] 546 Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[1583] 547

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[1584] 548 property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating

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[1579] 543 *"Lusitania"* (see footnote [1550] 514 above), p. 35.

[1580] 544 For example, the *"Topaze"* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

[1581] 545 For example, the *William McNeil* case, *ibid.*, vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

[1582] 546 See the review by Shelton, *op. cit.* (footnote [1557] 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea", *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

[1583] 547 See, *e.g.*, the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote [84] 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote [1551] 515 above).

[1584] 548 See, *e.g.*, R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

bodies, the awards exhibit considerable variability.[1585] [549] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[1586] [550] The method used to assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.[1587] [551] Where the property interests in

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[1585] [549] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by the Permanent Court of International Justice in *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, *e.g.*, the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote [1495] 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote [1483] 496 above), p. 600, para. 138; and *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, *e.g.*, the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote [408] 67 above), p. 122, para. 110. See also *Starrett Housing, Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[1586] [550] See *American International Group, Inc.* v. *The Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares", Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing* (footnote [1585] 549 above), the tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat" (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation "will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known", World Bank, *Legal Framework for the Treatment of Foreign Investment* (Washington, D. C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation".

[1587] [551] Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, *e.g.*, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, H. M. Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Settlement of Mutual Historical

question are unique or unusual, for example, art works or other cultural property,[1588] [552] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[1589] [553]

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[1590] [554]

(24) An alternative valuation method for capital loss is the determination of net book value, *i.e.* the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[1591] [555] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases no provision is made for value over and above the market value of the individual assets. Techniques have been

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Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid.*) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[1588] [552] See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$ 100 000 (category "D" claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[1589] [553] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 8, p. 373 (1985).

[1590] [554] Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D. C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in "Propositions and conclusions on compensation for business losses: types of damages and their valuation" (S/AC.26/1992/9), para. 16.

[1591] [555] For an example of a business found not to be a going concern, see *Phelps Dodge Corp.* v. *The Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc.* v. *National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid.*, p. 180 (1986).

developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[1592] 556

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[1593] 557 The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[1594] 558 But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (*e.g.* discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[1595] 559 A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[1596] 560

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case[1597] 561 and *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company*.[1598] 562 Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured

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[1592] 556 The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (footnote [1585] 549 above), at pp. 256–257, paras. 220–223.

[1593] 557 See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of "E4" claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of "E2" claims, 9 December 1999 (S/AC.26/1999/22)).

[1594] 558 The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (footnote [1585] 549 above); *Starrett Housing Corporation* (footnote [1585] 549 above.); *Phillips Petroleum Company Iran* (footnote [408] 67 above); and *Ebrahimi (Shahin Shaine)* v. *Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

[1595] 559 See, *e.g.*, *Amoco* (footnote [1585] 549 above); *Starrett Housing Corporation* (footnote [1585] 549 above.); and *Phillips Petroleum Company Iran* (footnote [408] 67 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (footnote [1590] 554 above) states: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

[1596] 560 See, *e.g.*, *Ebrahimi* (footnote [1594] 558 above), p. 227, para. 159.

[1597] 561 *Navires* (footnote [769] 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote [1215] 561 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote [520] 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co.* case *(Great Britain* v. *Portugal)*, Lapradelle–Politis, *op. cit.* (*ibid.*), vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America* v. *Brazil)*, Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote [520] 139 above).

[1598] 562 ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[1599] [563] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*[1600] [564] and in some ICSID arbitrations.[1601] [565] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[1602] [566] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[1603] [567] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[1604] [568]

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property

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[1599] [563] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), pp. 47–48 and 53.

[1600] [564] *Libyan American Oil Company (LIAMCO)* (footnote [1495] 508 above), p. 140.

[1601] [565] See, *e.g.*, *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA* v. *the Government of the People's Republic of the Congo*, *ibid*., p. 306 (1979).

[1602] [566] According to the arbitrator in the *Shufeldt* case (footnote [146] 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote [1601] 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid*., para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

[1603] [567] In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (*i.e.* profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (footnote [1602] 566 above).

[1604] [568] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D. C., United States Government Printing Office, 1943), vol. III, p. 1837).

between the date of taking of title and adjudication;[1605] [569] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[1606] [570]

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[1607] [571] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[1608] [527] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,[1609] [573] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[1610] [574]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[1611] [575] In the case of contracts, it is the future income stream which

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[1605] [569] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above) and *Norwegian Shipowners' Claims* (footnote [146] 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[1606] [570] Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment; Resubmitted case* (footnote [1601] 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

[1607] [571] Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (footnote [234] 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

[1608] [572] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above).

[1609] [573] *Norwegian Shipowners' Claims* (footnote [146] 87 above).

[1610] [574] For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote [1593] 557 above), paras. 184–187.

[1611] [575] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, *e.g.*, *Robert H. May (United States* v. *Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote [1604] 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, *e.g.*, *Gould*

is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, *e.g.* where the contract is determinable at the instance of the State,[1612] [576] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[1613] [577] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[1614] [578] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[1615] [579] Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

Marketing, Inc. v. *Ministry of Defence of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote [1597] 561 above), and in *Shufeldt* (footnote [146] 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleums Ltd.* (footnote [1598] 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (footnote [1495] 508 above), p. 140; and *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment*; *Resubmitted case* (footnote [1601] 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

[1612] [576] As in *Sylvania Technical Systems, Inc.* (footnote [1611] 575 above).

[1613] [577] See footnote [1061] 385 above.

[1614] [578] See footnote [1558] 522 above.

[1615] [579] Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of "E2" claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Panel of Commissioners of the United Nations Compensation Commission

S/AC.26/1999/6

In its 1999 report concerning the second instalment of "E2" claims,[1616] [196] the Panel of Commissioners of the United Nations Compensation Commission found that its interpretation, based on Governing Council decision 9, according to which losses resulting from a decline in operations were compensable, was "confirmed by accepted principles of international law regarding State responsibility" as enshrined, for example, in draft article 44, paragraph 2, adopted by the International Law Commission on first reading:[1617] [197]

> 77. The preceding analysis based on decision 9 [of the Governing Council of the United Nations Compensation Commission] is confirmed by accepted principles of international law regarding State responsibility. The Draft articles on State Responsibility by the International Law Commission, for example, provide in relevant part that 'compensation covers any economically assessable damage sustained … , and, where appropriate, loss of profits'.[1618] [198]

[A/62/62, para. 111]

S/AC.26/2000/2

In its 2000 report concerning the fourth instalment of "E2" claims,[1619] [199] the UNCC Panel of Commissioners, after having found that "[t]he standard measure of compensation for each loss that is deemed to be direct should be sufficient to restore the claimant to the same financial position that it would have been in if the contract had been performed", referred in a footnote (without specifying any paragraph) to the commentary to draft article 44 adopted by the International Law Commission on first reading.[1620] [200]

[A/62/62, para. 112]

[1616] [196] "E2" claims before the United Nations Compensation Commission are claims of non-Kuwaiti corporations that do not fall into any of the other subcategories of "E" claims (*i.e.*, "E1" (oil sector claims), "E3" (claims of non-Kuwaiti corporations related to construction and engineering) and "E4" (claims of Kuwaiti corporations, excluding those relating to the oil sector)).

[1617] [197] This provision was amended and incorporated in article 36 as finally adopted in 2001. The text of draft article 44 adopted on first reading was as follows:

> Article 44
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> Compensation
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> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
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> 2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

[1618] [198] S/AC.26/1999/6, para. 77 (footnote omitted).

[1619] [199] See footnote [1616] 196 above.

[1620] [200] S/AC.26/2000/2, para. 157, footnote 61.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

S.D. Myers Inc. v. *Canada*

In its 2000 partial award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA under the UNCITRAL Rules to hear the *Myers* v. *Canada* case, in order to determine the methodology for the assessment of the compensation due in that case, noted that, "[t]here being no relevant provisions of the NAFTA other than those contained in article 1110", it needed to turn "for guidance" to international law.[1621] [201] After having quoted a passage of the judgement of the Permanent Court of International Justice on the merits in the *Factory at Chorzów* case on the question of reparation, the arbitral tribunal further observed that

> [t]he draft articles on State responsibility under consideration by the International Law Commission at the date of this award similarly propose that in international law, a wrong committed by one State against another gives rise to a right to compensation for the economic harm sustained.[1622] [202]

[A/62/62, para. 113]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1623] [203] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 36, it stated that "[c]ompensation is designed to cover any 'financially assessable damage including loss

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[1621] [201] NAFTA, Partial Award, 13 November 2000, para. 310 reproduced in *International Law Reports*, vol. 121, p. 127. The relevant parts of article 1110 of NAFTA read as follows:

> 1110(1). No Party may directly or indirectly nationalize or expropriate an investment of an investor or another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (*a*) For a public purpose;
>
> (*b*) On a non-discriminatory basis;
>
> (*c*) In accordance with due process of law and Article 1105(1); and
>
> (*d*) On payment of compensation in accordance with paragraphs 2 through 6.
>
> 1110(2). Compensation shall be equivalent to the firm market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

[1622] [202] *Ibid*., para. 312, reproduced in *International Law Reports*, vol. 121, p. 128. Although the arbitral tribunal did not mention it expressly, it was referring to draft article 44, as adopted by the International Law Commission on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65), which was amended and incorporated in article 36 finally adopted in 2001. For the text of draft article 44, see footnote [1617] 197 above.

[1623] [203] See footnote [1100] 163 above.

of profits insofar as it is established'" and that "compensation is only called for when the damage is not made good by restitution".[1624] 204

[A/62/62, para. 114]

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, noted that article 36 finally adopted by the International Law Commission in 2001 provided that "only where restitution cannot be achieved can equivalent compensation be awarded".[1625] 205

[A/62/62, para. 115]

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 36 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo Nagymaros Project (Hungary/Slovakia)*, '[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it' *(I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152–153; see also Article 36 of the ILC's Articles on State Responsibility).[1626] 11

[A/62/62/Add.1, para. 7]

International arbitral tribunal (under the ICSID Convention)

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

In its 2007 award, the arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* case applied article 36 of the State responsibility articles in its determination of the loss suffered by the investor.[1627] 56 It recalled the relevant paragraph of the commentary to article 36 indicating that the func-

[1624] 204 *Ibid.*, para. 401 and notes 214 and 215.

[1625] 205 ICSID, Case No. ARB/03/16, Award, 2 October 2006, paras. 494 and 495.

[1626] 11 ICJ, Judgment, *I.C.J. Reports 2007*, p. 43, para. 460.

[1627] 56 ICSID, Case No. ARB/02/1, Award, 25 July 2007, paras. 41–43.

tion of compensation is "to address the *actual losses incurred as a result* of the internationally wrongful act",[1628] 57 and held that

> [a]ccordingly, the issue that the Tribunal has to address is that of the identification of the '*actual loss*' suffered by the investor '*as a result*' of Argentina's conduct. The question is one of '*causation*': what did the investor lose by reason of the unlawful acts?[1629] 58

The tribunal also referred to the State responsibility articles in its consideration of a claim for loss of profits. It again recalled the relevant extracts of the commentary in holding that,

> as a matter of principle, it is necessary to outline at this point the distinction between accrued losses and lost future profits. Whereas the former have commonly been awarded by tribunals, the latter have only been awarded when '*an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable*'. Or, in the words of the Draft articles, '*in so far as it is established*'. The question is one of '*certainty*'. '*Tribunals have been reluctant to provide compensation for claims with inherently speculative elements*'.[1630] 59

[A/65/76, para. 39]

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentine Republic* case, in its 2007 award, referred to the requirement in article 36, paragraph 2, that compensation is meant to cover any "financially assessable damage including loss of profits insofar as it is established", as reflecting the "appropriate standard of reparation under international law" in the absence of restitution or agreed renegotiation of contracts or other measures of redress.[1631] 60

[A/65/76, para. 40]

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* referred to article 36 of the State responsibility articles in support of the assertion that

> compensation encompasses both the loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*). Any direct damage is to be compensated. In addition, the second paragraph of Article 36 recognizes that in certain cases compensation for loss of profits may be appropriate to reflect a rule applicable under customary international law.[1632] 61

[1628] 57 *Ibid*., para. 43. Reference to paragraph (4) of the commentary to article 36, emphasis in award.

[1629] 58 *Ibid*., para. 45, emphasis in original.

[1630] 59 *Ibid*., para. 51 (footnotes omitted). References to article 36, paragraph 2, and to paragraph (27) of the commentary to article 36, emphasis in award.

[1631] 60 See footnote [1026] 25 above, para. 401.

[1632] 61 See footnote [3] 4 above, para. 281.

The tribunal continued:

> Any determination of damages under principles of international law requires a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, *i.e.*, damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage, measured in an amount of money.[1633] 62

[A/65/76, para. 41]

International arbitral tribunal (under the ICSID Convention)

Desert Line Projects LLC v. *The Republic of Yemen*

In its 2008 award, the arbitral tribunal constituted to hear the *Desert Line Projects LLC* v. *Yemen* case, in dealing with a claim for non-material ("moral") damages, cited the commentary to article 36 in support of its conclusion that

> [e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them … . [As] it was held in the *Lusitania* cases, non-material damages may be 'very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated'.[1634] 63

[A/65/76, para. 42]

European Court of Human Rights

Guiso-Gallisay v. *Italy*

In the *Guiso-Gallisay* v. *Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 36 of the State responsibility articles as reflecting relevant international law in the case.[1635] 64

[A/65/76, para. 43]

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

In its award in *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia*, the arbitral tribunal indicated that "[t]he *Chorzów Factory* standard is reflected today in the ILC's Articles on State Responsibility, and in particular in their compensation provision

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[1633] 62 *Ibid*., para. 282.

[1634] 63 ICSID, Case No. ARB/05/17, Award, 6 February 2008, para. 289, emphasis in original, citing the reference to the *Lusitania* case (footnote [1550] 514 above), in paragraph (16) of the commentary to article 36.

[1635] 64 See footnote [1502] 55 above, para. 54.

… ".[1636] 171 The tribunal then cited the commentary to article 36 in support of the proposition that "compensation is generally assessed on the basis of the [Fair Market Value] of the property rights lost".[1637] 172 The tribunal also relied on article 36 in providing guidance on the applicable standard of compensation for breach of a provision requiring fair and equitable treatment, in a context where the treaty in question was silent on the point.[1638] 173

[A/68/72, para. 120]

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 36 in support of the assertion that "[w]here damage is not made good by way of restitution, then the ILC Articles envisage monetary compensation for the damage shown to be caused by the misconduct".[1639] 174

[A/68/72, para. 121]

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 relied upon article 36 of the State responsibility articles, and the commentary thereto, in its analysis of the claimants' claim for compensation.[1640] 175 Hence, it noted that:

> Article 36 contains two express requirements, (i) that the damage be 'financially assessable', *i.e.* capable of being evaluated in money, and that it be 'established', *i.e.* such that the remedy be commensurate with the injured party's proven loss and thus make it whole in accordance with the general principle expressed in *The Chorzów Factory* Case as regards compensation for an illegal act … .[1641] 176

It further pointed to the commentary to paragraph (2) of article 36, as providing guidance when considering "the quality of evidential proof required of a claimant to establish a claim, directly or indirectly, based on lost future profits under international law",[1642] 177 and noted that the commentary emphasized "'certainty' to be established evidentially by a claimant in all cases".[1643] 178 However, the tribunal took the view that it was clear from other legal materials cited in the commentary that the "concept of certainty [was] both

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[1636] 171 See footnote [288] 36 above, para. 504.

[1637] 172 *Ibid*., para. 505.

[1638] 173 *Ibid*., para. 532.

[1639] 174 See footnote [1198] 144 above, paras. 52 and 65.

[1640] 175 See footnote [866] 116 above, paras. 13–80 to 13–83.

[1641] 176 *Ibid*., para. 13–81.

[1642] 177 *Ibid*., para. 13–82.

[1643] 178 *Ibid*., para. 13–83.

relative and reasonable in its application, to be adjusted to the circumstances of the particular case".[1644] [179] It subsequently indicated that it was,

addressing contingent future events and not actual past events; it [was] seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involve[d] the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. It [was] not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal [could] only evaluate the chances of such a future event happening. That is not therefore an exercise in certainty, as such; but it is, in the circumstances, an exercise in 'sufficient certainty', as indicated by the ILC's Commentary cited above.[1645] [180]

[A/68/72, paras. 122–123]

International arbitral tribunal (under the ICSID Convention)

Joseph C. Lemire v. *Ukraine*

In its award in *Joseph C. Lemire* v. *Ukraine*, the arbitral tribunal, referring to article 36, paragraph 2, as reflecting the accepted understanding of the purpose of compensation, indicated that it only provided,

a theoretical definition of a general standard; the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, 'but for' the State's breach.[1646] [181]

The tribunal also relied upon article 36 in support of its assertions that "[t]he duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act",[1647] [182] and that compensation for speculative claims is not typically awarded.[1648] [183]

[A/68/72, paras. 124–125]

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

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal, citing the commentary to article 36, indicated that "[t]he reference to '*loss of profits*' in Article 36(2) confirms that the value of the property should be determined with reference to a date subsequent to that of the internationally wrongful act, provided the damage is '*financially assessable*', therefore not speculative".[1649] [184]

[A/68/72, para. 126]

[1644] [179] *Ibid*.

[1645] [180] *Ibid*., para. 13–91.

[1646] [181] See footnote [1291] 156, para. 152.

[1647] [182] *Ibid*., para. 155.

[1648] [183] *Ibid*., paras. 245–246.

[1649] [184] See footnote [56] 16 above, para. 710.

Marion Unglaube and Reinhard Unglaube v. *Republic of Costa Rica*

In its award in *Marion Unglaube and Reinhard Unglaube* v. *Republic of Costa Rica*, the arbitral tribunal referred to the State responsibility articles, particularly articles 34 through 39, as constituting "subsequent international practice" reflecting "the compensation standard under customary international law".[1650] [185]

[A/68/72, para. 127]

INTERNATIONAL COURT OF JUSTICE

Ahmadou Sadio Diallo (Republic of Guinea v. *Democratic Republic of the Congo)*

In its judgment on compensation in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo*), the International Court of Justice cited, *inter alia*, the commentary to article 36 of the State responsibility articles in support of the proposition that "[w]hile an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative".[1651] [186]

[A/68/72, para. 128]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

[*Mr Franck Charles Arif* v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[1652] [172] as relevant for the analysis regarding the award of reparation.

[A/71/80, para. 121]]

Ioan Micula and others v. *Romania*

[In *Ioan Micula and others* v. *Romania*, the arbitral tribunal referred to articles 34 and 36 in acknowledging that the obligation to make full reparation "[i]n most cases … involves the payment of compensation".[1653] [173] It further noted that "the commentary to the ILC Articles limits compensation to 'damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote'".[1654] [174]

[A/71/80, para. 122]]

[1650] [185] ICSID, Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 306.

[1651] [186] ICJ, Judgment, 19 June 2012, para. 49.

[1652] [[172] See footnote [320] 46 above, para. 560.]

[1653] [[173] See footnote [1188] 133 above, para. 917.]

[1654] [[174] *Ibid*., para. 1009 (quoting para. (5) of the commentary to article 34).]

The arbitral tribunal in *Ioan Micula and others* v. *Romania*, observed that article 36, paragraph 2, provides that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established".[1655] 196

[A/71/80, para. 133]

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. *Kazakhstan*

In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, the arbitral tribunal agreed that, "as reflected in Article 36 and Article 39 … Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct".[1656] 197 The tribunal also noted that the respondent

> rightly referred to the comments in [the] Commentaries on the ILC Articles on State Responsibility and to respective comments in earlier awards that the investor must meet a high standard of proof to establish a claim for lost profits, especially due to the degree of economic, political and social exposure of long-term investment projects. To meet this standard, an investor must show that their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages.[1657] 198

[A/71/80, para. 134]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

SAUR International S.A. v. *Republic of Argentina*

In *SAUR International S.A.* v. *Republic of Argentina*, the arbitral tribunal cited article 36, paragraph 2, when discussing "un principe international bien établi et que les deux parties reconnaissent: une fois les violations avérées, l'investisseur affecté doit obtenir une réparation intégrale qui soit équivalente au paiement d'une indemnisation incluant à la fois le dommage réel et le manque à gagner".[1658] 199

[A/71/80, para. 135]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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",[1659] 147 including articles 31, 36 and 39. In assessing contributory fault, the tribunal, quoting the commentary to article 31, stated that

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[1655] 196 See footnote [1188] 133 above, para. 920 (quoting article 36 (emphasis omitted)).

[1656] 197 SCC, Case No. V (116/2010), Award, 19 December 2013, paras. 1330 and 1452.

[1657] 198 *Ibid*., para. 1688.

[1658] 199 ICSID, Case No. ARB/04/4, Award, 22 May 2014, para. 160, footnote 105 (footnote omitted).

[1659] [147 See footnote [19] 7 above, para. 1593.]

[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.[1660] [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.[1661] [149]

[A/71/80, para. 106]]

In deciding on the existence of a breach of the Energy Charter Treaty, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* referred to the principle contained in article 36 and quoted from the commentary to the article, which states that "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. Compensation corresponds to the financially assessable damage suffered … it is not concerned to punish … nor does compensation have an expressive or exemplary character".[1662] [200] The tribunal indicated that while unanticipated events "decrease the value of the right to restitution (and accordingly the right to compensation in lieu of restitution), they do not affect an investor's entitlement to compensation of the damage 'not made good by restitution' within the meaning of Article 36(1) of the ILC Articles on State Responsibility".[1663] [201]

[A/71/80, para. 136]

International arbitral tribunal (under the ICSID Convention)

Tidewater Investments SRL and Tidewater Caribe C.A. v. *The Bolivarian Republic of Venezuela*

In *Tidewater Investments SRL and Tidewater Caribe C.A.* v. *The Bolivarian Republic of Venezuela*, the arbitral tribunal referenced the commentary to article 36 in support of "the standard of compensation to be applied in cases of lawful compensation, where the investment constituted a going concern at the time of the taking. The Guidelines prescribe 'the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred'".[1664] [202]

[A/71/80, para. 137]

[1660] [148 *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).]

[1661] [149 *Ibid*., para. 1775.]

[1662] [200] *Ibid*., para. 1590 (quoting para. (4) of the commentary to article 36).

[1663] [201] *Ibid*., para. 1768.

[1664] [202] ICSID, Case No. ARB/10/5, Award, 13 March 2015, para. 153, footnote 241.

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* referred to article 36 in support of the view that "the basic standard to be applied is that of full compensation (*restitutio in integrum*) for the loss incurred as a result of the internationally wrongful act", which represents "the accepted standard in customary international law".[1665] [203]

[A/71/80, para. 138]

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

The arbitral tribunal in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia* indicated with reference to article 36 that, "if restitution in kind is impossible or not practicable, the compensation awarded must wipe out all the consequences of the wrongful act", and that "compensation shall cover any financially assessable damage, including loss of profits insofar as it is established".[1666] [204] It also observed that it was required to "value the loss with reasonable certainty".[1667] [205]

[A/71/80, para. 139]

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

In *Hrvatska Elektroprivreda d.d.* v. *Republic of Slovenia*, the arbitral tribunal relied on article 36 as "reflecting the principle in *Chorzów Factory*" when stating that "it is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered".[1668] [206]

[A/71/80, para. 140]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela* stated that the State responsibility articles "are currently considered to be the most accurate reflection of customary international law" regarding the measurement and calculation of compensation.[1669] [207] Regarding the determination of fair market value, the arbitral tribunal noted that "[e]ach tribunal must, thus, attempt to give meaning both to the words of the treaty regarding the putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles, and the ruling of the PCIJ in the *Chorzów* case".[1670] [208]

[A/71/80, para. 141]

[1665] [203] See footnote [63] 16 above, para. 27.

[1666] [204] See footnote [65] 18 above, para. 328 (quoting article 36).

[1667] [205] *Ibid*., para. 384.

[1668] [206] See footnote [1322] 163 above, para. 238, footnote 19.

[1669] [207] See footnote [342] 68 above, para. 515.

[1670] [208] *Ibid*., para. 543 (footnotes omitted).

[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",[1671] [150] which were relevant with regard to the parties' claims for relief.[1672] [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.[1673] [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.[1674] [158]

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

[*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".[1675] [176]

[A/74/83, p. 31]]

[*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".[1676] [177]

[A/74/83, p. 31]]

[1671] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1672] [[151] *Ibid*., para. 9.9.]

[1673] [[157] ICSID, Case No. ARB/13/7, Award, 12 January 2016, para. 222.]

[1674] [[158] *Ibid*., paras. 223–224.]

[1675] [[176] ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 663.]

[1676] [[177] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 1127–1129.]

[*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].[1677] [191]

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

[European Court of Human Rights

Ryabkin and Volokitin v. *Russia*

In *Ryabkin and Volokitin* v. *Russia*, the European Court of Human Rights considered articles 35 and 36 of the State responsibility articles as relevant international law.[1678] [193]

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

International Arbitral tribunal (under the ICSID Convention)

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal referred to article 36 of the State responsibility articles when stating that it is generally recognized that in matters of expropriation, the value of the expropriated good(s) has to assessed with reference to the fair market value.[1679] [199]

[A/74/83, p. 35]

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that the State responsibility articles "are currently considered to be the most accurate reflection of customary international law" regarding the assessment of compensation.[1680] [200] Regarding the determination of fair market value, the arbitral tribunal noted that "[e]ach tribunal must, thus, attempt to give meaning both to the words of the treaty regarding the putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles, and the ruling of the PCIJ in the *Chorzów* case".[1681] [201]

[A/74/83, p. 35]

[1677] [191 ICSID, Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, para. 1085.]

[1678] [193 ECHR, Third Section, Application Nos. 52166/08 and 8526/09, Judgment, 28 June 2016, para. 30.]

[1679] 199 ICSID, Case No. ARB/13/7, Award (French), 12 January 2016, paras. 224–225 and footnote 157.

[1680] 200 ICSID, Case No. ARB/11/26, Award, 29 January 2016, paras. 515–516.

[1681] 201 *Ibid*., para. 543.

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* cited article 36 and the corresponding commentary to note that "[a]ppraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished".[1682] [202] The tribunal also noted that "the ILC Articles recognize that in certain cases compensation for loss of profits may be appropriate".[1683] [203]

[A/74/83, p. 35]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Tidewater Investment SRL and Tidewater Caribe, C.A. v. *Bolivarian Republic of Venezuela*

In *Tidewater Investment SRL and Tidewater Caribe, C.A.* v. *Bolivarian Republic of Venezuela*, the *ad hoc* committee, in discussing the respondent's arguments for an excess of powers by the tribunal, noted that the tribunal had considered the "World Bank Guidelines [on the Treatment of Foreign Direct Investment]… together with case law, doctrine and the International Law Commission Draft on the Responsibility of States, as providing 'reasonable guidance' for the interpretation of Articles 5 and 8 of the BIT"[1684] [204] to find "a proper standard for the determination of the 'market value'".[1685] [205]

[A/74/83, p. 35]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, referred to articles 35 and 36 of the State responsibility articles in support of its view that "the fair market value also reflects the compensation standard under customary international law".[1686] [206]

[A/74/83, p. 36]

Burlington Resources Inc. v. *Republic of Ecuador*

The arbitral tribunal in *Burlington Resources Inc.* v. *Republic of Ecuador* concluded, citing article 36 of the State responsibility articles, that "Burlington has not proven, with

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[1682] [202] ICSID, Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 849–850.

[1683] [203] *Ibid*., para. 873.

[1684] [204] ICSID, Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 144.

[1685] [205] *Ibid*., para. 132.

[1686] [206] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 627 and 711.

the reasonable certainty that international law requires for a lost profits claim, that an extension capable of being 'taken' [by expropriation] would in fact have materialized from its [Burlington's] right to negotiate [a contractual extension]".[1687] 207

[A/74/83, p. 36]

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*, with reference to article 36 of the State responsibility articles, calculated "compensation reflecting the capital value of property taken as a result of an internationally wrongful on the basis of the 'fair market value' of the property lost", taking into account "the nature of the asset concerned".[1688] 208

[A/74/83, p. 36]

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, citing the text of article 36, paragraph 1, that the claimant "is entitled to full reparation of the loss that it has suffered from Respondent's breaches of the treaty".[1689] 209 It further observed that "moral damages are not covered by the principle set out in Article 36 of the ILC Articles".[1690] 210

[A/74/83, p. 36]

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

> [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.[1691] 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.[1692] 212

[A/74/83, p. 36]

[1687] 207 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 278.

[1688] 208 ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 872–73.

[1689] 209 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 564.

[1690] 210 *Ibid*., para. 565.

[1691] 211 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.96–10.97.

[1692] 212 *Ibid*., para. 10.138.

[*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".[1693] 236

[A/74/83, p. 39]]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[1694] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[1695] 43

[A/77/74, p. 11]]

[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* referred to articles 27, under which the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, and to article 36.[1696] 112 The tribunal therefore determined that under the applicable investment treaty, "whilst a State may adopt or enforce a measure pursuant to the stated objectives" in the treaty, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[1697] 113

[A/77/74, p. 22]]

[1693] [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 above), 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.]

[1694] [42 Final Award, 26 March 2021, para. 72.]

[1695] [43 *Ibid*., paras. 72 and 134–135.]

[1696] [112 See footnote [401] 51 above, para. 835.]

[1697] [113 *Ibid*., para. 830.]

[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 principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1698] [157] The tribunal also referred to articles 36[1699] [158] and 37.[1700] [159]

[A/77/74, p. 28]]

[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 noted that article 36, paragraph 2, provided that "compensation shall cover any financially assessable damages including loss of profits insofar as it is established".[1701] [181]

[A/77/74, p. 31]]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *9REN Holding S.à.r.l.* v. *Kingdom of Spain* referred to article 36 in assessing the amount of recoverable legal costs of the proceeding, noting that the claims for legal costs had been made under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, "and not as compensation for an internationally wrongful act subject to the *Chorzów Factory* and other principles of international law".[1702] [182]

[A/77/74, p. 31]

Perenco Ecuador Limited v. *Ecuador*

In *Perenco Ecuador Limited* v. *Ecuador*, the arbitral tribunal found that, pursuant to article 36, "it should award compensation insofar as [the] damage is not made good by restitution".[1703] [183] Furthermore, the tribunal emphasized that "[t]he key point is that financial damage must not only be proximately caused by the unlawful act(s), but that it also be 'assessable', that is, capable of being assessed".[1704] [184]

[A/77/74, p. 31]

[1698] [157 PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.]

[1699] [158 *Ibid*., para. 740.]

[1700] [159 *Ibid*., para. 701.]

[1701] [181] ITLOS, *M/V "Norstar" (Panama* v. *Italy)* (footnote [72] 12 above), p. 116, para. 431.

[1702] [182] See footnote [1372] 122 above, para. 440.

[1703] [183] See footnote [1379] 129 above, para. 74.

[1704] [184] *Ibid*., paras. 321–322.

(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 cited articles 35, 36 and 38, noting that "in investment law, full reparation may take the form of restitution or compensation", plus interest.[1705] [179]

The arbitral tribunal noted that, pursuant to article 36, "it is generally accepted that compensation can be claimed for incidental expenses incurred as the result of an internationally wrongful act, insofar as they are financially assessable and reasonable".[1706] [185]

[A/77/74, p. 31]

Permanent Court of Arbitration (under UNCITRAL Rules)

OOO Manolium Processing v. *Republic of Belarus*

The arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* noted that article 36, paragraph 1, reflected the general principle that "injured claimants bear the burden of demonstrating that there is a sufficiently close relationship between the host State's irregular conduct and the compensation which is being claimed. The duty to compensate extends only to those damages which are legally regarded as the consequence of an unlawful act".[1707] [186]

[A/77/74, p. 31]

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* indicated that "[w]here restitution is not possible, pursuant to Article 36 (1) the ILC Draft Articles, a State's obligation is to pay compensation for the damage caused".[1708] [187]

[A/77/74, p. 32]

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 explained that damages, "under Article 36, include loss of profits insofar as they are established".[1709] [188] Furthermore, it stressed that article 36, paragraph 1, reflected the general principle that "injured claimants bear the burden of demonstrating … that the claimed quantum of damage was actually suffered, and … that such damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (*i.e.*, not 'too remote')".[1710] [189]

[A/77/74, p. 32]

[1705] [179 See footnote [1029] 108 above, para. 396.]

[1706] [185] *Ibid*., para. 427.

[1707] [186] See footnote [799] 86 above, para. 657.

[1708] [187] See footnote [401] 51 above, para. 894.

[1709] [188] See footnote [402] 52 above, para. 726.

[1710] [189] *Ibid*., paras. 728–729.

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal noted that "[s]ince restitution of Claimants to the *status quo* ante … is neither requested nor suggested by the Parties, nor is it materially possible, the only form of reparation in question in the present proceeding is compensation in the sense of Article 36 of the ILC Articles". The tribunal further cited the article, noting that "[p]ursuant to paragraph 1 of that provision, Respondent 'is under an obligation to compensate for the damage caused'; pursuant to paragraph 2 of the same provision, 'compensation shall cover any financially assessable damage including loss of profits insofar as it is established'".[1711] 190

[A/77/74, p. 32]

[1711] 190 See footnote [193] 26 above, para. 441.

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State." Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[1712] [580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-

[1712] [580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

tion. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[1713] 581

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[1714] 582 violations of sovereignty or territorial integrity,[1715] 583 attacks on ships or aircraft,[1716] 584 ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[1717] 585 and violations of the premises of embassies or consulates or of the residences of members of the mission.[1718] 586

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[1719] 587 Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[1720] 588 a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the

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[1713] 581 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 272–273, para. 122.

[1714] 582 Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (footnote [1007] 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (footnote [1485] 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[1715] 583 As occurred in the *"Rainbow Warrior"* arbitration (footnote [40] 46 above).

[1716] 584 Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[1717] 585 See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[1718] 586 Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (footnote [1485] 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[1719] 587 In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (footnote [40] 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[1720] 588 For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

internationally wrongful act[1721] [589] or the award of symbolic damages for non-pecuniary injury.[1722] [590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[1723] [591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.
>
> This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[1724] [592]

This has been followed in many subsequent cases.[1725] [593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apolo-

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[1721] [589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1966), p. 257).

[1722] [590] See, *e.g.*, the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and *"Rainbow Warrior"* (footnote [40] 46 above).

[1723] [591] See paragraph (11) of the commentary to article 30.

[1724] [592] *Corfu Channel, Merits* (footnote [29] 35 above), p. 35, repeated in the operative part (p. 36).

[1725] [593] For example, *"Rainbow Warrior"* (footnote [40] 46 above), p. 273, para. 123.

gies were required in the *"I'm Alone"*,[1726] [594] *Kellett*[1727] [595] and *"Rainbow Warrior"*[1728] [596] cases, and were offered by the responsible State in the *Consular Relations*[1729] [597] and *LaGrand*[1730] [598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, *e.g.* where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[1731] [599]

(8) Excessive demands made under the guise of "satisfaction" in the past[1732] [600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[1733] [601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph *3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Quiborax S.A. et al. v. *Plurinational State of Bolivia*

In its decision on jurisdiction in *Quiborax S.A. et al.* v. *Plurinational State of Bolivia,* the arbitral tribunal decided that it was more appropriate to entertain in the final award on the merits the claimants' request for a declaratory judgment pursuant to article 37.[1734] [187]

[A/68/72, para. 129]

[1726] [594] See footnote [1722] 590 above.

[1727] [595] Moore, *Digest*, vol. V, p. 44 (1897).

[1728] [596] See footnote [40] 46 above.

[1729] [597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[1730] [598] See footnote [236] 119 above.

[1731] [599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[1732] [600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote [1714] 582 above), pp. 187–188.

[1733] [601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[1734] [187] ICSID, Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 308.

[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".[1735] [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.[1736] [138]

[A/71/80, para. 99]]

International arbitral tribunal (under the ICSID Convention)

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, following a detailed examination of the remedy of satisfaction under international law, found that "the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair".[1737] [209] It further noted that "[t]he fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate".[1738] [210]

[A/71/80, para. 142]

[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",[1739] [150] which were relevant with regard to the parties' claims for relief.[1740] [151]

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

[1735] [137 Award, 24 October 2014, para. 275.]

[1736] [138 *Ibid*., para. 276.]

[1737] [209] See footnote [65] 18 above, para. 555 (see paras. 550–560 for the full discussion).

[1738] [210] *Ibid*., para. 560.

[1739] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1740] [151 *Ibid*., para. 9.9.]

European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1741] 213

[A/74/83, p. 37]

[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 principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1742] 157 The tribunal also referred to articles 36[1743] 158 and 37.[1744] 159

[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 referred to satisfaction as one of the three forms that full reparation could take, explaining that it "may consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality, as established in Article 37".[1745] 192 Moreover, the tribunal indicated that "[t]he only limitation (identified in Article 37 (3) of the ILC Articles) is that the satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State".[1746] 193

[A/77/74, p. 32]

[1741] 213 ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and footnote 6.

[1742] [157 PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.]

[1743] [158 *Ibid*., para. 740.]

[1744] [159 *Ibid*., para. 701.]

[1745] 192 See footnote [402] 52 above, para. 726.

[1746] 193 *Ibid*., para. 738.

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 referred to article 37 and the commentary thereto in analysing a request for reparations in the form of "the conduct of criminal investigations and prosecutions",[1747] [194] observing that the forms of satisfaction listed in article 37, paragraph 2, "are not exhaustive. In principle, satisfaction can include measures such as 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act'".[1748] [195]

[A/77/74, p. 32]

[1747] [194] ICJ, (footnote [1410] 160 above), para. 388.

[1748] [195] *Ibid*., para. 389.

Article 38. Interest

1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Commentary

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[1749] [602] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[1750] [603] In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due has been fixed and the obligation to pay has been established".[1751] [604]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[1752] [605] The experience of the Iran–United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran* v. *The United States of America (Case A–19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise . . . of the discretion accorded to them in deciding each particular case".[1753] [606] On the issue of principle the tribunal said:

[1749] [602] Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote [702] 182 above), pp. 252–253.

[1750] [603] See, *e.g.*, the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.)* v. *United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

[1751] [604] See footnote [28] 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[1752] [605] In the *M/V "Saiga"* case (footnote [1096] 160 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

[1753] [606] *The Islamic Republic of Iran* v. *The United States of America,* Iran–U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (footnote [1017] 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment"… . Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[1754] 607

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[1755] 608 It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[1756] 609

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[1757] 610

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[1758] 611

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the

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[1754] 607 *The Islamic Republic of Iran* v. *The United States of America* (*ibid.*), pp. 289–290.

[1755] 608 See C. N. Brower and J. D. Brueschke, *op. cit.* (footnote [1556] 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[1756] 609 See the detailed analysis of Chamber Three in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone,* Iran–U.S. C.T.R., vol. 11, p. 3, at pp. 26–31 (1986).

[1757] 610 Awards of interest, Decision, 18 December 1992, S/AC.26/1992/16.

[1758] 611 See, *e.g.*, the *Velásquez Rodríguez,* Compensatory Damages case (footnote [1552] 516 above), para. 57. See also *Papamichalopoulos* (footnote [1551] 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote [1557] 521 above), pp. 270–272.

principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[1759] [612] Some national court decisions have also dealt with issues of interest under international law,[1760] [613] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran–United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co.* v. *The Government of the Islamic Republic of Iran*, the tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable" … Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. [1761] [614]

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[1762] [615] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

> the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[1763] [616]

[1759] [612] See, *e.g.*, the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, H. M. Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote [1587] 551 above).

[1760] [613] See, *e.g.*, *McKesson Corporation* v. *The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F, Supp. 2d 13 (2000).

[1761] [614] Iran–U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law,* vol. III (footnote [1604] 568 above), p. 1997.

[1762] [615] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote [1017] 357 above), pp. 477–478.

[1763] [616] *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote [1483] 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[1764] 617 This view has also been supported by arbitral tribunals in some cases.[1765] 618 But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[1766] 619 date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[1767] 620 In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran–United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[1768] 621 On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally

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[1764] 617 F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

[1765] 618 See, *e.g.*, *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, Final Award, 17 February 2000, paras. 103–105.

[1766] 619 Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (footnote [1014] 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

[1767] 620 See, *e.g.*, J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid.*, pp. 38–40, with references).

[1768] 621 *The Islamic Republic of Iran* v. *The United States of America (Case No. A-19)* (footnote [1753] 606 above).

employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, *i.e.* compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

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,[1769] [206] the Panel of Commissioners was of the view that Governing Council decision 16 on "awards of interest" addressed any claim that in fact arose as a result of the delay of payment of compensation. It noted that the said decision provided that interest would be awarded "from the date the loss occurred until the date of payment". In a footnote, the panel further observed that this decision was "similar" to article 38, paragraph 2, as finally adopted by the International Law Commission in 2001, which it quoted.[1770] [207]

[A/62/62, para. 116]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1771] [208] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to the principles embodied in articles 34, 35, 36 and 38, as finally adopted by the International Law Commission in 2001. With regard to article 38, it found that "[d]ecisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends".[1772] [209]

[A/62/62, para. 117]

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 38, and the commentary thereto, in support of the assertion that "the

[1769] [206] See footnote [1497] 192 above.

[1770] [207] S/AC.26/2003/15, para. 172, footnote 59.

[1771] [208] See footnote [1100] 163 above.

[1772] [209] *Ibid.*, para. 404 and footnote 220.

awarding of interest depends on the circumstances of each case and, in particular, whether an award of interest is necessary in order to ensure full reparation".[1773] 188

[A/68/72, para. 130]

SGS Société générale de Surveillance S.A. v. *The Republic of Paraguay*

The arbitral tribunal in *SGS Société Générale de Surveillance S.A.* v. The Republic of Paraguay cited article 38, paragraph 2, in support of its assertion that "[t]he virtually universal principle of international law and international arbitration practice in the case of a delayed payment of monetary obligations due is to apply interest as of the date payment became due".[1774] 189

[A/68/72, para. 131]

Marion Unglaube and Reinhard Unglaube v. *Republic of Costa Rica*

In *Marion Unglaube and Reinhard Unglaube* v. *Republic of Costa Rica*, the arbitral tribunal, citing article 38, paragraph 1, indicated that "[c]ustomary international law, as reflected in the ILC articles, broadly indicates that the interest rate should be set to achieve the result of full reparation".[1775] 190

[A/68/72, para. 132]

Mr Franck Charles Arif v. *Republic of Moldova*

In *Mr Franck Charles Arif* v. *Republic of Moldova*, the arbitral tribunal noted that:

Article 38 of the International Law Commission's Articles on State Responsibility confirms that interest will be payable 'when necessary in order to ensure full reparation'. It also confirms that the general view in international law is in favour of simple and not compound interest, although other commentators suggest the trend in investment arbitration is in favour of compound interest.[1776] 212

[A/71/80, para. 143]

Ioan Micula and others v. *Romania*

The arbitral tribunal in *Ioan Micula and others* v. *Romania* agreed that the "overwhelming trend among investment tribunals is to award compound rather than simple interest", which was not reflected in the commentary to article 38 relied on by the respondent.[1777] 213 The tribunal further noted that, according to the commentary to article 38, an award of interest is inappropriate where it would result in double recovery, but "interest

[1773] 188 See footnote [288] 36 above, paras. 659 and 660.

[1774] 189 ICSID, SGS Société générale de Surveillance S.A. v. The Republic of Paraguay, Case No. ARB/07/29, Award, 10 February 2012, para. 184.

[1775] 190 See footnote [1650] 185 above, para. 320.

[1776] 212 See footnote [320] 46 above, para. 617.

[1777] 213 See footnote [1188] 133 above, para. 1266.

may be due on the profits which would have been earned but which have been withheld from the original owner".[1778] 214

[A/71/80, para. 144]

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* referred to article 38 and the commentary thereto, as part of the legal framework relevant for the award of interest.[1779] 215 It went on to note that "the ILC Articles on State Responsibility [do not] provide specific rules regarding how interest should be determined".[1780] 216

[A/71/80, para. 145]

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*

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, the arbitral tribunal indicated, based on article 38, that "customary international law authorizes the payment of interest on the principal sum due from the time the amount should have been paid until the date when the payment obligation is actually fulfilled".[1781] 217

[A/71/80, para. 146]

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

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal relied on article 38 to explain that pre-award interest, as opposed to post-award interest, "is granted in order to ensure full reparation",[1782] 218 and to note that "it is relevant to take into account the returns the Claimants might have earned on these investments because, had they been immediately compensated for the wrongs they suffered, this is where the Claimants contend they would have invested their wealth".[1783] 219

[A/71/80, para. 147]

[1778] 214 *Ibid*., para. 1275 (quoting para. (11) of the commentary to article 38).

[1779] 215 See footnote [19] 7 above, paras. 1652–1653.

[1780] 216 *Ibid*., para. 1678.

[1781] 217 See footnote [63] 16 above, para. 27, footnote 19.

[1782] 218 See footnote [114] 24 above, para. 943.

[1783] 219 *Ibid*., para. 947.

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, according to the commentary to article 38,

> [w]here a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery,' because '[a] capital sum cannot be earning interest and notionally employed in earning profits at one and the same time.' However, … 'interest may be due on the profits which would have been earned but which have been withheld from the original owner.[1784] 220

The tribunal also noted that it was

> aware that the Commentary to ILC Article 38, which the Respondent also invokes, states that '[t]he general view of courts and tribunals has been against the award of compound interest.' Yet, a review of arbitral decisions shows that compound interest has been deemed to 'better reflect … contemporary financial practice' and to constitute 'the standard of international law in … expropriation cases.' The view that compound interest better achieves full reparation has been adopted in a large number of decisions and is shared by this Tribunal.[1785] 221

[A/71/80, para. 148]

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

In *Hrvatska Elektroprivreda d.d.* v. *Republic of Slovenia*, the arbitral tribunal relied on article 38 and the commentary thereto when stating that "[t]his principle of full reparation thus guides the Tribunal in making its finding on interest".[1786] 222

[A/71/80, para. 149]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, in determining the interest due upon the compensation awarded, the arbitral tribunal referred to article 38 and the commentary thereto.[1787] 223

[A/71/80, para. 150]

[1784] 220 See footnote [65] 18 above, para. 514 (quoting para. (11) of the commentary to article 38).

[1785] 221 *Ibid*., para. 524 (quoting para. (8) of the commentary to article 38, and the cases of *LG&E* v. *Argentina*, ICSID, Case No. ARB/02/1, Award, 25 July 2007, para. 103; *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, ICSID, Case No. ARB/99/6, Award, 12 April 2002, para. 174; *Occidental* v. *Ecuador II*, ICSID, Case No. ARB/06/11, Award, 5 October 2012, para. 840; *El Paso* v. *Argentina*, ICSID, Case No. ARB/03/15, Award, 31 October 2011, para. 745 (footnote [56] 16 above); *Vivendi* v. *Argentina II*, ICSID, Case No. ARB/97/3, Award, 20 August 2007, para. 9.2.6; and *Wena* v. *Egypt*, ICSID, Case No. ARB/98/4, Award, 8 December 2000, para. 129 (footnotes omitted)).

[1786] 222 See footnote [1322] 163 above, para. 539 (quoting para. (2) of the commentary to article 38).

[1787] 223 See footnote [342] 68 above, paras. 575–576.

[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",[1788] [150] which were relevant with regard to the parties' claims for relief.[1789] [151]

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

International arbitral tribunal (under the ICSID Convention)

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal quoted article 38 of the State responsibility articles and the commentary thereto[1790] [214] with regard to the actualization of the loss caused by an expropriation.[1791] [215] The tribunal stated: "While the rationale and rate of interest applied by investment tribunals has varied widely, a consensus appears to have evolved around the principle of the claimant's opportunity cost."[1792] [216]

[A/74/83, p. 37]

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 38 of the State responsibility articles as an "authoritative statement" that "[t]he substantive international legal obligation to pay interest on monies due is well established",[1793] [217] and relied on the corresponding commentary to discuss the award of simple or compound interest.[1794] [218]

[A/74/83, p. 37]

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* referred to article 38 and its commentary thereto, when

[1788] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1789] [151 *Ibid*., para. 9.9.]

[1790] [214] ICSID, Case No. ARB/11/26, Award, 29 January 2016, para. 575.

[1791] [215] *Ibid*., para. 576.

[1792] [216] *Ibid*., para. 577.

[1793] [217] ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 930.

[1794] [218] *Ibid*., para. 935 and footnote 1319.

"deem[ing] it appropriate to award interest for damages so as to ensure full reparation to Claimant".[1795] 219

[A/74/83, p. 37]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela* noted "[a]s to the standard under customary international law, Article 38 of the ILC Draft Articles provides that '[t]he interest rate and mode of calculation shall be set so as to achieve [the] result [of ensuring full reparation]'".[1796] 220

[A/74/83, p. 37]

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal awarded compound interest, thereby diverging from the commentary to article 38 to the State responsibility articles, because "compound interest achieves full reparation better than simple interest".[1797] 221

[A/74/83, p. 38]

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, citing article 38, "note[d] that the ILC Articles also address interest as a component of a State's obligation to make full reparation"[1798] 222 and "ha[d] no hesitation in accepting that the payment of interest forms part of the obligation to make full reparation for a breach of an international obligation".[1799] 223

[A/74/83, p. 38]

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* "noted that neither the BIT nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined".[1800] 224

[A/74/83, p. 38]

[1795] 219 PCA, Case No. 2012–16, Partial Final Award, 6 May 2016, paras. 511–513.

[1796] 220 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 872.

[1797] 221 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 540.

[1798] 222 See footnote [355] 45 above, para. 1120.

[1799] 223 *Ibid*., para. 1121.

[1800] 224 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 992, also referring to *Yukos Universal Ltd. (Isle of Man)* v. *Russia*, PCA, Case No. AA 227, Final Award, 18 July 2014, para. 1678.

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* stated that article 38 of the State responsibility articles confirmed the general premise that "[a]n award of interest compensates the claimant for the loss of the use of its money as a result of the respondent's wrong. Thus, limiting the reparation for the deprivation of the use of money to a period shorter than the actual time during which the deprivation lasted can only be an exception."[1801] [225] The tribunal awarded interest upon finding "no reason to depart from the general principles set forth in article 38 of the ILC Articles".[1802] [226]

[A/74/83, p. 38]

International Court of Justice

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. *Nicaragua)*

The International Court of Justice in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* referred to article 38 and the commentary thereto when it recalled that "in the practice of international courts and tribunals, prejudgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case."[1803] [227]

[A/74/83, p. 38]

International Chamber of Commerce

Olin Holdings Limited v. *State of Libya*

In *Olin Holdings Limited* v. *State of Libya*, the tribunal "refer[red] to Article 38.1 of the ILC Articles on State responsibility, formulating the basic rules of international law concerning the responsibility of States for their internationally wrongful acts".[1804] [228] The tribunal further noted the "[p]arties' positions in relation to the rate of interest, and considers that the five percent (5%) commercial rate of interest applicable in Cyprus would achieve the result of ensuring full compensation pursuant to the ILC Articles on State Responsibility for the following reasons:

> (1) The Tribunal acknowledges that neither the Cyprus-Libya BIT nor international law more generally prompts the Tribunal to award interest based on the commercial rate of interest applicable in Libya;
>
> (2) The Tribunal recognizes that Olin is a Cypriot company and the interest rate applicable in Cyprus represents Olin's cost of borrowing this same sum from Cypriot banks and that as

[1801] [225] ICSID, Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, paras. 1217–1218.

[1802] [226] *Ibid*., para. 1221.

[1803] [227] ICJ, Judgment, 2 February 2018, para. 151.

[1804] [228] ICC, Case No. 20355/MCP, Final Award, 25 May 2018, para. 531.

such, awarding interests at the commercial rate applicable in Cyprus would enable the Claimant to achieve the result of full reparation.[1805] 229

[A/74/83, p. 38]

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 cited article 38 of the State responsibility articles when stating that "guidance should be taken from the principle of *restitutio ad integrum* under international law as reflected in Art. 38 of the ILC Articles".[1806] 230

[A/74/83, p. 39]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[1807] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[1808] 43

[A/77/74, p. 11]]

[International arbitral tribunal (under the ICSID Convention)

(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 cited articles 35, 36 and 38, noting that "in investment law, full reparation may take the form of restitution or compensation", plus interest.[1809] 179

[A/77/74, p. 31]]

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 cited article 38 and noted that, in its commentary thereto, the Commission had observed

[1805] 229 *Ibid*., para. 532.

[1806] 230 ICSID, Case No. ARB/13/35, Award, 9 October 2018, para. 596.

[1807] [42 Final Award, 26 March 2021, para. 72.]

[1808] [43 *Ibid*., paras. 72 and 134–135.]

[1809] [179 See footnote [1029] 108 above, para. 396.]

that "[t]here is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable".[1810] 196

[A/77/74, p. 33]

International arbitral tribunal (under the ICSID Convention)

Tethyan Cooper Company Pty Limited v. *Islamic Republic of Pakistan*

In *Tethyan Cooper Company Pty Limited* v. *Islamic Republic of Pakistan*, the arbitral tribunal quoted article 38 "as reflective of the standard [of full reparation] under customary international law".[1811] 197

[A/77/74, p. 33]

Permanent Court of Arbitration (under UNCITRAL Rules)

Stans Energy Corp. and Kutisay Mining LLC v. *Kyrgyz Republic (II)*

The tribunal in *Stans Energy Corp. and Kutisay Mining LLC* v. *Kyrgyz Republic (II)* reasoned that "[t]he principle of full reparation … implies that Stans Energy is entitled to both pre-award interest applied from the valuation date … to the date of the Award, and to post-award interest on the full amount of damages awarded by the Tribunal", and that "[g]uidance can be taken from the principle of *restitutio ad integrum* under international law as reflected in Art. 38 of the ILC Articles".[1812] 198

[A/77/74, p. 33]

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* noted that "[p]re-award interest is consistent with the principle of full compensation and also generally accepted in investment arbitration and this principle is enshrined in Article 38 of the ILC Draft Articles".[1813] 199 It added that "post-award interest provides an incentive to pay as is recognized in the ILC Draft Articles, Commentary (12) of Article 38".[1814] 200

[A/77/74, p. 33]

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. *Kingdom of Spain*

The arbitral tribunal in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l.* v. *Kingdom of Spain* referred to article 38, noting that "[i]nter-

[1810] 196 ITLOS, *M/V "Norstar" (Panama* v. *Italy)* (footnote [72] 12 above), p. 122, paras. 457–458.

[1811] 197 ICSID, Case No. ARB/12/1, Award, 12 July 2019, para. 1780.

[1812] 198 PCA, Case No. 2015–32, Award, 20 August 2019, para. 849.

[1813] 199 ICISD, Case No. ARB/15/36 (footnote [1378] 128 above), para. 718.

[1814] 200 *Ibid*., para. 722.

ests (whether pre- or post-award) are a necessary consequence of the principle of full reparation. They are a compensation for the damage suffered by the loss of use of the principal sum during the period for which the payment thereof continued to be withheld".[1815] 201

[A/77/74, p. 33]

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

The arbitral tribunal in *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar* noted that, pursuant to article 38, full reparation may take the form of restitution or compensation, "to which is added the interest on the capital 'when necessary in order to ensure full reparation'".[1816] 202

[A/77/74, p. 34]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

The arbitral tribunal in *Strabag SE* v. *Libya* referred to article 38 when analysing the question as to whether interest over the compensation determined in the award should be simple or compound. The tribunal referred to the commentary to article 38, noting that "compound interest should be awarded only where there are 'special circumstances which justify some element of compounding as an aspect of full reparation'".[1817] 203

[A/77/74, p. 34]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

Duzgit Integrity Arbitration (Republic of Malta v. *Democratic Republic of Sao Tome and Principe)*

In the *Duzgit Integrity Arbitration (Republic of Malta* v. *Democratic Republic of Sao Tome and Principe)*, the arbitral tribunal noted that

> [i]nterest is well established as an element of full reparation where monetary damages are awarded and is recognized as such within the Articles on State Responsibility. Whether an award of interest is required in a particular case, however, and the appropriate rate and mode of calculation depend upon what is required to achieve full reparation.

Since there was no specific rule established in the State responsibility articles or the United Nations Convention on the Law of the Sea, "this determination falls within the Tribunal's discretion, subject to the overarching goal of achieving full reparation".[1818] 204

[1815] 201 ICSID, Case No. ARB/13/30, Award, 11 December 2019, paras. 65–66.

[1816] 202 See footnote [1029] 108 above, para. 396.

[1817] 203 See footnote [498] 59 above, para. 962.

[1818] 204 See footnote [883] 98 above, para. 204.

The arbitral tribunal proceeded to analyse whether interest was due in respect of damages under various heads of claim.[1819] 205

[A/77/74, p. 34]

Permanent Court of Arbitration (under UNCITRAL Rules)

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

The arbitral tribunal in *Cairn Energy PLC and Cairn UK Holdings Limited* v. *Republic of India* indicated that "interest is a component of full reparation", with reference to article 38, paragraph 1.[1820] 206 The tribunal added:

> [A]n award of interest must put the Claimants in the position [in which] they would have been had the breach not occurred. An award of interest aims to compensate a claimant for having been deprived of funds that it could have either invested, or used to pay off existing debts or avoid new ones. In today's economy, this means that the claimant had to forgo earning compound interest or was forced to pay it.[1821] 207

[A/77/74, p. 34]

International arbitral tribunal (under the ICSID Convention)

Abed El Jaouni and Imperial Holding SAL v. *Lebanese Republic*

The arbitral tribunal in *Abed El Jaouni and Imperial Holding SAL* v. *Lebanese Republic* referred to article 38, noting that

> interest is an integral component of full compensation under customary international law, as expressed in the ILC Articles. In this regard, the purpose of the award of interest is the same purpose as an award of damages for breach of an international obligation: to place the victim in the economic position it would have been [in] if the international wrong had not been committed.[1822] 208

[A/77/74, p. 34]

Permanent Court of Arbitration (under UNCITRAL Rules)

Olympic Entertainment Group AS v. *Ukraine*

In *Olympic Entertainment Group AS* v. *Ukraine*, the arbitral tribunal cited article 38 and found that the claimant was "entitled to receive pre-award and post-award interest on the compensation awarded to it as to ensure full reparation".[1823] 209 The tribunal also cited articles 31 and 36.[1824] 210

[A/77/74, p. 35]

[1819] 205 *Ibid*., paras. 205–216.

[1820] 206 See footnote [1392] 142 above, para. 1955.

[1821] 207 *Ibid*., para. 1956.

[1822] 208 ICSID, Case No. ARB/15/3, Award, 14 January 2021, para. 356.

[1823] 209 PCA, Case No. 2019–18, Award, 15 April 2021, para. 183.

[1824] 210 *Ibid*., paras. 140–141.

International arbitral tribunal (under the ICSID Convention)

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal cited article 38, explaining that "compensation under the principle of full reparation for internationally unlawful conduct has to bear interest from the Valuation Date until the date of payment. This is what follows from general international law concerning State responsibility".[1825] [211] In that case, the tribunal took the view that compound interest was necessary in the sense of article 38 "to ensure full reparation of an investor for breach of a treaty that aims at protecting his or her investment",[1826] [212] as was the payment of interest "on the costs of the proceedings from the date the award is rendered".[1827] [213]

[A/77/74, p. 35]

[1825] [211] See footnote [193] 26 above, para. 587.

[1826] [212] *Ibid*., para. 592.

[1827] [213] *Ibid*., para. 610.

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", *etc.*[1828] [622]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[1829] [623]

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[1830] [624] and in State practice.[1831] [625] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

[1828] [622] See C. von Bar, *op. cit.* (footnote [960] 315 above), pp. 544–569.

[1829] [623] *LaGrand, Judgment* (footnote [236] 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (*b*), and commentary.

[1830] [624] See, *e.g.*, B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote [1241] 454 above) and B. Bollecker-Stern, *op. cit.* (footnote [1241] 454 above), pp. 265–300.

[1831] [625] In the *Delagoa Bay Railway* case (footnote [1597] 561 above), the arbitrators noted that: "[a]11 the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant … a reduction in reparation". In *S.S. "Wimbledon"* (footnote [28] 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote [1206] 432 above), p. 23.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, *i.e.* which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[1832] [626] While the notion of a negligent action or omission is not qualified, *e.g.* by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[1833] [627] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 cited article 39 in its analysis of the concept of "contributory negligence", and referred to the treatment of the concept in paragraph (5) of the commentary to the article when drawing the conclusion that "[t]he common feature [was] a fault by the claimant which ha[d] caused or contributed to the injury which [was] the subject-matter of the claim; and such a fault [was] synonymous with a form of culpability and not any act or omission falling short of such culpability".[1834] [191]

[A/68/72, para. 133]

[1832] [626] This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

[1833] [627] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

[1834] [191] See footnote [866] 116 above, paras. 11.12 and 11.13.

International arbitral tribunal (under the ICSID Convention)

Joseph C. Lemire v. *Ukraine*

In *Joseph C. Lemire* v. *Ukraine*, the arbitral tribunal considered article 39 as providing "supplementary guidance" to judges and arbitrators attempting to define and give content to the specific elements required by article 36 of the State responsibility articles.[1835] 192

[A/68/72, para. 134]

International arbitral tribunal (under the ICSID Convention)

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

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal cited article 39 in support of its finding that "[t]here [was] no contribution by the Claimant to a loss it suffered due to its own conduct, in the absence of wilful or negligent action by the Claimant".[1836] 193

[A/68/72, para. 135]

International arbitral tribunal (under the ICSID Convention)

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 referred to articles 31 and 39 of the State responsibility articles in its analysis of the concept of "contributory negligence".[1837] 194 The tribunal relied upon article 39, and the commentary thereto, in its analysis of the extent to which the damages owed to the claimants for the wrongful act of the respondent were to be reduced as a consequence of the claimant's own wrongful conduct.[1838] 195

[A/68/72, para. 136]

International arbitral tribunal (under the ICSID Convention)

Ioan Micula and others v. *Romania*

In *Ioan Micula and others* v. *Romania*, the arbitral tribunal relied on article 39 and the accompanying commentary to support the proposition that "cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation"[1839] 224 and not a release of the responsible State from liability.

[A/71/80, para. 151]

[1835] 192 See footnote [1291] 156 above, para. 156.

[1836] 193 See footnote [56] 16 above, para. 684, and note 648 thereto.

[1837] 194 See footnote [309] 50 above, paras. 665–668.

[1838] 195 See *ibid.*, paras. 665–666 and 673.

[1839] 224 See footnote [1188] 133 above, para. 926, footnote 180.

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. *Kazakhstan*

In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, the arbitral tribunal agreed with the parties that "Article 39 [of the] ILC Articles requires that the Claimants' conduct be taken into account in determining compensation"[1840] [225] and that "the burden may shift to the state to prove that a factor attributable to the victim or a third party caused the damage alleged, unless the injury can be shown to be severable in causal terms from that attributed to the State".[1841] [226]

[A/71/80, para. 152]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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",[1842] [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.[1843] [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.[1844] [149]

[A/71/80, para. 106]]

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

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[1840] [225] See footnote [1656] 196 above, para. 1452. See also the reference to article 39 in the text accompanying footnote [1656] 196 above.

[1841] [226] *Ibid*., para. 1452.

[1842] [[147] See footnote [19] 7 above, para. 1593.]

[1843] [[148] *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).]

[1844] [[149] *Ibid*., para. 1775.]

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.[1845] 227

"Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary", the tribunal had to

determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the Cyprus-Russia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain.[1846] 228

[A/71/80, para. 153]

[*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",[1847] 150 which were relevant with regard to the parties' claims for relief.[1848] 151

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

Cooper Mesa Mining Corporation v. *The Republic of Ecuador*

In *Cooper Mesa Mining Corporation* v. *The Republic of Ecuador*, the arbitral tribunal noted that "[a]s to 'contributory fault', the Tribunal refers to Article 39 of the ILC Articles on State Responsibility, entitled 'Contribution to the Injury' as being declaratory of international law".[1849] 231 The tribunal

decide[d] that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands. Given that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles.[1850] 232

The tribunal further noted that "Article 39 requires a factual assessment as regards the Claimant's conduct …".[1851] 233

[A/74/83, p. 39]

[1845] 227 See footnote [19] 7 above, paras. 1592.

[1846] 228 *Ibid*., para. 1633.

[1847] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1848] [151 *Ibid*., para. 9.9.]

[1849] 231 PCA, Case No. 2012–2, Award, 15 March 2016, para. 6.91.

[1850] 232 *Ibid*., para. 6.97.

[1851] 233 *Ibid*., para. 6.98.

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, citing the text of article 39 and the commentary thereto, noted that "[i]t is undisputed that a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury",[1852] [234] but "reject[ed] Ecuador's argument that Burlington [had] contributed to its own losses".[1853] [235]

[A/74/83, p. 39]

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".[1854] [236]

[A/74/83, p. 39]

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* referring to article 39 of the State responsibility articles, concluded that "the damages awarded to CIOC [the Caratube International Oil Company LLP] in the amount of its sunk investment costs must not be reduced on the basis of contributory fault".[1855] [237]

[A/74/83, p. 40]

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

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".[1856] [238]

[A/74/83, p. 40]

[1852] [234] ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 572.

[1853] [235] *Ibid*., para. 585.

[1854] [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 above), 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.

[1855] [237] ICSID, Case No. ARB/13/13, Award, 27 September 2017, para. 1195.

[1856] [238] ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.124–10.125.

Perenco Ecuador Limited v. *Ecuador*

The arbitral tribunal in *Perenco Ecuador Limited* v. *Ecuador* referred to article 39 and the commentary thereto, and recalled that the latter noted that the focus of the article was on "situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', *etc.*". The tribunal went on to recall that, according to paragraph (5) of the commentary thereto, "article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, *i.e.* which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights".[1857] 214

The arbitral tribunal concluded that "[n]one of the alleged instances of contributory fault said to arise from Perenco's responses to Ecuador's contractual demands can be considered to amount to wilful or negligent conduct within the meaning of Article 39".[1858] 215 It cautioned that "it is wrong to equate a party's zealous protection of its legal rights and interests with wilful conduct or contributory negligence within the meaning of the ILC Articles",[1859] 216 referring to actions taken by the investor pursuant to provisional measures obtained in the arbitral proceeding.[1860] 217

[A/77/74, p. 35]

(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 cited article 39 and the commentary thereto, noting that in the determination of reparation in investment cases, account should be taken of "the victim's contribution to the damage".[1861] 218 The tribunal explained that "according to the jurisprudence, a party contributes to the damage that it incurs if it engages in wilful or negligent conduct that demonstrates a want of due diligence on the part of the injured party in respect of its property or its rights and there is a causal link between the conduct and the injury".[1862] 219

[A/77/74, p. 35]

STEAG GmbH v. *Kingdom of Spain*

In *STEAG GmbH* v. *Kingdom of Spain*, the arbitral tribunal observed that, pursuant to article 39, "the conduct of the party that claims to have suffered damage and, in particular, its contribution to the damage or injury, is a widely recognized element for analysing and quantifying the compensable injury".[1863] 220

[A/77/74, p. 36]

[1857] 214 See footnote [1379] 129 above, para. 344.

[1858] 215 *Ibid*., para. 352.

[1859] 216 *Ibid*., para. 359.

[1860] 217 *Ibid*., para. 360.

[1861] 218 See footnote [1029] 108 above, para. 396; see also paras. 460–461.

[1862] 219 *Ibid*., para. 461.

[1863] 220 See footnote [1390] 140 above, para. 760.

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal's majority failed "to see any indications for Claimants' contribution to injury pursuant to Article 39 of the ILC Articles, either in the form of contributory fault to Respondent's internationally wrongful conduct …, or as a violation of a duty to mitigate damages after the revocation has taken place".[1864] [221]

[A/77/74, p. 36]

[1864] [221] See footnote [193] 26 above, para. 444 (footnote 521).

Chapter III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Commentary

(1) Chapter III of Part Two is entitled "Serious breaches of obligations under peremptory norms of general international law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[1865] [628] The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[1866] [629]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[1867] [630] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined

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[1865] [628] For full bibliographies, see M. Spinedi, "Crimes of State: bibliography", *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

[1866] [629] *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford, Clarendon Press, 1997).

[1867] [630] See footnote [48] 54 above.

by the [Genocide] Convention are rights and obligations *erga omnes*":[1868] [631] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[1869] [632]

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[1870] [633] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function of damages is essentially compensatory.[1871] [634] Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[1872] [635]

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[1873] [636] As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.[1874] [637] In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems."[1875] [638]

[1868] [631] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote [48] 54 above), p. 616, para. 31.

[1869] [632] See article 26 and commentary.

[1870] [633] See *Yearbook … 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

[1871] [634] See paragraph (4) of the commentary to article 36.

[1872] [635] International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (footnote [969] 321 above), p. 221.

[1873] [636] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, *Treaty Series*, vol. 82, No. 251, p. 279, arts. 9 and 10.

[1874] [637] See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote [862] 257 above).

[1875] [638] *Prosecutor* v. *Blaskić,* International Tribunal for the Former Yugoslavia, Case IT-95–14-AR 108 *bis,* ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Preven-*

The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole"(preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).[1876] 639

(7) Accordingly the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of obligations towards the international community as a whole[1877] 640 all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention[1878] 641 involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—*i.e.* in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

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tion and Punishment of the Crime of Genocide, Preliminary Objections (footnote [48] 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

[1876] 639 See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

[1877] 640 According to ICJ, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction* (footnote [46] 52 above), at p. 32, para. 34. See also *East Timor* (footnote [48] 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

[1878] 641 The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens:* "(*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples", *Yearbook … 1966,* vol. II, p. 248.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Caribbean Court of Justice

Trinidad Cement Limited and TCL Guyana Incorporated v. *The State of the Co-Operative Republic of Guyana*

In the *Trinidad Cement Limited and TCL Guyana Incorporated* v. *Guyana* case, the Caribbean Court of Justice, in considering the question of the acceptance of exemplary (punitive) damages in international law, quoted the following passage from the general commentary to chapter III:

> [T]he award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms.[1879] [65]

The Court went on to hold that it was "… not persuaded that exemplary damages may be awarded by it and in this case shall not award any such damages".[1880] [66]

[A/65/76, para. 44]

[1879] [65] See footnote [1452] 52 above, para. 38, quoting from paragraph (5) of the introductory commentary to Part Two, Chapter III.

[1880] [66] *Ibid.*, para. 40.

Article 40. Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

> accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[1881] 642

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[1882] 643 uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,[1883] 644 the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and

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[1881] 642 For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

[1882] 643 *Yearbook … 1966*, vol. II, p. 247–249.

[1883] 644 In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41,46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

the Court's own position in that case.[1884] [645] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.[1885] [646]

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[1886] [647] In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[1887] [648] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination … is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[1888] [649]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain

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[1884] [645] *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), at pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

[1885] [646] See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote [1151] 412 above), pp. 439–440; Counter-Claims (footnote [1152] 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel* v. *Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

[1886] [647] Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others* v. *The Republic of Argentina and Others,* ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani* v. *Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote [1154] 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga* v. *Pena-Irala* , ILR, vol. 77, p. 169, at pp. 177–179 (1980).

[1887] [648] *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

[1888] [649] *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, *e.g.* in terms of the non-applicability of the rule of exhaustion of local remedies.[1889] 650

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[1890] 651

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

[1889] 650 See the *Ireland* v. *the United Kingdom* case (footnote [800] 236 above), para. 159; cf., *e.g.*, the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

[1890] 651 At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

> "(*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> "(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> "(*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;
>
> "(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."
>
> *Yearbook … 1976*, vol. II (Part Two), pp. 95–96.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

European Court of Human Rights

Güzelyurtlu And Others v. *Cyprus and Turkey*

In the case of *Güzelyurtlu And Others* v. *Cyprus and Turkey*, the European Court of Human Rights referred to articles 40 and 41, as well as the commentary to article 41, as relevant international law.[1891] [239]

[A/74/83, p. 40]

Inter-American Court of Human Rights

The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)

In an advisory opinion concerning the effects of a State's denunciation of the American Convention on Human Rights, the Inter-American Court of Human Rights, in an analysis of *jus cogens* norms, cited articles 40, 41 and 48 and the commentary to article 40, indicating that the obligations contained in article 40 "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[1892] [222]

[A/77/74, p. 36]

[International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

Dispute Concerning Costal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. *Russian Federation)*

In its award concerning preliminary objections, the arbitral tribunal in *Dispute Concerning Costal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)* indicated that article 41 "imposes upon all States an obligation not to recognize as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law".[1893] [223] Nevertheless, the arbitral tribunal concluded that it did not consider "that the [General Assembly] resolutions to which Ukraine refers can be read to go as far as prohibiting it from recognizing the existence of a dispute over the territorial status of Crimea".[1894] [224] The tribunal also cited article 40.[1895] [225]

[A/77/74, p. 36]]

[1891] [239] ECHR, Grand Chamber, Application No. 36925/07, Judgment, 29 January 2019, paras. 157–158.

[1892] [222] IACHR, Series A, No. 26, Advisory Opinion No. OC-26/20, 9 November 2020, paras. 103–104.

[1893] [223 PCA, Case No. 2017–06, Award (Preliminary Objections), 21 February 2020, para. 170.]

[1894] [224 *Ibid*., para. 177.]

[1895] [225 *Ibid*., para. 169.]

Article 41. Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to paragraph 2 of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40, and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[1896] [652] The obligation applies to "situations" created

[1896] [652] This has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law" (C. Tomuschat, "International crimes by States: an endangered

by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

> admit the legality of any situation *de facto* nor … recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the … sovereignty, the independence or the territorial and administrative integrity of the Republic of China, … [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.[1897] 653

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[1898] 654 As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[1899] 655

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council in resolution 662 (1990) of 9 August 1990, decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.[1900] 656 The same obligations are reflected in the resolutions of the Security

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species?", *International Law: Theory and Practice—Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259).

[1897] 653 Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D. C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal,* March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

[1898] 654 General Assembly resolution 2625 (XXV), annex, first principle.

[1899] 655 *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), at p. 100, para. 188.

[1900] 656 *Namibia* case (footnote [690] 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all

Council and General Assembly concerning the situation in Rhodesia[1901] [657] and the Bantustans in South Africa.[1902] [658] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.[1903] [659]

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

> the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[1904] [660]

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[1905] [661]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct

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States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

[1901] [657] Cf. Security Council resolution 216 (1965) of 12 November 1965.

[1902] [658] See, *e.g.*, General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

[1903] [659] See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

[1904] [660] *Namibia* case (footnote [690] 176 above), p. 56, para. 125.

[1905] [661] *Loizidou, Merits* (footnote [573] 160 above), p. 2216; *Cyprus* v. *Turkey* (footnote [811] 247 above), paras. 89–98.

"after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[1906] [662] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[1907] [663] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to paragraph 3, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

[1906] [662] *Namibia* case (footnote [690] 176 above), p. 56, para. 126.

[1907] [663] See, *e.g.*, Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Court of Justice

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

In *Jurisdictional Immunities of the State (Germany* v. *Italy*), the International Court of Justice rejected the respondent's argument that a conflict existed "between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another".[1908] [196] Instead, the Court held that,

> [t]he two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful … . [R]ecognizing the immunity of a foreign State in accordance with customary international law [did] not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so [could not] contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[1909] [197]

[A/68/72, para. 137]

International Criminal Court

Prosecutor (on the application of Victims) v. *Bosco Ntaganda*

The International Criminal Court in *Prosecutor (on the application of Victims)* v. *Bosco Ntaganda* indicated that "as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law", citing article 41, paragraph 2, of the State responsibility articles.[1910] [240]

[A/74/83, p. 40]

[Inter-American Court of Human Rights

The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)

In an advisory opinion concerning the effects of a State's denunciation of the American Convention on Human Rights, the Inter-American Court of Human Rights, in an analysis of *jus cogens* norms, cited articles 40, 41 and 48 and the commentary to article 40, indicating that the obligations contained in article 40 "arise from those substantive rules

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[1908] [196] See footnote [788] 104 above, para. 93.

[1909] [197] *Ibid.*

[1910] [240] International Criminal Court, Trial Chamber VI, Second decision on the defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Case No. ICC-01/04–02/06–1707, ICL 1730, 4 January 2017, para. 53 and footnote 131.

of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[1911] [222]

[A/77/74, p. 36]]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

Dispute Concerning Costal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. *Russian Federation)*

In its award concerning preliminary objections, the arbitral tribunal in *Dispute Concerning Costal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)* indicated that article 41 "imposes upon all States an obligation not to recognize as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law".[1912] [223] Nevertheless, the arbitral tribunal concluded that it did not consider "that the [General Assembly] resolutions to which Ukraine refers can be read to go as far as prohibiting it from recognizing the existence of a dispute over the territorial status of Crimea".[1913] [224] The tribunal also cited article 40.[1914] [225]

[A/77/74, p. 36]

[1911] [[222] IACHR, *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)*, Series A, No. 26, Advisory Opinion No. OC-26/20, 9 November 2020, paras. 103–104.]

[1912] [223] PCA, Case No. 2017–06, Award (Preliminary Objections), 21 February 2020, para. 170.

[1913] [224] *Ibid*., para. 177.

[1914] [225] *Ibid*., para. 169.

Part Three

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, *i.e.* with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

Chapter I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Commentary

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, *i.e.* with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[1915] [664] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles , which was the subject of the decision

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[1915] [664] Cf. the statement by ICJ that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

in the *S.S. "Wimbledon"* case.[1916] 665 It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, *i.e.* to apply as a *lex specialis*.

[1916] 665 Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. "Wimbledon"* (footnote [28] 34 above).

Article 42. Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[1917] [666] or even the taking of countermeasures. In order to take such steps, *i.e.* to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, *e.g.* a right of action specifically conferred by a treaty,[1918] [667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

[1917] [666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[1918] [667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, *e.g.* under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[1919] [668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "interdependent" obligation.[1920] [669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to subparagraph (*a*) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily

[1919] [668] Cf. the 1969 Vienna Convention, art. 73.

[1920] [669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, *e.g.* of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[1921] [670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[1922] [671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to "'bundles' of bilateral relations".[1923] [672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over

[1921] [670] Cf. the 1969 Vienna Convention, art. 36.

[1922] [671] See, *e.g.*, Article 59 of the Statute of ICJ.

[1923] [672] See, *e.g.*, K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL*, 1988*, vol. 59, p. 151, at pp. 154–155.

the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[1924] 673

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) Subparagraph (*b*) deals with injury arising from violations of collective obligations, *i.e.* obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character.

(12) Subparagraph (*b*) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a

[1924] 673 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 41–43, paras. 89 and 92.

State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (*b*) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[1925] [674] a nuclear free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel, in considering the European Communities argument according to which the United States had "no legal right or interest" in the case (given that its banana production was minimal and its banana exports were nil, and therefore it

[1925] [674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

had not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by article 3.3. and 3.7 of the WTO Dispute Settlement Understanding), considered that a WTO member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO agreement were each sufficient to establish a right to pursue a WTO dispute settlement proceeding. The panel was of the view that this result was consistent with decisions of international tribunals: in a footnote,[1926] [210] it referred to relevant findings by the Permanent Court of International Justice and the International Court of Justice, as well as to paragraph 2 (*e*) and (*f*) of draft article 40 adopted by the International Law Commission on first reading.[1927] [211]

[A/62/62, para. 118]

[1926] [210] WTO, Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM and WT/DS27/R/HND, 22 May 1997, para. 7.50, footnote 361.

[1927] [211] Draft article 40, paragraph 2 (*e*) and (*f*) adopted on first reading were amended and incorporated respectively in article 42(*b*) and article 48, paragraph 1 (*a*), finally adopted in 2001. The complete text of draft article 40 adopted on first reading is reproduced in footnote [2017] 221 below.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of PartTwo.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[1928] [675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, *etc.* Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[1929][676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

[1928] [675] See article 48, paragraph (3), and commentary.

[1929] [676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 253, para. 31.

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [1930] 677

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [1931] 678

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, paragraph 2 (*a*) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) Paragraph 2 (*b*) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[1932] 679 or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[1933] 680 Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States

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[1930] 677 *Ibid*., p. 254, para. 35.

[1931] 678 *Ibid*., pp. 254–255, para. 36.

[1932] 679 As PCIJ noted in the *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[1933] 680 In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures*, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred to the commentary to article 43 in support of the view that "the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution".[1934] [230]

[A/71/80, para. 154]

International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to "reject the [respondent's] view that notice or prior negotiations are required" in accordance with article 43 of the State responsibility articles. The International Court of Justice further observed that "[t]he Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified".[1935] [241]

[A/74/83, p. 41]

[1934] [230] See footnote [320] 46 above, footnote 264.

[1935] [241] ICJ, Judgment, 5 October 2016, para. 42.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[1936] [681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (*a*) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[1937] [682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[1938] [683]

[1936] [681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[1937] [682] *Mavrommatis* (footnote [800] 236 above), p. 12.

[1938] [683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1. [Editor's Note: the Commission subsequently adopted the draft articles on diplomatic protection, in 2006; see *Yearbook … 2006*, vol. II (Part Two), para. 49.]

(3) Subparagraph (*b*) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[1939] [684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[1940] [685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[1941] [686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[1942] [687]

[1939] [684] *ELSI* (footnote [144] 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959,* p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, *e.g.*, C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote [1085] 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, *e.g.*, A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[1940] [685] *ELSI* (footnote [144] 85 above), p. 46, para. 59.

[1941] [686] *Ibid*., p. 48, para. 63.

[1942] [687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514. (See footnote [1938] 683 above.)

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France

In its 1978 award, the arbitral tribunal established to hear the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, to decide on France's allegation according to which the United States was required, before resorting to arbitration, to wait until the United States company (Pan American World Airways) that considered itself injured had exhausted the local remedies available under French law, referred to the principles appearing in draft article 22, as provisionally adopted by the International Law Commission.[1943] [212] It considered that it was "significant" that the said provision:

> establishes the requirement of exhaustion of local remedies only in relation to an obligation of "result", which obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State", and which is an obligation "concerning the treatment of aliens". Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of "procedure" or one of "substance"—a matter which the Tribunal considers irrelevant for the present case—it is clear that the juridical character of the *rules* of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under article I of the Air Service Agreement, "[t]he Contracting Parties grant *to each other* the rights specified in the Annex hereto … " (emphasis added), and sections I and II of the annex both mention "the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country … " as a right granted by one *Government* to the other *Government*. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a "result" to be achieved, let alone one allowing an "equivalent result" to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an "equivalent result".[1944] [213]

[1943] [212] This provision was amended and incorporated in article 44(*b*) finally adopted by the ILC in 2001. The text of draft article 22 provisionally adopted was as follows:

> Article 22
> Exhaustion of local remedies
>
> When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[1944] [213] Award, 9 December 1978, para. 31, reproduced in UNRIAA, vol. XVIII [(Sales No. E/F.80.V.7), pp. 431–432.

On this basis, the arbitral tribunal thus found that its decision should not be postponed until such time as the company had exhausted local remedies.

[A/62/62, para. 119]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal invoked draft article 22, as adopted by the International Law Commission on first reading,[1945] [214] in the context of determining whether the rule that local remedies must be exhausted was applicable in the said case:

As stated in article 22 of the draft articles on State responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens … ". None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.[1946] [215]

[A/62/62, para. 120]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in support of its finding that

where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding … because the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations … that are in dispute,

referred to draft article 22 adopted by the International Law Commission on first reading and the commentary thereto.[1947] [216]

[A/62/62, para. 121]

[1945] [214] The text of that draft article was identical to that of draft article 22 provisionally adopted by the International Law Commission. (See footnote [1943] 212 above.)

[1946] [215] See footnote [1096] 159 above, para. 98.

[1947] [216] ICSID, *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 29 and footnote 5, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 12.

International arbitral tribunal (under the ICSID Additional Facility Rules)

The Loewen Group, Inc. and Raymond L. Loewen v. *United States*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 NAFTA to hear *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States* case, in examining the argument of the respondent that "State responsibility only arises when there is final action by the State's judicial system as a whole", referred to article 44 finally adopted by the International Law Commission in 2001:

> The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law … Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Elettronica Sicula Spa (ELSI) United States* v. *Italy* (1989) ICJ 15 at para. 50.[1948] [217]

[A/62/62, para. 122]

International arbitral tribunal (under the ICSID Convention)

Philip Morris Brands Sàrl, and others v. *Uruguay*

The arbitral tribunal in *Philip Morris Brands Sàrl, and others* v. *Uruguay* noted that "[t]he reference [by the claimants] to Art. 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[1949] [231]

[A/71/80, para. 155]

Permanent Court of Arbitration (under UNCITRAL Rules)

ST-AD GmbH v. *Republic of Bulgaria*

In *ST-AD GmbH* v. *Republic of Bulgaria*, the arbitral tribunal relied on, *inter alia*, article 44, subparagraph (*b*), in support of the view that "the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the ICJ".[1950] [232] Specifically, the tribunal noted that the article "refers to the exhaustion of any 'available and effective local remedy'".[1951] [233]

[A/71/80, para. 156]

[1948] [217] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 149, footnote 12, reproduced in *ILM*, vol. 42, 2003, p. 835 (citing *ELSI*, see footnote [144] 85 above.).

[1949] [231] ICSID, Case No. ARB/10/7 (formerly *FTR Holding S.A., Philip Morris Products S.A., and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*), Decision on Jurisdiction, 2 July 2013, para. 135.

[1950] [232] PCA, Case No. 2011–06, Award on Jurisdiction, 18 July 2013, para. 365.

[1951] [233] *Ibid*., footnote 395.

[International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to "reject the [respondent's] view that notice or prior negotiations are required" in accordance with article 43 of the State responsibility articles …[1952] 241

[A/74/83, p. 41]]

International arbitral tribunal (under the ICSID Convention)

Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. *Oriental Republic of Uruguay*

The arbitral tribunal in *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay* noted that "[t]he reference [by the claimants] to article 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[1953] 243

[A/74/83, p. 41]

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 article 44, subparagraph (*b*), and the commentary thereto, and indicted that the exhaustion of local remedies was not a requirement to bring arbitral claims. The tribunal noted the explanation in the commentary that the provision is

> not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the condition for the admissibility of cases brought before such courts or tribunals. Rather, [it] define[s] the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States.[1954] 227

[A/77/74, p. 37]

[1952] [241 ICJ, Judgment, 5 October 2016, para. 42.]

[1953] 243 ICSID, Case No. ARB/10/7, Award, 8 July 2016, para. 135.

[1954] 227 See footnote [1407] 157 above, paras. 516–518 and 526.

Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) Subparagraph (*a*) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[1955] [688]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[1956] [689] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In *Certain Phosphate Lands in Nauru*, it was argued that the Nauruan authorities before independ-

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[1955] [688] *Russian Indemnity* (footnote [1014] 354 above), p. 446.

[1956] [689] Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

ence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[1957] 690

In particular, the statements relied on "[n]otwithstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[1958] 691

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. Subparagraph (*b*) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in *Certain Phosphate Lands in Nauru*, in the following passage:

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[1959] 692

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[1960] 693

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, *e.g.* as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.[1961] 694 In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not

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[1957] 690 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 247, para. 13.

[1958] 691 *Ibid*., p. 250, para. 20.

[1959] 692 *Ibid*., pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

[1960] 693 *LaGrand*, *Provisional Measures* (footnote [150] 91 above) and *LaGrand, Judgment* (footnote [236] 119 above), at pp. 486–487, paras. 53–57.

[1961] 694 See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini*, *ibid*., vol. X (Sales No. 60.V.4), p. 551 (1903).

establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[1962] 695

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit, expressed in terms of years, has been laid down.[1963] 696 The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[1964] 697 Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[1965] 698 None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[1966] 699 It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (*e.g.* before an international tribunal) will not usually be regarded as rendering it inadmissible.[1967] 700 Thus, in *Certain Phosphate Lands in Nauru*, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[1968] 701 In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[1969] 702

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any preju-

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[1962] 695 See, *e.g.*, *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote [1961] 694 above), pp. 386–387.

[1963] 696 In some cases time limits are laid down for specific categories of claims arising under specific treaties (*e.g.* the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (*e.g.* in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[1964] 697 Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

[1965] 698 C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (footnote [1085] 409 above), vol. 3, p. 1105, at p. 1107.

[1966] 699 A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes [777] 230 and [779] 232 above), see, *e.g. Gentini* (footnote [1961] 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23 , p. 306, at pp. 314–317 (1956).

[1967] 700 For statements of the distinction between notice of claim and commencement of proceedings, see, *e.g.* R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[1968] 701 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 250, para. 20.

[1969] 702 *Tagliaferro* (footnote [1962] 695 above), p. 593.

dice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[1970] 703

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Court of Justice

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

In its 2005 judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court invoked its own previous case law and the commentary of the International Law Commission to article 45, as finally adopted in 2001, in relation to the argument, made by the Democratic Republic of the Congo, that Uganda had waived whatever claims it might have had against the Democratic Republic of the Congo as a result of actions or inaction of the Mobutu regime:

> The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247–250, paras. 12–21). Similarly, the International Law Commission, in its commentary on article 45 of the draft articles on responsibility of States for internationally wrongful acts, points out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal" ([*Yearbook of the International Law Commission, 2001,* vol. II (Part Two)], para. 77). In the Court's view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu regime.[1971] 218

[A/62/62, para. 123]

World Trade Organization Appellate Body

Peru—Additional Duty on Imports of Certain Agricultural Products

The Appellate Body in *Peru—Additional Duty on Imports of Certain Agricultural Products* indicated that "there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention".[1972] 234

[A/71/80, para. 157]

[1970] 703 See article 39 and commentary.

[1971] 218 ICJ, Judgment, 19 December 2005, para. 293.

[1972] 234 See also footnote [977] 126, para. 5.105 (as restated in paras. 5.118 and 6.4).

International Tribunal for the Law of the Sea

M/V "Norstar" (Panama/Italy)

In *M/V "Norstar" (Panama/Italy)*, the International Tribunal for the Law of the Sea relied on the commentary to article 45 of the State responsibility articles to find "that Panama has not failed to pursue its claim since the time when it first made it, so as to render the Application inadmissible"[1973] 244 and to "rejec[t] the objection raised by Italy based on extinctive prescription".[1974] 245

[A/74/83, p. 41]

International arbitral tribunal (under the ICSID Convention)

Salini Impregilo S.p.A. v. *Argentine Republic*

The arbitral tribunal deciding on jurisdiction and admissibility of the claim in *Salini Impregilo S.p.A.* v. *Argentine Republic* noted with regard to "extinctive prescription as a matter of international law" that:

> this is not mentioned as a separate ground for loss of the right to invoke responsibility in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The ILC rejected the idea that lapse of time alone might entail the loss of a claim. Rather, Article 45(*b*) specifies that the responsibility of a state may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.[1975] 246

Having regard to all circumstances, the arbitral tribunal concluded that "the delay here was not unreasonable, did not entail any acquiescence by Salini Impregilo in the lapse of its claim and did not trigger the principle of extinctive prescription".[1976] 247

[A/74/83, p. 41]

[1973] 244 ITLOS, Preliminary Objections, Judgment of 4 November 2016, paras. 310 and 313.

[1974] 245 *Ibid.*, para. 314.

[1975] 246 ICSID, Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 85.

[1976] 247 *Ibid.*, para. 91.

Article 46. Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Commentary

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (*b*) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".[1977] [704] In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[1978] [705] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[1979] [706]

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than

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[1977] [704] *S.S. "Wimbledon"* (footnote [28] 34 above), p. 20.

[1978] [705] ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959,* p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (footnote [1033] 363 above), p. 106.

[1979] [706] See *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (footnote [738] 196 above), pp. 256 and 460, respectively.

one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[1980] [707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[1981] [708]

[1980] [707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (footnote [1058] 382 above), p. 1432.

[1981] [708] *Reparation for Injuries* (footnote [32] 38 above), p. 186.

Article 47. Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, *e.g.* a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[1982] [709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[1983] [710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[1984] [711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[1985] [712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in

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[1982] [709] See article 17 and commentary.

[1983] [710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote [1258] 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[1984] [711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[1985] [712] See footnote [777] 230 above.

Monetary Gold,[1986] [713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia. [1987] [714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[1988] [715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[1989] [716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects . Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[1990] [717]

[1986] [713] See footnote [917] 286 above. See also paragraph (11) of the commentary to article 16.

[1987] [714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), pp. 258–259, para. 48.

[1988] [715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote [779] 232 above) and the settlement agreement (*ibid*.).

[1989] [716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, *e.g.*, annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, *e.g.*, A. Rosas, "Mixed Union—mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[1990] [717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[1991] [718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[1992] [719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in paragraph 2. Subparagraph (*a*) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[1993] [720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States,

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[1991] [718] See paragraph 4 of the introductory commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[1992] [719] *Corfu Channel, Merits* (footnote [29] 35 above), pp. 22–23.

[1993] [720] Such a principle was affirmed, for example, by Permanent Court of International Justice in the *Case concerning the Factory at Chorzów, Merits* case (footnote [28] 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also *ibid*., pages 45 and 49.

but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in subparagraph (*b*), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 19 of the Treaty between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaries of a Channel Fixed Link Signed at Canterbury on 12 February 1986 between 1. The Channel Tunnel Group Limited 2. France-Manche S.A. and 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland 2. Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République Française (hereinafter the "partial award in the Eurotunnel case")

In its 2007 partial award in the *Eurotunnel* case, the arbitral tribunal constituted to hear the case, in examining the Claimants' thesis of the "joint and several responsibility" of the Respondents (France and the United Kingdom) for the violation of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (the "Treaty of Canterbury") and the Concession Agreement that followed, referred to article 47 finally adopted by the International Law Commission in 2001, and the commentary thereto:

173. It is helpful to start with Article 47 of the ILC Articles on State Responsibility, to which all Parties referred in argument … .

174. As the commentary notes:

> The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.[1994] 12

[A/62/62/Add.1, para. 8]

[1994] 12 Partial Award in the *Eurotunnel* case, paras. 173–174.

Committee on the Rights of the Child

Sacchi et al. v. *Argentina, Brazil, France, Germany and Turkey*

In five cases—*Sacchi et al.* v. *Argentina*,[1995] [228] *Brazil*,[1996] [229] *France*,[1997] [230] *Germany*[1998] [231] and *Turkey*[1999] [232] respectively—concerning the legal implications of climate change, the Committee on the Rights of the Child referred to the commentary to article 47, finding that "the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location".

[A/77/74, p. 37]

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 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".[2000] [233]

[A/77/74, p. 38]

[1995] [228] *Sacchi et al.* v. *Argentina* (CRC/C/88/D/104/2019), para. 10.10.

[1996] [229] *Sacchi et al.* v. *Brazil* (CRC/C/88/D/105/2019), para. 10.10.

[1997] [230] *Sacchi et al.* v. *France* (CRC/C/88/D/106/2019), para. 10.10.

[1998] [231] *Sacchi et al.* v. *Germany* (CRC/C/88/D/107/2019), para. 9.10.

[1999] [232] *Sacchi et al.* v. *Turkey* (CRC/C/88/D/108/2019), para. 9.10.

[2000] [233] See footnote [1410] 160 above, para. 98.

Article 48. Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.[2001] 721 Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

[2001] 721 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

(4) Paragraph 1 refers to "[a]ny State other than an injured State". In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (*a*)), and obligations owed to the international community as a whole (paragraph 1 (*b*)).[2002] 722

(6) Under paragraph 1 (*a*), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of paragraph 1 (*a*) have to be "collective obligations", *i.e.* they must apply between a group of States and have been established in some collective interest.[2003] 723 They might concern, for example, the environment or security of a region (*e.g.* a regional nuclear free zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[2004] 724 But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (*a*), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[2005] 725

[2002] 722 For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

[2003] 723 See also paragraph (11) of the commentary to article 42.

[2004] 724 In the *S.S. "Wimbledon"* (footnote [28] 34 above), the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind" (p. 23).

[2005] 725 Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

(8) Under paragraph 1 (*b*), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[2006]726 The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[2007] 727 With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[2008] 728 In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[2009] 729

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) Paragraph 2 specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a

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[2006] 726 For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[2007] 727 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[2008] 728 *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[2009] 729 See footnote [48] 54 above.

State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan which had no economic interest in the particular voyage sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[2010] [730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[2011] [731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[2012] [732]

(12) Under paragraph 2 (*a*), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, paragraph 2 (*b*) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[2013] [733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles cannot solve.[2014] [734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph *3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

[2010] [730] *S.S. "Wimbledon"* (footnote [28] 34 above), p. 30.

[2011] [731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment.* (See footnote [2005] 725 above.)

[2012] [732] *Namibia* case (footnote [690] 176 above), p. 56, para. 127.

[2013] [733] See, *e.g.*, the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

[2014] [734] See also paragraphs (3) to (4) of the commentary to article 33.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel referred, *inter alia*, to paragraph 2 (*f*) of draft article 40 (Meaning of injured State) adopted by the International Law Commission on first reading. The relevant passage is [summarized on pages 467–468] above.

[A/62/62, para. 124]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber noted that article 29 of the Statute of the Tribunal

> does not create bilateral relations. Article 29 [of the Statute] imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*". By the same token, article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in article 29 (on the manner in which this legal interest can be exercised …).[2015] [219]

In a first footnote accompanying this text, the Appeals Chamber observed:

> As is well known, in the *Barcelona Traction, Power & Light Co.* case, the International Court of Justice mentioned obligations of States "towards the international community as a whole" and defined them as obligations *erga omnes* (I.C.J. Reports 1970, p. 33, para. 33). The International Law Commission has rightly made a distinction between such obligations and those *erga omnes partes* (*Yearbook of the International Law Commission*, *1992*, vol. II, Part Two, p. 39, para. 269). This distinction was first advocated by the Special Rapporteur, G. Arangio-Ruiz, in his third report on State responsibility (see *Yearbook … , 1991*, vol. II, Part One, p. 35, para. 121; see also his fourth report, *ibid*., *1992*, vol. II, Part One, p. 34, para. 92).[2016] [220]

In a second footnote, it added, with regard to the obligation under article 29 of the Statute:

> … The fact that the obligation is incumbent on all States while the correlative "legal interest" is only granted to Member States of the United Nations should not be surprising. Only the latter category encompasses the "injured States" entitled to claim the cessation of any breach of article 29 or to promote the taking of remedial measures. See on this matter article 40 of the draft articles on State responsibility adopted on first reading by the International Law Commission (former art. 5 of Part Two). It provides as follows in para. 2 (*c*): "[injured State means] if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court

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[2015] [219] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 26 (footnotes omitted). (See footnote [52] 8 above.)

[2016] [220] *Ibid*., para. 26, footnote 33.

or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right", in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10).[2017] 221

[A/62/62, para. 125]

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 con-

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[2017] 221 *Ibid*., para. 26, footnote 34. Draft article 40, as adopted on first reading, read as follows:

Article 40

Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(*a*) If the right infringed by the act of a State arises from a bilateral treaty, the other Statezparty to the treaty;

(*b*) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(*c*) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(*d*) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(*e*) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) The right has been created or is established in its favour;

(ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(*f*) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime, all other States. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

In the articles finally adopted in 2001, the International Law Commission followed a different approach in which it distinguished, for purposes of invocation of responsibility, the position of the injured State, defined narrowly (article 42), and that of States other than injured State (article 48). The passages of the judgement of the Appeals Chamber reproduced in the text concern the latter category of States and this is the reason why they are reproduced here with reference to article 48.

sidered which subjects were entitled to claim compensation for "damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment".[2018] [198] It expressed the opinion that while,

> [n]o provision of the Convention can be read as explicitly entitling the Authority to make such a claim[, it] may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility … .[2019] [199]

[A/68/72, para. 138]

International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament between Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice stated that "Article 48, paragraph 3, applies that requirement [to give notice of a claim under Article 43 of the State responsibility articles] *mutatis mutandis* to a State other than an injured State which invokes responsibility".[2020] [248]

[A/74/83, p. 42]

[Inter-American Court of Human Rights

The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)

In an advisory opinion concerning the effects of a State's denunciation of the American Convention on Human Rights, the Inter-American Court of Human Rights, in an analysis of *jus cogens* norms, cited articles 40, 41 and 48 and the commentary to article 40, indicating that the obligations contained in article 40 "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[2021] [222]

[A/77/74, p. 36]]

[2018] [198] See footnote [12] 10 above, para. 179.

[2019] [199] *Ibid*., para. 180.

[2020] [248] ICJ, Judgment, 5 October 2016, para. 42.

[2021] [[222] IACHR, Series A, No. 26, Advisory Opinion No. OC-26/20, 9 November 2020, paras. 103–104.]

Chapter II

COUNTERMEASURES

Commentary

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures, which would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State. They were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[2022] [735] This is reflected in article 23 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[2023] [736] More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; *i.e.* it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[2024] [737] Countermeasures are to be contrasted with retorsion, *i.e.* "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic

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[2022] [735] For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

[2023] [736] See, *e.g.*, E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote [1070] 394 above), vol. II, chap. XVIII, p. 342.

[2024] [737] *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 82.

relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 23. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[2025] [738] Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[2026] [739] There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.[2027] [740] A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.[2028] [741] Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclu-

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[2025] [738] On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

[2026] [739] See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook … 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

[2027] [740] Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

[2028] [741] Cf. *Ireland* v. *United Kingdom* (footnote [800] 236 above).

sion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.[2029] [742]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (*a*)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (*a*)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (*b*)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) 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.[2030] [743]

[2029] [742] See footnotes [992] 339 and [1944] 213 above.

[2030] [743] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Court of Justice

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court relied, *inter alia*, on draft articles 47 to 50, as adopted by the International Law Commission on first reading,[2031] [222] to establish the conditions relating to resort to countermeasures:

> In order to be justifiable, a countermeasure must meet certain conditions (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America) Merits, Judgment, I.C.J. Reports 1986, p. 127, para. 249. See also Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, United Nations, Reports of International Arbitral Awards (RIAA), vol. XVIII, pp. 443 *et seq.*; also articles 47 to 50 of the draft articles on State responsibility adopted by the International Law Commission on first reading, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 144–145.)[2032] [223]

[A/62/62, para. 126]

World Trade Organization panel

Mexico—Tax Measures on Soft Drinks and Other Beverages

In its 2005 report on *Mexico—Tax Measures on Soft Drinks and Other Beverages*, the panel noted that the European Communities (which was a third party in the proceedings) had criticized Mexico's invocation of article XX(*d*) of GATT 1994[2033] [224] as a justification for the measures at issue by invoking the articles finally adopted by the International Law Commission in 2001, which it considered a codification of customary international law on the conditions imposed on countermeasures. According to the European Communities:

[2031] [222] These provisions were amended and incorporated in articles 49 to 52 finally adopted by the International Law Commission in 2001, which constitute, together with articles 53 and 54, chapter II of Part Three of the articles.

[2032] [223] See footnote [31] 37 above, at p. 55, para. 83.

[2033] [224] Mexico had argued that the challenged tax measures were "designed to secure compliance" by the United States with NAFTA, a law that was considered not inconsistent with the provisions of GATT 1994. The relevant part of article XX (General exceptions) of GATT 1994 reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
>
> …

5.54. At a systemic level, Mexico's interpretation would transform article XX(*d*) of GATT 1994 into an authorization of countermeasures within the meaning of public international law. It must be assumed, however, that if the contracting parties had intended such an interpretation, they would have expressed this in a clearer way. Moreover, under customary international law, as codified in the International Law Commission's articles on responsibility of States for internationally wrongful acts, countermeasures are subject to strict substantive and procedural conditions, which are not contained in article XX(*d*) of GATT 1994.

5.55. The EC notes that Mexico has not so far justified its measure as a countermeasure under customary international law. Such a justification would already meet the objection that the Mexican measure does not only apply to products from the United States, but from anywhere. In any event, should Mexico still attempt such a justification, then this would also raise the difficult question of whether the concept of countermeasures is available to justify the violation of WTO obligations. In accordance with article 50 of the International Law Commission's articles on responsibility of States for internationally wrongful acts, this would not be the case if the WTO agreements are to be considered as a *lex specialis* precluding the taking of countermeasures. This complex question has been addressed in the report of the International Law Commission at its fifty-third session.[2034] [225]

The panel considered that the phrase "to secure compliance" in article XX(*d*) was to be interpreted as meaning "to enforce compliance" and that therefore the said provision was concerned with action at a domestic rather than international level; it thus further found that the challenged measures taken by Mexico were not covered under that provision.[2035] [226] In that context, the panel referred itself to the text of article 49 in support of its interpretation of article XX(*d*):

… it is worth noting that the draft articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission do not speak of enforcement when addressing the use of countermeasures. Rather, paragraph 1 of article 49 states that "[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two". Nor is the notion of enforcement used in the commentary on the articles, except in regard to procedures within the European Union, which because of its unique structures and procedures is obviously a special case.[2036] [227]

[A/62/62, para. 127]

[2034] [225] WTO, Panel Report, WT/DS308/R, 7 October 2005, paras. 5.54–5.55 (footnotes omitted).

[2035] [226] This conclusion was later upheld by the WTO Appellate Body in *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006.

[2036] [227] WTO, Panel Report, WT/DS308/R, 7 October 2005, para. 8.180 (footnotes omitted).

Article 49. Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.[2037] [744] Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word "only" in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

> In order to be justifiable, a countermeasure must meet certain conditions …
>
> In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.[2038] [745]

(3) Paragraph 1 of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in

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[2037] [744] For these obligations, see articles 30 and 31 and commentaries.

[2038] [745] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 83. See also *"Naulilaa"* (footnote [990] 337 above), p. 1027; *"Cysne"* (footnote [991] 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 128.

the event of an incorrect assessment.[2039] [746] In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.[2040] [747]

(4) A second essential element of countermeasures is that they "must be directed against"[2041] [748] a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.[2042] [749] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.[2043] [750]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and paragraph 2 of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make

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[2039] [746] The tribunal's remark in the *Air Service Agreement* case (footnotes [992] 339 and [1944] 213 above), to the effect that "each State establishes for itself its legal situation *vis-à-vis* other States" (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

[2040] [747] See paragraph (8) of the introductory commentary to chapter V of Part One.

[2041] [748] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 55–56, para. 83.

[2042] [749] In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia's response was directed against it on that ground.

[2043] [750] On the specific question of human rights obligations, see article 50, paragraph (1) (*b*), and commentary.

itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.[2044] [751]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[2045] [752] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.[2046] [753] In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.[2047] [754]

(9) Paragraph 3 of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.[2048] [755]

[2044] [751] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

[2045] [752] This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

[2046] [753] See paragraph (1) of the commentary to article 37.

[2047] [754] Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (*b*), and commentary.

[2048] [755] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 56–57, para. 87.

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

Mexico—Tax Measures on Soft Drinks and Other Beverages

In its 2005 report on *Mexico—Tax Measures on Soft Drinks and Other Beverages*, the panel, in relation to Mexico's argument according to which the measures at issue were a response to the persistent refusal of the United States to respond to Mexico's repeated efforts to resolve the dispute, referred, in a footnote and without any further comment, to a passage of the International Law Commission's commentary to article 49 finally adopted in 2001:

> As the International Law Commission noted in its commentary on countermeasures, "[a] second essential element of countermeasures is that they 'must be directed against' a State which has committed an internationally wrongful act … This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties … Similarly if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided."[2049] 228

[A/62/62, para. 128]

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* referred to article 49 of the State responsibility articles as follows:

> The Tribunal takes as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice [in the *Gabčíkovo-Nagymaros* case], as confirmed by the ILC Articles.[2050] 67

[2049] 228 WTO, Panel Report, WT/DS308/R, 7 October 2005, para. 4.335, footnote 73. The passage referred to is taken from paragraphs (4) and (5) of the commentary to article 49 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

[2050] 67 *Archer Daniels Midland Company* (footnote [3] 4 above), para. 125.

One of the issues before the tribunal was to decide whether a tax had been enacted by Mexico "in order to induce" the United States to comply with its NAFTA obligations, as required by article 49 of the State responsibility articles. Following an analysis of the facts, the tribunal held that that was not the case, and accordingly the tax was not a valid countermeasure within the meaning of article 49 of the State responsibility articles.[2051] [68]

[A/65/76, para. 45]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc., v. *The United Mexican States*

In its 2008 Decision on Responsibility, the tribunal established to consider the case of *Corn Products International Inc.* v. *Mexico* was presented with a defence raised by the respondent that its imposition of a tax, which the tribunal found violated its obligations under NAFTA, was justified as a lawful countermeasure taken in response to a prior violation by the State of nationality of the applicant, the United States. One of the central issues for consideration by the tribunal was whether the countermeasures regime under the State responsibility articles was applicable to claims by individual investors under Chapter XI of NAFTA. The tribunal proceeded from the position, reflected in the commentary to article 49 (which it cited *in extenso*), that "[i]t is a well established feature of the law relating to countermeasures that a countermeasure must be directed against the State which has committed the prior wrongful act".[2052] [69] The tribunal further noted the distinction, drawn in paragraphs (4) and (5) of the commentary to article 49, between a countermeasure extinguishing or otherwise affecting the "rights" as opposed to the "interests" of a third party and stated:

> A countermeasure cannot … extinguish or otherwise affect the *rights* of a party other than the State responsible for the prior wrongdoing. On the other hand, it can affect the *interests* of such a party.[2053] [70]

The issue then was "whether an investor within the meaning of article 1101 of the NAFTA has rights of its own, distinct from those of the State of its nationality, or merely interests. If it is the former, then a countermeasure taken by Mexico in response to an unlawful act on the part of the United States will not preclude wrongfulness as against [the investor], even though it may operate to preclude wrongfulness against the United States".[2054] [71] The tribunal subsequently held that NAFTA did confer upon investors substantive rights separate and distinct from those of the State of which they are nationals, and accordingly that a countermeasure ostensibly taken against the United States could not deprive investors of such rights, and thus could not be raised as a circumstance precluding wrongfulness in the relation to a violation of the investor's rights.[2055] [72] The tribunal was further confronted with the question of whether the requirements for a lawful countermeasure, as relied upon by the respondent, had been satisfied. In particular, the requirement of a prior

[2051] [68] *Ibid*., paras. 134–151.

[2052] [69] *Corn Products International Inc.* (footnote [4] 5 above), para. 163.

[2053] [70] *Ibid*., para. 164, emphasis in the original.

[2054] [71] *Ibid*., para. 165.

[2055] [72] *Ibid*., paras. 167 and 176.

violation of international law, which it considered to be "an absolute precondition on the right to take countermeasures", as supported by, *inter alia*, article 49, paragraph 1, of the State responsibility articles (which it cited together with the corresponding sentence in the commentary[2056] [73]). In its view, "[i]t [was] plainly not open to this Tribunal to dispense with a fundamental prerequisite of this kind".[2057] [74] The difficulty the tribunal faced was that it lacked jurisdiction to ascertain whether the allegations of the respondent against the United States, in support of the respondent's defence of lawful countermeasures, were well founded or not, since the United States was not a party to the proceedings. As such, it could not uphold the respondent's defence since it had not established one of the requirements of a valid countermeasure.[2058] [75] The tribunal cited, *inter alia*, the following extract from the commentary to article 49:

A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[2059] [76]

[A/65/76, para. 46]

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—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 considered the reference to "appropriate countermeasures" under article 4, paragraph 10 (and separately under article 7, paragraph 10), of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and held, *inter alia*:

4.40 We note that the term 'countermeasures' is the general term used by the ILC in the context of its Draft Articles on State Responsibility, to designate temporary measures that injured States may take in response to breaches of obligations under international law.

4.41 We agree that this term, as understood in public international law, may usefully inform our understanding of the same term, as used in the SCM Agreement. Indeed, we find that the term 'countermeasures', in the SCM Agreement, describes measures that are in the nature of countermeasures as defined in the ILC's Draft Articles on State Responsibility.

4.42 At this stage of our analysis, we therefore find that the term 'countermeasures' essentially characterizes the nature of the measures to be authorized, *i.e.* temporary measures that would otherwise be contrary to obligations under the WTO Agreement and that are taken in response to a breach of

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[2056] [73] Paragraph (2): "A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure."

[2057] [74] *Corn Products International Inc.* (footnote [4] 5 above), paras. 185–187.

[2058] [75] *Ibid*., para. 189.

[2059] [76] *Ibid*., para. 187, quoting from paragraph (3) of the commentary to article 49 (footnote omitted).

an obligation under the SCM Agreement. This is also consistent with the meaning of this term in public international law as reflected in the ILC Articles on State Responsibility.[2060] 77

The arbitrator, in making the assertion that "[t]he fact that countermeasures … serve to induce compliance does not in and of itself provide specific indications as to the level of countermeasures that may be permissible … ", held that such "distinction is also found under general rules of international law, as reflected in the ILC's Articles on State Responsibility". He proceeded to recall that "[a]rticle 49 of [the] Draft Articles defines 'inducing compliance' as the only legitimate object of countermeasures, while a separate provision, Article 51, addresses the question of the permissible level of countermeasures, which is defined in relation to proportionality to the injury suffered, taking into account the gravity of the breach".[2061] 78

[A/65/76, para. 47]

[2060] 77 WTO, Case No. WT/DS267/ARB/2, Decision by the Arbitrator, 31 August 2009, paras. 4.30–4.32 (footnotes omitted). See also the discussion under article 55 below.

[2061] 78 *Ibid*., paras. 4.113 and 4.61, respectively.

Article 50. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) obligations for the protection of fundamental human rights;

(*c*) obligations of a humanitarian character prohibiting reprisals;

(*d*) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) under any dispute settlement procedure applicable between it and the responsible State;

(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations, which by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) obligations for the protection of fundamental human rights; (*c*) obligations of a humanitarian character prohibiting reprisals; and (*d*) other obligations under peremptory norms of general international law.

(4) Paragraph 1 (*a*) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of

force."[2062] [756] The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial[2063] [757] and other bodies.[2064] [758]

(6) Paragraph 1 (*b*) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[2065] [759] The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[2066] [760] This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[2067] [761]

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,[2068] [762] as well as with countermeasures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[2069] [763] and went on to state that:

> it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[2070] [764]

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited."[2071] [765]

[2062] [756] General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force".

[2063] [757] See especially *Corfu Channel*, *Merits* (footnote [29] 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 127, para. 249.

[2064] [758] See, *e.g.*, Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

[2065] [759] *"Naulilaa"* (footnote [990] 337 above), p. 1026.

[2066] [760] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[2067] [761] See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

[2068] [762] See below, article 59 and commentary.

[2069] [763] E/C.12/1997/8, para. 1.

[2070] [764] *Ibid*., para. 4.

[2071] [765] See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that "In no case may a people be deprived of its own means of subsistence".

(8) Paragraph 1 (*c*) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.[2072] [766] The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[2073] [767]

(9) Paragraph 1 (*d*) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (*d*) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under peremptory norms makes it clear that subparagraph (*d*) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (*b*) and (*c*) stand on their own. Subparagraph (*d*) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[2074] [768]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (*d*). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[2075] [769] Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend conces-

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[2072] [766] Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

[2073] [767] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, "Methods and means of combat", D. Fleck, ed., *op. cit.*, p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

[2074] [768] See paragraphs (4) to (6) of the commentary to article 40.

[2075] [769] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91–63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities* v. *Italian Republic*), *ibid*., p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities* v. *French Republic*), *ibid*., p. 2729 (1979); and case

sions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[2076] [770] Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[2077] [771] To the extent that derogation clauses or other treaty provisions (*e.g.* those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[2078] [772] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in paragraph 2 (*a*), applies to "any dispute settlement procedure applicable" between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council:*

> Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[2079] [773]

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision

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C-5/94 (*The Queen.* v. *Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I–2553 (1996).

[2076] [770] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

[2077] [771] See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote [94] 73 above), paras. 7.35–7.46.

[2078] [772] To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

[2079] [773] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

> In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.[2080] [774]

(14) The second exception in paragraph 2 (*b*) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (*b*), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.[2081] [775] The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[2082] [776] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[2083] [777]

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[2084] [778] On the other hand, no reference need be made

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[2080] [774] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 28, para. 53.

[2081] [775] See, *e.g.*, Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

[2082] [776] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 38, para. 83.

[2083] [777] *Ibid*., p. 40, para. 86. Cf. article 45, subparagraph (*a*), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (*a*), of the Vienna Convention on Consular Relations (premises, property and archives to be protected "even in case of armed conflict").

[2084] [778] See articles 9, 11, 26, 36, paragraph 2, 43 (*b*) and 47, paragraph 2 (*a*), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (*b*), subparagraph (*c*) and article 35,

in article 50, paragraph 2 (*b*), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, *i.e.* the international organization concerned.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. *Zoran Kupreškić, Mirjian Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić ("Lasva Valley")*

In its 2000 judgement in the *Kupreškić et al. ("Lasva Valley")* case, the Trial Chamber invoked draft article 50(*d*) adopted on first reading[2085] [229] to confirm its finding that there existed a rule in international law that prohibited belligerent reprisals against civilians and fundamental rights of human beings. It stated that:

> … the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanization of armed conflict is among other things confirmed by the works of the United Nations International Law Commission on State responsibility. Article 50(*d*) of the draft articles on State responsibility, adopted on first reading in 1996, prohibits as countermeasures any "conduct derogating from basic human rights".[2086] [230]

In the same context, the Trial Chamber again relied on draft article 50(*d*) adopted on first reading, which it considered authoritative, to confirm its interpretation of the relevant rules of international law. It observed that:

> The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on subparagraph d of article 14 (now article 50) of the draft articles on State responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that article 3 common to the four 1949 Geneva Conventions "prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment". It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, common article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held

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paragraph (3), of the Vienna Convention on Consular Relations.

[2085] [229] The relevant subparagraph was amended and incorporated in article 50, paragraph 1 (*b*), finally adopted by the International Law Commission in 2001.

[2086] [230] International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Zoran Kupreškić, Mirjian Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić ("Lasva Valley"), Judgement,* Case No. IT-95–16-T, 14 January 2000, para. 529 (footnote omitted).

in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.[2087] 231

[A/62/62, para. 129]

ERITREA-ETHIOPIA CLAIMS COMMISSION

Prisoners of War—Eritrea's Claim 17, Partial Award

In its 2003 partial award on *Prisoners of War—Eritrea's Claim 17*, the Eritrea-Ethiopia Claims Commission noted that Eritrea had claimed *inter alia* that:

Ethiopia's suspension of prisoner of war exchanges cannot be justified as a non-forcible countermeasure under the law of state responsibility because, as article 50 of the International Law Commission's articles on responsibility of States for internationally wrongful acts emphasizes, such measures may not affect "obligations for the protection of fundamental human rights", or "obligations of a humanitarian character prohibiting reprisals".[2088] 232

The Claims Commission did not refer explicitly to the International Law Commission articles in its subsequent reasoning, but it considered that Eritrea's arguments were "well founded in law", although they were considered insufficient to establish that Ethiopia had violated its repatriation obligation.[2089] 233

[A/62/62, para. 130]

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

In the matter of an Arbitration Between Guyana and Suriname

In its 2007 award in the *Guyana* v. *Suriname* case, the arbitral tribunal constituted to hear the case, after holding that certain military action taken by Suriname constituted a threat of the use of force in contravention of the United Nations Convention on the Law of the Sea of 1982, the Charter of the United Nations and general international law, was faced with a claim by Suriname that the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana. The tribunal held that "[i]t is a well established principle of international law that countermeasures may not involve the use of force" and continued:

This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(*a*), which states that countermeasures shall not affect 'the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'. As the commentary to the ILC Draft Articles mentions, this principle is consistent with the jurisprudence emanating from international judicial bodies. It is also contained in the Declaration on Principles of International Law concerning Friendly Relations

[2087] 231 *Ibid*., para. 534 (footnotes omitted).

[2088] 232 Eritrea-Ethiopia Claims Commission, *Prisoners of War—Eritrea's Claim 17*, Partial Award, 1 July 2003, para. 159.

[2089] 233 *Ibid*., para. 160.

and Cooperation among States in accordance with the Charter of the United Nations, the adoption of which, according to the ICJ, is an indication of State's *opinio juris* as to customary international law on the question.[2090] 79

[A/65/76, para. 48]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc., v. *The United Mexican States*

The tribunal established to hear the case of *Corn Products International Inc.,* v. *Mexico*, in its 2008 Decision on Responsibility, relied on article 50 of the State responsibility articles to draw the inference that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of countermeasures in the case of alleged violations of obligations under NAFTA.[2091] 80

[A/65/76, para. 49]

[2090] 79 *Guyana* v. *Suriname* (footnote [967] 19 above), para. 446 (footnote omitted).

[2091] 80 *Corn Products International Inc.* (footnote [4] 5 above), para. 158. See article 22 above.

Article 51. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case:

> even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.[2092] 779

(3) In the *Air Service Agreement* arbitration,[2093] 780 the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France". In particular, the majority said:

> It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation. [2094] 781

[2092] 779 *"Naulilaa"* (footnote [990] 337 above), p. 1028.

[2093] 780 *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), para. 83.

[2094] 781 *Ibid.*; Reuter, dissenting, accepted the tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.[2095] [782] ICJ, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

> In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.
>
> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:
>
> > "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" …
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well …
>
> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law …
>
> The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (*e.g.* self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.[2096] [783] The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two

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United States, which the tribunal has been unable to assess definitely" (p. 448).

[2095] [782] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

[2096] [783] E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

United States—Import Measures on Certain Products From the European Communities

In its 2000 report on *United States—Import Measures on Certain Products from the European Communities*, the panel noted that the suspension of concessions or other obligations authorized by the Dispute Settlement Body—which is the remedial action available, in last resort, for WTO members under the WTO Dispute Settlement Understanding—was "essentially retaliatory in nature". In a footnote, it further referred to the conditions imposed on countermeasures under the International Law Commission articles, and in particular draft article 49, as adopted on first reading:[2097] [234]

> … Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on state responsibility (proportionality, *etc.* … see article [49] of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO Dispute Settlement Understanding.[2098] [235]

[A/62/62, para. 131]

[2097] [234] Although the original text of the quoted passage inadvertently refers to draft article 43 with regard to the issue of proportionality, the draft article adopted on first reading that dealt with that issue was draft article 49, which was amended and incorporated in article 51 finally adopted by the International Law Commission in 2001. The text of draft article 49 adopted on first reading was the following:

> Article 49
>
> Proportionality
>
> Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

(*Yearbook … 1996*, vol. II (Part Two), para. 65.)

[2098] [235] WTO, Panel Report, WT/DS165/R, 17 July 2000, para. 6.23, footnote 100.

World Trade Organization Appellate Body

United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan

In its 2001 report on *United States—Cotton Yarn*, the Appellate Body considered that its interpretation according to which article 6.4, second sentence, of the agreement on textiles and clothing did not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone had caused all the serious damage

> [was] supported further by the rules of general international law on State responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.[2099] 236

This sentence was followed by a footnote that reproduced the complete text of article 51 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 132]

United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea

In its 2002 report on *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, the Appellate Body again referred to article 51 finally adopted by the International Law Commission in 2001, which it considered as reflecting customary international law rules on State responsibility, to support its interpretation of the first sentence of article 5.1 of the agreement on safeguards:

> We note … the customary international law rules on State responsibility, to which we also referred in *US—Cotton Yarn*. We recalled there that the rules of general international law on State responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the International Law Commission's draft articles on responsibility of States for internationally wrongful acts provides that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". Although article 51 is part of the International Law Commission's draft articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law. We observe also that the United States has acknowledged this principle elsewhere. In its comments on the International Law Commission's draft articles, the United States stated that "under customary international law a rule of proportionality applies to the exercise of countermeasures".[2100] 237

[A/62/62, para. 133]

[2099] 236 WTO Appellate Body, WT/DS192/AB/R, 8 October 2001, para. 120.

[2100] 237 WTO Appellate Body Report, WT/DS202/AB/R, 15 February 2002, para. 259 (footnotes omitted).

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* referred to article 51 of the State responsibility articles in recalling that, as per the requirement of proportionality, countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[2101] [81] Reference was further made to paragraph (7) of the commentary to article 51, which provides:

(7) Proportionality is concerned with the relationship between the international wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49.[2102] [82]

In casu, the tribunal found that Mexico's aim to secure compliance by the United States of its obligations under Chapters Seven and Twenty of NAFTA could have been attained by other measures not impairing the investment protection standards. Accordingly, it held that a tax imposed by Mexico, ostensibly to secure such compliance, did not meet the proportionality requirement for the validity of countermeasures under customary international law.[2103] [83]

[A/65/76, para. 50]

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—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 referred to article 51 of the State responsibility articles in noting that the articles maintain a general distinction between the purpose of countermeasures and the level of permissible countermeasures.[2104] [84]

[A/65/76, para. 51]

[2101] [81] *Archer Daniels Midland Company* (footnote [3] 4 above), para. 152.

[2102] [82] *Yearbook of the International Law Commission*, *2001*, Volume II (Part Two), p. 135.

[2103] [83] *Archer Daniels Midland Company* (footnote [3] 4 above), para. 160.

[2104] [84] Case No. WT/DS267/ARB/1, Decision by the Arbitrator, 31 August 2009, para. 4.113, and Case No. WT/DS267/ARB/2, Decision by the Arbitrator, 31 August 2009, para. 4.61. See also the discussion under article 49 above.

Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) the internationally wrongful act has ceased; and

(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.[2105] [784] At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, *e.g.* as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

[2105] [784] See above, paragraph (7) of the commentary to the present chapter.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.[2106] [785] The first requirement, set out in paragraph 1 (*a*), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the tribunal in the *Air Service Agreement* arbitration[2107] [786] and by ICJ in the *Gabčíkovo-Nagymaros Project* case.[2108] [787] It also appears to reflect a general practice.[2109] [788]

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (*a*).

(5) Paragraph 1 (b*)* requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*) and (*b*) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (*b*) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

[2106] [785] *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), pp. 445–446, paras. 91 and 94–96.

[2107] [786] *Ibid*., p. 444, paras. 85–87.

[2108] [787] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 56, para. 84.

[2109] [788] A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

(8) A dispute is not "pending before a court or tribunal" for the purposes of paragraph 3 (*b*) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.[2110] [789] Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.[2111] [790] The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[2112] [791]

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

[2110] [789] Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[2111] [790] The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote [236] 119 above), pp. 501–504, paras. 99–104.

[2112] [791] Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute" (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization Appellate Body

United States—Continued Suspension of Obligations in the EC—Hormones Dispute

In its 2008 report, the WTO Appellate Body in the *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, declined to uphold the argument of the European Communities that the latter's position was consistent with the approach in article 52, paragraph 3, of the State responsibility articles, *i.e.* requiring that countermeasures be suspended if the internationally wrongful act has ceased and the dispute is pending before a tribunal that has the authority to make decisions binding upon the parties.[2113] [85]

[A/65/76, para. 52]

[2113] [85] WTO Appellate Body, Case No. AB-2008–5, Report of the Appellate Body, 14 November 2008, para. 382 ("the Articles on State Responsibility do not lend support to the European Communities' position"). See article 53. See also *WTO Appellate Body, Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, Case No. AB-2008–6, Report of the Appellate Body, 14 November 2008, para. 382.

Article 53. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization Appellate Body

United States—Continued Suspension of Obligations in the EC—Hormones Dispute

In its 2008 report, the WTO Appellate Body in the *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, held that

> … Article 53 provides that countermeasures must be terminated as soon as the State 'has complied with its obligations' in relation to the internationally wrongful act. Thus, relevant principles under international law, as reflected in the Articles on State Responsibility, support the proposition that countermeasures may continue until such time as the responsible State has ceased the wrongful act by fully complying with its obligations.[2114] [86]

[A/65/76, para. 53]

[2114] [86] *Ibid.*

Article 54. Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[2115] [792]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.[2116] [793] More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[2117] [794]

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (*e.g.* breaking off air links or other contacts). Examples include the following:

– *United States–Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[2118] [795] The legislation recited that "[t]he Government of Uganda … has committed geno-

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[2115] [792] See, *e.g.*, M. Akehurst, "Reprisals by third States", BYBIL*, 1970*, vol. 44, p. 1; J. I. Charney, "Third State remedies in international law", *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote [1923] 672 above); Sicilianos, *op. cit.* (footnote [2022] 735 above), pp. 110–175; B. Simma, "From bilateralism to community interest in international law", *Collected Courses … , 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, "Reactions by not directly affected States to breaches of public international law", *Collected Courses … , 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

[2116] [793] See article 59 and commentary.

[2117] [794] See article 57 and commentary.

[2118] [795] Uganda Embargo Act, Public Law 95–435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington D. C., United States Government Printing Office, 1980), pp. 1051–1053.

cide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[2119] [796]

– *Certain Western countries–Poland and the Soviet Union (1981).* On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.[2120] [797] The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[2121] [798] The suspension procedures provided for in the respective treaties were disregarded.[2122] [799]

– *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[2123] [800] Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (*b*) (iii) of the Agreement.[2124] [801] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[2125] [802] for which security exceptions of the Agreement did not apply.

– *United States–South Africa (1986).* When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[2126] [803] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African

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[2119] [796] *Ibid*., sects. 5(*a*) and (*b*).

[2120] [797] RGDIP, vol. 86 (1982), pp. 603–604.

[2121] [798] *Ibid*., p. 606.

[2122] [799] See, *e.g.*, article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

[2123] [800] Security Council resolution 502 (1982) of 3 April 1982.

[2124] [801] Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

[2125] [802] The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

[2126] [803] Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote [2022] 735 above), p. 165.

Airlines on United States territory.[2127] [804] This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories[2128] [805] and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy".[2129] [806]

– *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[2130] [807] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

– *Collective measures against the Federal Republic of Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[2131] [808] For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.[2132] [809] Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's … worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally apply."[2133] [810] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[2134] [811]

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

– *Netherlands–Suriname (1982).* In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development

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[2127] [804] For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

[2128] [805] United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

[2129] [806] For the implementation order, see ILM (footnote [2127] 804 above), p. 105.

[2130] [807] See, *e.g.*, President Bush's Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

[2131] [808] Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid*., No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid*., No. L 248 of 8 September 1998, p. 1.

[2132] [809] See, *e.g.*, United Kingdom, *Treaty Series* No. 10 (1960) (London, H. M. Stationery Office, 1960); and *Recueil des Traités et Accords de la France,* 1967, No. 69.

[2133] [810] BYBIL, *1998*, vol. 69, p. 581; see also BYBIL, *1999*, vol. 70, pp. 555–556.

[2134] [811] Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1999.

assistance under which Suriname was entitled to financial subsidies.[2135] [812] While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.[2136] [813]

– *European Community member States–the Federal Republic of Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.[2137] [814] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[2138] [815]

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[2139] [816]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessa-

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[2135] [812] *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

[2136] [813] R. C. R. Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", NYIL, 1984, vol. 15, p. 321.

[2137] [814] *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

[2138] [815] See also the decision of the European Court of Justice in *A. Racke GmbH and Co.* v. *Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998–6, p. I–3655, at pp. 3706–3708, paras. 53–59.

[2139] [816] Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

tion of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

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 peremptory 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 peremptory 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

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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

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[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.

Annex I. Text of the articles

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Part One

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II

ATTRIBUTION OF CONDUCT TO A STATE

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental

authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6. Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7. Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11. Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 12. Existence of a breach of an international obligation

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

Article 13. International obligation in force for a State

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

Article 14. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV

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

Article 16. Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 17. Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 18. Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) the coercing State does so with knowledge of the circumstances of the act.

Article 19. Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21. Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Article 23. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence

of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

Article 24. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) the international obligation in question excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

Article 26. Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

Part Two

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

GENERAL PRINCIPLES

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.

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.

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.

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.

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.

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.

Chapter II

REPARATION FOR INJURY

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38. Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40. Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41. Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Part Three

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42. Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of Part Two.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46. Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47. Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Article 48. Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II

COUNTERMEASURES

Article 49. Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) obligations for the protection of fundamental human rights;

(*c*) obligations of a humanitarian character prohibiting reprisals;

(*d*) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) under any dispute settlement procedure applicable between it and the responsible State;

(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) the internationally wrongful act has ceased; and

(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Article 54. Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Part Four

GENERAL PROVISIONS

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.

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.

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.

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.

Article 59. Charter of the United Nations

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

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