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Date:20/3/13 Time:13:20:08 Page Number: 1

State Responsibility

The General Part

Annexed to UN General Assembly Resolution 56/83 of 2001, the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts put the international law of responsibility on a sound footing. As Special Rapporteur for the second reading, James Crawford helped steer it to a successful conclusion. With this book, he provides a detailed analysis of the general law of international responsibility and the place of state responsibility in particular within that framework. It serves as a companion to *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), and is essential reading for scholars and practitioners concerned with issues of international responsibility, whether they arise in interstate relations, in the context of arbitration or litigation or in bringing international claims.

JAMES CRAWFORD is Whewell Professor of International Law at the University of Cambridge. From 1997 to 2001 he was the ILC Special Rapporteur on State Responsibility.

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State Responsibility

The General Part

James Crawford

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521822664

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First published 2013

Printed and bound in the United Kingdom by the MPG Books Group

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing-in-Publication data

Crawford, James, 1948–
State responsibility : the general part / James Crawford SC, FBA, BA, LLB (Adel), DPhil (Oxon), LLD (Cantab), Whewell Professor of International Law, University of Cambridge, Former Member of the International Law Commission.
pages cm. – (Cambridge studies in international and comparative law)
ISBN 978-0-521-82266-4 (Hardback)
1. International obligations. 2. Government liability (International law) I. Title.
KZ4080.C73 2013
341.26–dc23

2012049381

ISBN 978-0-521-82266-4 Hardback

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Date:20/3/13 Time:13:20:09 Page Number: 5

And louder sing

For every tatter in its mortal dress.

W. B. Yeats, 'Sailing to Byzantium'.

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Date:20/3/13 Time:13:20:09 Page Number: 6

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:10 Page Number: 7

Contents

Preface and acknowledgements *page* xxi
Abbreviations xxiv
Table of cases xxxii
Table of treaties and other instruments lv
Reports of Special Rapporteurs lxxiii

Part I The framework of responsibility

1 Historical development 3
1.1 Introduction 3
1.2 Intimations of responsibility in early international law writings 4
1.2.1 Italian precursors of Grotius: Belli and Gentili 4
1.2.2 Grotius: civil law obligations with no equivalent in the law of nations 8
1.2.3 Zouche: breaches of treaties 11
1.2.4 Pufendorf: a perfect system of natural law 12
1.2.5 Van Bynkershoek: the honour of the sovereign and *pacta sunt servanda* 15
1.2.6 Wolff and Vattel: elements of a law on responsibility 17
1.3 Nineteenth- and early twentieth-century developments 20
1.3.1 Nineteenth-century writers: from Wheaton to Heffter 20
1.3.2 The early twentieth century: Triepel and Anzilotti 22
1.3.3 Borchard and Eagleton and the legacy of the Great War 24

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:10 Page Number: 8

1.3.4 The Hague Codification Conference of 1930 28
1.3.5 The Harvard Draft Research 32
1.3.5.1 The 1929 Draft 32
1.3.5.2 The 1961 Draft 34
1.4 The work of the International Law Commission 35
1.4.1 The first reading: 1949–1996 35
1.4.2 The second reading: 1998–2001 39
1.4.3 Responses to the 2001 Articles 42

2 Key concepts 45
2.1 The modern synthesis 45
2.1.1 The ILC's codification 45
2.1.2 The modern concept of state responsibility 49
2.2 The language of state responsibility 51
2.2.1 Typology of state responsibility 51
2.2.2 Prerequisites for the invocation of responsibility 54
2.2.2.1 The debate over 'damage' and 'injury' 54
2.2.2.2 The principle of 'objective responsibility' 60
2.2.3 'Delictual capacity' 62
2.2.4 'Responsibility' and 'liability' 62
2.2.5 Rights and obligations 64
2.2.5.1 'Primary' and 'secondary' obligations 64
2.2.5.2 'Obligations *erga omnes*' and related concepts 66
2.3 Invocation and admissibility 67
2.3.1 Invocation of state responsibility: formal requirements 67
2.3.2 Certain questions as to the admissibility of claims 68
2.3.2.1 Nationality of claims 69
2.3.2.2 Exhaustion of local remedies 69
2.3.2.3 Waiver 70
2.3.2.4 Acquiescence 72
2.4 Diplomatic protection and its analogues 74
2.4.1 Public and private rights in international law 74
2.4.2 The institution of diplomatic protection 75
2.4.3 Functional and other protection (by international organizations or third states) 77
2.4.3.1 International organizations 77
2.4.3.2 Nationals of third states 78

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:11 Page Number: 9

2.5 Responsibility of non-state actors 79
2.5.1 Individual criminal responsibility 79
2.5.2 Corporate criminal responsibility 80
2.5.3 International law claims against individuals and groups 81
2.6 Responsibility and accountability 83
2.7 The modern synthesis and its future 85
2.7.1 Governmental criticisms 85
2.7.2 Scholarly criticisms 87
2.7.3 A convention on state responsibility? 90

3 Corollaries of breach of an international obligation 93
3.1 Introduction 93
3.2 Breach of obligation and its corollaries 94
3.2.1 The components of a breach 94
3.2.2 The substantive corollary: reparation 94
3.2.3 The procedural corollary: claim and countermeasure 95
3.2.4 Dispute settlement in claims of responsibility 95
3.3 The applicable law in claims of responsibility 99
3.3.1 Overview 99
3.3.2 International law as the governing law 100
3.3.3 The *lex specialis* principle and 'self-contained regimes' 103
3.3.4 Claims of responsibility arising under peremptory norms 106
3.3.5 State responsibility and the United Nations Charter 106
3.3.6 Other legal consequences of internationally wrongful acts 108

Part II Attribution to the state

4 Organs and entities exercising governmental authority 113
4.1 General principles of attribution 113
4.1.1 The process of attribution and its discontents 113
4.1.2 Bases of attribution in the ARSIWA 115
4.2 Organs of the state 116
4.2.1 Responsibility for the acts of state organs 116

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:11 Page Number: 10

4.2.2 Defining an 'organ' 118
4.2.2.1 The executive 119
4.2.2.2 The legislature 120
4.2.2.3 The judiciary 121
4.2.2.4 Federal and other internal subdivisions 123
4.2.3 De facto organs 124
4.3 Entities exercising governmental authority 126
4.3.1 Attribution of acts of private parties 126
4.3.2 Defining 'governmental authority' 129
4.3.3 'Empowered by the law' of the state 132
4.4 Organs placed at the disposal of another state 132
4.4.1 Defining 'disposal' 133
4.4.2 Additional requirements 135
4.5 *Ultra vires* and personal acts 136

5 Direction or control by the state 141
5.1 Development of the law 141
5.1.1 Early cases 141
5.1.2 The work of the International Law Commission 143
5.2 Persons acting on state instruction 144
5.3 Persons acting under direction or control 146
5.3.1 'Effective control' versus 'overall control' 146
5.3.2 *Nicaragua* 147
5.3.3 *Tadić* 149
5.3.3.1 The trial chamber 149
5.3.3.2 The Appeals Chamber 151
5.3.4 *Bosnian Genocide* 154
5.4 State responsibility and terrorism 156
5.4.1 The alleged inadequacy of the effective control test 156
5.4.2 Alternate bases of state responsibility with respect to terrorism 157
5.5 Attribution and state-owned corporations 161

6 Other cases of attribution 166
6.1 Introduction 166
6.2 Exercise of governmental authority in the absence of the state 166
6.2.1 Foundations of ARSIWA Article 9 166

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:12 Page Number: 11

6.2.2 Operation of the provision 168
6.3 Responsibility for the acts of insurgents 170
6.3.1 ARSIWA Article 10 in the ILC 170
6.3.2 Responsibility where the insurgency creates a new government 174
6.3.3 Responsibility where the insurgency creates a new state 176
6.3.4 Responsibility where the insurgency fails 179
6.4 *Ex post facto* adoption of conduct 181
6.4.1 ARSIWA Article 11 in the ILC 181
6.4.2 Judicial consideration of *ex post facto* adoption 182
6.4.2.1 *Lighthouses Arbitration* 182
6.4.2.2 The *Eichmann* case 183
6.4.2.3 The *Tehran Hostages* case 183
6.4.2.4 The *Gabčíkovo-Nagymaros* case 186
6.4.3 The operation of ARSIWA Article 11 187
6.5 State organs and international organizations 188
6.5.1 Early theory and practice of international organizations 190
6.5.2 Peacekeeping policy and DARIO Article 7 193
6.5.3 Judicial consideration of contributing state responsibility 197
6.5.3.1 *Behrami and Saramati* 197
6.5.3.2 *Al-Jedda* 200
6.5.4 The standard of 'effective control' 203
6.5.4.1 Defining the basic concept 203
6.5.4.2 Positive and negative conceptions of 'control': the *Dutchbat* case 205
6.5.5 Distinction between attribution of acts and secondary responsibility with regard to international organizations 210

Part III Breach

7 Breach: the material element 215
7.1 Introduction 215
7.2 The autonomy of the primary obligation 216
7.3 Acts and omissions 217
7.4 The classification of obligations 219

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:12 Page Number: 12

7.4.1 Obligations of conduct and result 220
7.4.2 Due diligence and obligations of prevention 226
7.4.3 Substantive and procedural obligations 232
7.5 Specific issues 232
7.5.1 Anticipatory breach 233
7.5.2 Illusory obligations 235
7.5.3 'Non-violation complaints' 238

8 Breach: the temporal element 240
8.1 Introduction 240
8.2 The intertemporal law 241
8.2.1 Applications of the principle 241
8.2.1.1 *Island of Palmas* and Huber's restatement 241
8.2.1.2 The intertemporal law and the law of treaties 242
8.2.1.3 The intertemporal law and the ILC's work on responsibility 244
8.2.2 Some qualifications 245
8.2.2.1 Retrospective acceptance of responsibility 245
8.2.2.2 Evolutive interpretation of treaties 246
8.2.2.3 New peremptory norms 250
8.2.3 Termination of the primary obligation 251
8.3 Duration of the breach 253
8.3.1 Instantaneous breaches 254
8.3.2 Continuing breaches 258
8.3.2.1 The concept of continuing breach 258
8.3.2.2 The distinction between instantaneous and continuing breach 262
8.3.2.3 Completion of the act 264
8.3.3 Composite breaches 265
8.3.3.1 The character of the composite breach 265
8.3.3.2 Determining the scope of the composite breach 268
8.3.4 Complex breaches 269

9 Circumstances precluding wrongfulness 274
9.1 Justifications and excuses in international law 274
9.1.1 The category of 'circumstances precluding wrongfulness' 274
9.1.2 Termination and suspension of obligations 281

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:13 Page Number: 13

9.2 General justifications and excuses 283
9.2.1 Consent 283
9.2.2 Self-defence 289
9.2.3 Countermeasures 292
9.2.4 *Force majeure* 295
9.2.5 Distress 301
9.2.6 Necessity 305
9.3 Further Questions 315
9.3.1 Obligations arising under peremptory norms 315
9.3.2 Compensation for material loss 318
9.3.3 The burden of proof 320

Part IV Collective or ancillary responsibility

10 Responsibility in cases of joint or collective conduct 325
10.1 Introduction 325
10.1.1 Historical background: the work of the ILC and the Institut 326
10.1.2 The influence of private law analogies 328
10.2 Joint and collective conduct by states 333
10.2.1 Attribution to multiple states: the principle of independent responsibility 333
10.2.2 Implication in the act of another state: exceptions to the principle of independent responsibility 336
10.2.3 Conduct of joint organs 339
10.2.4 Other bases for solidary responsibility 341
10.3 Conduct within the framework of international organizations 343
10.4 Cognate questions 354
10.4.1 Guarantees and indemnities 354
10.4.2 Contribution between persons collectively responsible 355
10.4.3 International claims involving conduct of private parties 358

11 Responsibility for breaches of communitarian norms 362
11.1 Introduction 362
11.2 The International Law Commission's compromise 365
11.3 Invocation of communitarian norms 370

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:13 Page Number: 14

11.4 The relation between communitarian and other norms 376
11.5 Invocation and consequences of breaches of peremptory norms 378
11.5.1 Defining peremptory norms 378
11.5.2 Consequences of the serious breach of peremptory norms 380
11.5.2.1 The obligation of non-recognition 381
11.5.2.2 The obligation of non-assistance 385
11.5.2.3 The obligation of co-operation 386
11.6 Future prospects 389
Excursus: international crimes of state 390

12 Ancillary and secondary responsibility 395
12.1 Responsibility of states for the conduct of other states and international organizations 395
12.1.1 The scope of ancillary or secondary responsibility 395
12.1.2 The standards of direction and control and coercion 397
12.2 Aid or assistance in the commission of a breach 399
12.2.1 ILC development and customary status 400
12.2.2 Defining 'aid or assistance' 401
12.2.2.1 The terms of ARSIWA Article 16 401
12.2.2.2 Omissions as 'aid or assistance' 403
12.2.2.3 'Aid or assistance': general principles? 405
12.2.3 The 'subjective' element of complicity 405
12.2.4 Complicity and the *pacta tertiis* rule 409
12.2.5 Complicity and international organizations 410
12.3 Direction and control over another state or international organization 412
12.3.1 The scope and relevance of ARSIWA Article 17 412
12.3.2 Defining 'direction and control' 414
12.3.3 Additional considerations 416
12.3.3.1 Knowledge and opposability of obligation 416
12.3.3.2 Responsibility of the directed state 417
12.3.4 Direction and control of an international organization 417

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:14 Page Number: 15

12.4 Coercion of a state or international organization 419
12.4.1 Defining 'coercion' 419
12.4.2 Other considerations 421
12.4.3 Coercion of an international organization 422
12.5 Member state responsibility for the acts of international organizations 422
12.5.1 Responsibility of member states 423
12.5.1.1 The basic rule 423
12.5.1.2 Judicial confirmation of the basic rule 424
12.5.2 Exceptions to the basic rule 428
12.5.2.1 Acceptance of responsibility 428
12.5.2.2 Injured party reliance 429
12.5.3 Abuse of the separate personality of international organizations 430

13 Succession to responsibility 435
13.1 Introduction 435
13.2 The negative succession rule 437
13.2.1 The early authorities 437
13.2.2 Defences and criticisms of the negative succession rule 438
13.3 Rebutting the negative succession rule: judicial consideration 442
13.3.1 *Lighthouses Arbitration* 443
13.3.2 The *Gabčíkovo-Nagymaros* case 446
13.4 Rebutting the negative succession rule: modern state practice 447
13.4.1 The role of state practice 447
13.4.2 Succession where the predecessor ceases to exist 448
13.4.2.1 The reunification of Germany 449
13.4.2.2 The dissolution of the Socialist Federal Republic of Yugoslavia 451
13.4.3 Succession where the predecessor continues to exist 452
13.4.3.1 Separation from the Union of Soviet Socialist Republics 452
13.4.3.2 The independence of Namibia 453
13.5 Conclusions 455

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:15 Page Number: 16

Part V Cessation and reparation

14 Restoration of legal relations after breach 459
14.1 Introduction 459
14.2 Legal effects of the breach 460
14.2.1 The applicable secondary obligations 460
14.2.2 The continuation of the primary obligation 461
14.3 Cessation 461
14.3.1 Wrongful acts that are 'continuing' 462
14.3.2 The distinction between cessation and the continued duty of performance 464
14.3.3 The distinction between cessation and restitution 465
14.4 Assurances and guarantees against repetition 469
14.4.1 The status of the obligation to offer assurances and guarantees 469
14.4.2 The distinction between assurances and guarantees of non-repetition and reparation 475
14.4.3 Appropriate assurances and guarantees 476

15 Reparation 480
15.1 The basic principle 480
15.2 'Full' reparation 481
15.2.1 The position taken in the ARSIWA 481
15.2.2 Subsequent case law 483
15.3 The notion of injury 485
15.3.1 Injury defined 485
15.3.2 Material and moral injury 486
15.3.3 'Legal injury'? 487
15.4 Questions of causation 492
15.4.1 An expanded rubric 492
15.4.2 Mitigation of damage and reparation 494
15.4.3 Concurrent causes 495
15.4.3.1 The applicable principles 495
15.4.3.2 Hard cases 498
15.4.4 Contribution to the injury 500
15.5 Plurality of injured states 503

16 Remedies 506
16.1 The link between reparation and remedies 506
16.1.1 The available forms of reparation 506

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:16 Page Number: 17

16.1.2 The right of election 508
16.1.3 A hierarchy of reparation? 509
16.2 Restitution 510
16.2.1 The basic principle 510
16.2.2 The forms of restitution 511
16.2.3 Limitations on the availability of restitution 512
16.2.3.1 Material impossibility 512
16.2.3.2 Disproportionate burden 514
16.2.4 A flexible approach 515
16.3 Compensation 516
16.3.1 The basic principle 516
16.3.2 The practice of the Permanent and International Courts 518
16.3.3 Quantification of damage 519
16.3.4 Loss of profits 522
16.3.5 Punitive damages 523
16.4 Satisfaction 527
16.4.1 The basic principle 527
16.4.2 Forms of satisfaction 527
16.4.3 Judicial declarations 529
16.4.4 Limitations on the availability of satisfaction 530
16.5 Interest 531
16.5.1 The basic principle 531
16.5.2 Pre-judgment and post-judgment interest distinguished 533
16.5.3 The period for which interest is payable 534
16.5.4 The rate of interest and mode of calculation 536

Part VI The implementation of responsibility

17 The claims process 541
17.1 Entitlement to claim 541
17.1.1 The injured state 542
17.1.2 Other injured parties 548
17.1.3 Concerned states or other entities 549
17.2 The process of claim 553
17.3 Loss of the right to invoke responsibility 557
17.3.1 Waiver and acquiescence 558
17.3.2 Lapse of time 560
17.3.3 Adjudication and settlement 563
17.3.4 Effects on related or derivative claims 563

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:17 Page Number: 18

18 Claims on behalf of others: diplomatic and functional protection 566
18.1 Introduction 566
18.2 Diplomatic protection: an overview 567
18.2.1 The character and role of diplomatic protection 568
18.2.2 Title to protect: the nationality of claims 573
18.2.3 Exhaustion of local remedies 580
18.3 Diplomatic protection and individual and state invocation 584
18.3.1 Human rights 585
18.3.2 Investment protection 587
18.3.3 Other fields 592
18.4 Functional protection by international organizations and third states 593

19 Implementation of responsibility by judicial process 598
19.1 Introduction 598
19.2 Jurisdiction in matters of responsibility 599
19.2.1 The *Chorzów* principle 599
19.2.2 The distinction between cause of action and applicable law 603
19.2.3 Jurisdiction over counterclaims 609
19.3 Is there a remedial discretion? 615
19.4 Election of remedies 621
19.4.1 The claimant's right to elect and election in the course of proceedings 621
19.4.2 Fork-in-the-road clauses 624
19.4.3 The *non ultra petita* rule 626
19.5 Systematic remedies arising from individual cases 629
19.5.1 The ECHR: *Broniowski* and its progeny 630
19.5.2 Class actions in investment arbitration: *Abaclat* v. *Argentina* 637
19.5.3 Compensation as an incident of criminal proceedings 641

20 Invocation in cases involving multiple parties 644
20.1 Introduction 644
20.2 Multiple claimants 645

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:18 Page Number: 19

20.3 Multiple respondents 648
20.4 Intervention by third states 650
20.5 The *Monetary Gold* principle: 'indispensable' third states 655
20.5.1 The scope of the principle 657
20.5.1.1 The *Monetary Gold* jurisprudence 658
20.5.1.2 Uncertainty of application 660
20.5.1.3 Further questions of scope 664
20.5.1.4 Conclusion 665
20.5.2 Possible exceptions 666
20.5.2.1 Defunct states 666
20.5.2.2 Criminal prosecution 667
20.5.2.3 Waiver 668
20.6 Other procedural incidents 669
20.6.1 Joinder of claims 669
20.6.2 The composition of the bench 671
20.6.3 The rule against double recovery 673

21 Implementation of responsibility by extrajudicial process 675
21.1 Overview 675
21.2 Unilateral self-help measures 676
21.2.1 Retorsion 676
21.2.2 The exception of non-performance (*exceptio inadimpleti contractus*) 678
21.2.3 Suspension of obligations 682
21.2.4 Countermeasures by an injured state 684
21.2.4.1 The scope and object of countermeasures 686
21.2.4.2 Prohibited countermeasures 688
21.2.4.3 Proportionality 697
21.2.4.4 Procedural incidents of countermeasures 700
21.2.4.5 Termination of countermeasures 702
21.2.5 Collective countermeasures 703
21.3 Issues of responsibility in the Security Council and other international forums 706

Appendices 712
Appendix 1 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 712

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:20 Page Number: 20

Appendix 2 General Assembly Resolution 56/83, 12 December 2001 724
General Assembly Resolution 59/35, 2 December 2004 725
General Assembly Resolution 62/61, 6 December 2007 726
General Assembly Resolution 65/19, 6 December 2010 727

Appendix 3 ILC Draft Articles on Diplomatic Protection (2006) 728

Appendix 4 ILC Draft Articles on State Responsibility (as proposed by F. V. García-Amador, 1961) 733

Appendix 5 ILC Draft Articles on State Responsibility (as adopted on first reading, 1996) 743

Appendix 6 ILC Draft Articles on Responsibility of International Organizations (2010) 761

Bibliography 778
Index 808

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:20 Page Number: 21

Preface and acknowledgements

PROOF

This book grows out of work I was privileged to do as the International Law Commission's fifth and final Special Rapporteur on State Responsibility. The State Responsibility project was conceived in the 1920s and was one focus of the League of Nations Conference for the Codification of International Law held at The Hague in 1930. That conference failed to produce any results. Following the creation of the International Law Commission (ILC) in 1948, the subject was identified as one of the initial topics for codification, and work on it resumed in 1955. Again, it got nowhere. The subject was reconceived under the inspired leadership of Roberto Ago in 1962, worked on (at times intensively, at times sporadically) in the period 1963–96 under Special Rapporteurs Ago, Riphagen and Arangio-Ruiz, and completed on first reading in 1996. The second reading process was completed during the years 1998–2001. It saw as its immediate outcome UN General Assembly Resolution 56/83 of 12 December 2001, which annexed the text of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter ARSIWA or 'the ILC Articles') and 'commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'. Three years later there was a further debate, leading to the adoption by consensus of General Assembly Resolution 59/35 on 2 December 2004, again deferring any decision on the final form of the Articles; similar debates occurred in 2007 and 2010. The texts of these resolutions form Appendix 2. The text of the ILC Articles themselves forms Appendix 1.

Subsequently the ILC moved to projects on diplomatic protection (completed in 2006) and the responsibility of international organizations (completed in 2010).

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:20 Page Number: 22

So far as the responsibility of states is concerned, the present book covers much the same subject matter as the ILC Articles. It is intended to provide an analysis and critical review of the present law and its functioning. Inevitably, there were many things the ILC did not say which need to be said, including matters where the ILC declined to deal with various issues – for example, the responsibility of states for the acts of international organizations.

In addition, this book covers certain issues of dispute settlement in relation to responsibility, and discusses questions concerning the connection between institutions and rules of responsibility, including the connection between action taken by international organizations, for example by the UN Security Council under Chapter VII of the UN Charter, and the link between the rules of responsibility and judicial settlement, for example in the context of countermeasures.

Like the ILC's work, this book does not attempt (except incidentally) to elaborate on the content of the primary international obligations breach of which gives rise to responsibility. It thus accepts the distinction between primary and secondary obligations, if not as fundamental then at least as a working device to limit the scope of the subject. The distinction itself and the criticisms that have been made of it are explored in Chapter 2.

Nor does this book examine in detail special features of the working of particular regimes in the field of responsibility (e.g. the human rights regimes, the World Trade Organization), except where this is useful in order to illustrate or shed light on the general law.

The book incorporates certain material from the author's four Reports on State Responsibility and other writings. But the attempt has been made to synthesise this material, together with subsequent developments and government comments on the ILC's work and to reflect on the resulting debate. At the same time, the work seeks to place the rules of state responsibility within the framework and dynamic of international law.

* * *

A large number of people have contributed to this work, directly or indirectly. They include my colleagues on the ILC in the years 1998–2001 – especially the four chairs of the Drafting Committee, Bruno Simma, Enrique Candioti, Giorgio Gaja and Peter Tomka, and others including John Dugard, Gerhard Hafner, Djamchid Momtaz, my ever faithful adversary and friend Alain Pellet, Robert Rosenstock, Bernardo Sepúlveda, Chusei Yamada and the late Ian Brownlie. On the Secretariat,

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:21 Page Number: 23

Mahnoush Arsanjani, Virginia Morris and Arnold Pronto were unfailingly helpful. My New York University interns were terrific – especially Jacqueline Peel and Simon Olleson. The former helped greatly with the commentaries; the latter became a constant professional companion. At Cambridge I had a stream of bright and lively graduate students who stayed on for a year or so as associates. Those who helped with this book were Anna Cowan, Callista Harris, Cameron Miles, Rowan Nicholson, Federica Paddeu and Tiina Pajuste. At Cambridge University Press, Finola O'Sullivan was patience personified. My thanks to all of them.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:26 Page Number: 24

Abbreviations

AC	Appeal Cases (UK)
ACHR	American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36
ADP	Articles on Diplomatic Protection, ILC Report 2006, UN Doc A/61/10
ADP Commentary	Commentary to Articles on Diplomatic Protection, ILC Report 2006, UN Doc A/61/10
AFDI	*Annuaire français de droit international*
AJIL	*American Journal of International Law*
AJIL Spec. Supp.	*American Journal of International Law Special Supplement*
AJLH	*Australian Journal of Legal History*
Ann. de l'Inst.	*Annuaire de l'Institut de droit international*
APD	*Archives de Philosophie du Droit*
APIL	Australian Practice in International Law (as published in the *Australian Yearbook of International Law*)
Arb. Int.	*Arbitration International*
ARSIWA	ILC Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Ybk 2001/II(2), 26
ARSIWA Commentary	Commentary to the ILC Articles on Responsibility of States for Internationally Wrongful Acts, ILC Ybk 2001/II(2) 31, reprinted in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002)
ASIL	American Society of International Law

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:26 Page Number: 25

ASIL Proc.	*American Society of International Law Proceedings*
AU	African Union
Austrian RIEL	*Austrian Review of International and European Law*
AYIL	*Australian Year Book of International Law*
Berk. JIL	*Berkeley Journal of International Law*
Bevans	Treaties and Other International Agreements of the United States of America, 1776–1949, compiled under the direction of C. I. Bevans
BFSP	*British and Foreign State Papers*
BGBl	*Bundegesetzblatt Jahrgang* (Germany)
Brownlie's Principles	J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press, 2012)
BUILJ	*Boston University International Law Journal*
BVerfGE	Bundesverfassungsgerichts (Federal Constitutional Court, Germany)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court, Germany)
BYIL	*British Yearbook of International Law*
Cal. Rptr	West's California Reporter
Calif. LR	*California Law Review*
Can. YIL	*Canadian Yearbook of International Law*
CCM	Convention on Cluster Munitions
Chicago JIL	*Chicago Journal of International Law*
Chin. JIL	*Chinese Journal of International Law*
CILJ	*Cornell International Law Journal*
CILSA	*Comparative and International Law Journal of Southern Africa*
CLF	*Criminal Law Forum*
Col. LR	*Columbia Law Review*
Conn. JIL	*Connecticut Journal of International Law*
CPIL	Canadian Practice in International Law (as published in the *Canadian Yearbook of International Law*)
CPUSIL	Contemporary Practice of the United States Relating to International Law (as published in the *American Journal of International Law*)
Crawford, First Report	J. Crawford, First Report on State Responsibility, ILC Ybk 1998/II(1), 1
Crawford, Second Report	J. Crawford, Second Report on State Responsibility, ILC Ybk 1999/II(1), 3

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:27 Page Number: 26

Crawford, Third Report	J. Crawford, Third Report on State Responsibility, ILC Ybk 2000/II(1), 3
Crawford, Fourth Report	J Crawford, Fourth Report on State Responsibility, ILC Ybk 2001/II(1), 1
CTS	Consolidated Treaty Series
DARIO	Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52
DARIO Commentary	Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67
Dep. State Bull.	*Department of State Bulletin* (US)
DJILP	*Denver Journal of International Law and Policy*
Draft Articles	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in 1996, ILC Ybk 1996/II(2), 58
Draft Articles Commentary	Commentary to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in 1996:
Arts. 1–35	S. Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility: Part 1, Articles 1–35* (Dordrecht: Martinus Nijhoff, 1991)
Art. 36(1)	ILC Ybk 1983/II(2), 42
Art. 36(2)	ILC Ybk 1993/II(2), 54
Arts. 37–9	ILC Ybk 1983/II(2), 42
Art. 40	ILC Ybk 1985/II(2), 25
Art. 41	ILC Ybk 1993/II(2), 55
Art. 42(1)-(2), (4)	ILC Ybk 1993/II(2), 58
Art. 42(3)	ILC Ybk 1996/II(2), 65
Arts. 43–6	ILC Ybk 1993/II(2), 61
Arts. 47–8	ILC Ybk 1996/II(2), 65
Arts. 49–50	ILC Ybk 1995/II(2), 64
Arts. 51–3	ILC Ybk 1996/II(2), 65
Arts. 54–60	ILC Ybk 1995/II(2), 75
DRC	Democratic Republic of the Congo
Duke JCIL	*Duke Journal of Comparative and International Law*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:28 Page Number: 27

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221
ECommHR Ybk	*Yearbook of the European Commission of Human Rights*
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EECC	Eritrea–Ethiopia Claims Commission
EHRLR	*European Human Rights Law Review*
EJIL	*European Journal of International Law*
EPL	*Environmental Policy and Law*
ETS	European Treaty Series
EWHC	England and Wales High Court
F.3d	Federal Reporter, Third Series (US)
F.Supp.	Federal Supplement (US)
GA	United Nations General Assembly
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277
Geo. Wash. ILR	*George Washington International Law Review*
GST	*Transactions of the Grotius Society*
GYIL	*German Yearbook of International Law*
Hague *Recueil*	*Recueil des cours de l'Académie de droit international*
Hastings ICLR	*Hastings International and Comparative Law Review*
HHRJ	*Harvard Human Rights Journal*
HILJ	*Harvard International Law Journal*
HILR	*Harvard International Law Review*
Hous. JIL	*Houston Journal of International Law*
HRLJ	*Human Rights Law Journal*
HRLR	*Human Rights Law Review*
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank of Reconstruction and Development (World Bank)
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3
ICJ	International Court of Justice
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:29 Page Number: 28

ICJ Statute	Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355
ICLQ	*International and Comparative Law Quarterly*
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159
ICSID Rev.	*International Centre for the Settlement of Investment Disputes Review*
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institute of International Law (Institut de droit international)
IELR	International Environmental Law Reports
IJGLS	*Indiana Journal of Global Legal Studies*
IL	*International Lawyer*
ILA	International Law Association
ILA Rep. Conf.	International Law Association, *Report of Conference*
ILC	International Law Commission
ILC Report	*Annual Report of the International Law Commission*
ILC Ybk	*Yearbook of the International Law Commission*
ILDC	Oxford Reports on International Law, International Law in Domestic Courts
ILM	International Legal Materials
ILP	*International Law and Politics*
ILR	International Law Reports
IOLR	*International Organizations Law Review*
Iran–US CTR	Iran–US Claims Tribunal Reports
Is. LR	*Israel Law Review*
Is. YBHR	*Israel Yearbook of Human Rights*
ITLOS	International Tribunal for the Law of the Sea
JDI	*Journal du droit international*
JICJ	*Journal of International Criminal Justice*
JIEL	*Journal of International Economic Law*
JORF	*Journal officiel de la République française*
JWIT	*Journal of World Investment and Trade*
JWT	*Journal of World Trade*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:29 Page Number: 29

KGZ	*Kokusaihō gaikō zasshi*
LJIL	*Leiden Journal of International Law*
LJN	*Landelijk Jurispr Nummer* (Netherlands)
LNOJ	League of Nations, *Official Journal*
LNTS	League of Nations Treaty Series
McNair, Opinions	A. D. McNair, 1–3 *International Law Opinions* (1956)
Md LR	*Maryland Law Review*
Mich. JIL	*Michigan Journal of International Law*
Mich. LR	*Michigan Law Review*
MJIL	*Melbourne Journal of International Law*
Moore, *Int. Arb.*	J. B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (1898), 6 vols.
MPEPIL	R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012), available at www.mpepil.com
MULR	*Melbourne University Law Review*
NGO	non-governmental organization
NILR	*Netherlands International Law Review*
NJW	*Neue Juristische Wochenschrift* (Germany)
Nordic JIL	*Nordic Journal of International Law*
NRG	*Nouveau Recueil Général de traités et autres actes relatifs aux rapports de droit international*
NYIL	*Netherlands Yearbook of International Law*
OAS	Organization of American States
OAU	Organization for African Unity
ODIL	*Ocean Development and International Law*
OJ	*Official Journal* (European Union)
Ok. LR	*Oklahoma Law Review*
PAPhS	*Proceedings of the American Philosophical Society*
PAriS	*Proceedings of the Aristotelian Society*
PBA	*Proceedings of the British Academy*
PCA	Permanent Court of Arbitration
PCIJ	Publications of the Permanent Court of International Justice
Pol. YIL	*Polish Yearbook of International Law*
Pub. Ad.	*Public Administration*
QB	Law Reports, Queen's Bench (United Kingdom)
RBDI	*Revue belge de droit international*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:30 Page Number: 30

RDI	*Rivista di diritto internazionale*
RDIPP	*Rivista di diritto internazionale privato e processuale*
RDISDP	*Revue de droit international, de sciences diplomatiques et politiques*
Rec. Lebon	Recueil des arrêts du Conseil d'État (France)
REDI	*Revue égyptienne de droit international*
RGDIP	*Revue générale de droit international public* (Paris)
RIAA	United Nations Reports of International Arbitral Awards
RJDA	*Recueil de jurisprudence du droit administratif et du Conseil d'Etat*
Rome Statute	Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3
RQDI	*Revue Québécoise de Droit International*
RSDIE	*Revue Suisse de droit international et européen*
S. Af. YIL	*South African Yearbook of International Law*
S Ct	Supreme Court Reporter (US)
SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
SLT	*Scots Law Times*
Tex. ILF	*Texas International Law Forum*
TIAS	Treaties and Other International Acts Series (US)
Tulane LR	*Tulane Law Review*
Tulsa JCIL	*Tulsa Journal of Comparative and International Law*
UCLA JILFA	*UCLA Journal of International Law and Foreign Affairs*
UCLA Pac. Basin LJ	*UCLA Pacific Basin Law Journal*
UKMIL	United Kingdom Materials on International Law (published in the *British Yearbook of International Law*)
UKPC	United Kingdom Privy Council
UNCC	United Nations Compensation Commission
UN Charter	Charter of the United Nations
UNCIO	United Nations Conference on International Organization
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	(in case citations) United States Supreme Court Reports

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:31 Page Number: 31

USC	United States Code
Utrecht LR	*Utrecht Law Review*
Va JIL	*Virginia Journal of International Law*
Va LR	*Virginia Law Review*
VCDR	Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95
VCLT	Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331
VUWLR	*Victoria University Wellington Law Review*
Wash. LR	*Washington Law Review*
WLR	*Weekly Law Reports* (United Kingdom)
WTO	World Trade Organization
WUGSLR	*Washington University Global Studies Law Review*
Yale JIL	*Yale Journal of International Law*
Yale LJ	*Yale Law Journal*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:31 Page Number: 32

Table of Cases

Abaclat and ors *v*. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, 637–40
Abdullahi *v*. Pfizer Inc., 562 F.3d 163 (2nd Cir., 2009), 82
Abebe-Jira *v*. Negewo, 72 F.3d 844 (11th Cir., 1996), 82
ADM and Tate & Lyle *v*. Mexico, (2008) 146 ILR 439, 699
Admissibility of Hearings of Petitioners by the Committee on South West Africa, ICJ Rep. 1956 p. 23, 109
Aegean Sea Continental Shelf (Greece v. Turkey), ICJ Rep. 1978 p. 3, 243–4, 248
Aerial Incident of 27 July 1955 (Israel v. Bulgaria)
– Memorial of the Government of Israel, 2 June 1958, 504, 648, 674
– Preliminary Objections Oral Hearings, 26 March 1959, 504
– Preliminary Objections, ICJ Rep. 1959 p. 127, 503
Aerial Incident of 27 July 1955 (UK v. Bulgaria), Order of 3 August 1959, ICJ Rep. 1959 p. 264, 503
Aerial Incident of 27 July 1955 (US v. Bulgaria)
– Memorial of the United States, 2 December 1958, 673–ENF
– Order of 30 May 1960, ICJ Rep. 1960 p. 146, 503
Aerial Incident of 3 July 1988 (Iran v. US), Order, 13 December 1989, ICJ Rep. 1989 p. 132, 656
Affaire des forêts du Rhodope central (fond) (Grèce contre Bulgarie) (Forests of Central Rhodope), (1933) 3 RIAA 1405, 513, 648
Aguilar-Amory and Royal Bank of Canada (Tinoco Concessions) (UK/Costa Rica), (1923) 1 RIAA 371, 168, 435–6
Ahmadou Sadio Diallo (Guinea v. DRC)
– Preliminary Objections, ICJ Rep. 2007 p. 582, 578–81, 583–4, 587–8
– ICJ Rep. 2010 p. 639, 76, 481, 502–3, 508–9, 518–22, 534, 536, 568–9, 593, 619, 1042

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:31 Page Number: 33

– Memorial of the Republic of Guinea: Compensation, 6 December 2011, 534
– ICJ, Compensation owed by the DRC to Guinea, 19 June 2012, 619
Air Services Agreement of 27 March 1946 between the US and France (US/France), (1978) 54 ILR 303; 18 RIAA 417, 292–3, 684–5, 690–1, 697–701, 706
Alabama Arbitration (Great Britain v. US) (1872) Moore, 1 *Int. Arb*. 45, 101, 117, 176–7, 245, 93
Aaland Islands Question, (October 1920) LNOJ Spec. Supp. No. 3, 363–4
Al-Jedda
– R (Al-Jedda) *v*. Secretary of State for Defence, [2008] 1 AC 332, 116, 200–5
– Al-Jedda *v*. United Kingdom, (2011) 147 ILR 107, 116, 349–50, 352–3
Alpha Projektholding *v*. Ukraine, ICSID Case No. ARB/07/16, 8 November 2010, 537–8
Al-Skeini *v*. UK, [2011] ECtHR 55721/07, 349–50
Ambatielos (Greece *v*. UK)
– Preliminary Objection, ICJ Rep. 1952 p. 27, 242–4, 252, 581, 583
– ICJ Rep. 1953 p. 10
– Arbitration (1956) 23 ILR 306, 561–2, 655
American Bell International *v*. Iran, (1986) 12 Iran–US CTR 170, 161
American Electric & Manufacturing Co., (1905) 9 RIAA 145, 297–8
Amto *v*. Ukraine *see* Limited Liability Company Amto *v*. Ukraine
Anaconda-Iran, Inc. *v*. Iran et al., Interlocutory Award No. ITL 65-167-3, (1986) 13 Iran–US CTR 199, 297–8, 213
Anglo-Iranian Oil Co. (United Kingdom v. Iran), Jurisdiction, ICJ Rep. 1952 p. 93, 655
Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), ICJ Rep. 1972 p. 46, 678–9, 695
Applicability of Article VI, Section 22, of the Convention of the Privileges and Immunities of the United Nations, ICJ Rep. 1989 p. 71, 77–8
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)
– Preliminary Objections, ICJ Rep. 1996 p. 595, 96–7, 267, 552
– Counter-claims, ICJ Rep. 1997 p. 243, 688–9
– ICJ Rep. 2007 p. 43, 43, 52–3, 96–7, 113–15, 125–6, 143–8, 157–9, 161, 203–4, 210, 218–19, 222–3, 230–1, 266–7, 315–17, 330, 338, 360–1, 375, 380, 394, 401, 403, 407, 449, 473, 481, 498–500, 512–13, 530, 610–11, 617, 667–8, 154–ENF

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:32 Page Number: 34

Application of the Interim Accord of 13 September 1995 (former Yugoslav Republic of Macedonia v. Greece), ICJ, 5 December 2011, 473, 478–9, 530, 675–6, 678, 680–2, 687–8, 700–1
Arab Organization for Industrialization and ors *v*. Westland Helicopters Ltd and ors, (1987) 80 ILR 625 (Court of Justice of Geneva); (1988) 80 ILR 652 (Federal Supreme Court), 346, 426–7
Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), ICJ Rep. 1960 p. 192, 74
Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. *v*. Mexico, (2007) 146 ILR 445, 294
Armed Activities on the Territory of the Congo (DRC v. Burundi), Order, 30 January 2001, ICJ Rep. 2001 p. 3, 648–9
Armed Activities on the Territory of the Congo (DRC v. Rwanda), ICJ, Order, 30 January 2001, 648–9, 663
Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Rep. 2006 p. 6, 552, 648–9, 378–ENF
Armed Activities on the Territory of the Congo (DRC v. Uganda), ICJ Rep. 2005 p. 168, 71, 113, 119, 144, 147, 154, 284–9, 372–3, 380, 473, 477–8, 525, 611, 618, 648–9, 659–60, 662–3, 690–1, 1274
Arrest Warrant of 11 April 2000 (DRC v. Belgium), ICJ Rep. 2002 p. 3, 467, 512, 515–16, 530, 584, 628–9
Asian Agricultural Products *v*. Sri Lanka, (1990) 4 ICSID Reports 250, 523
Asylum (Columbia/Peru), ICJ Rep. 1950 p. 266, 99, 609, 651–2
Attorney-General *v*. Nissan, [1970] AC 179, 208
Attorney-General (Israel) *v*. Eichmann, (1961) 36 ILR 18 (District Court); (1962) 36 ILR 277 (Supreme Court), 183, 187
Australia – Measures Affecting the Importation of Salmon (Article 21.5), WT/DS18/RW, 20 March 2000, 124
Austria *v*. Italy, [1961] ECommHR 788/60, 373
Avena and Other Mexican Nationals (Mexico v. US)
– Memorial of Mexico, 20 June 2003, 463–4
– Provisional Measures, ICJ Rep. 2003 p. 77, 124
– ICJ Rep. 2004 p. 12, 476–9, 584–5, 592–ENF
Ayyash et al., Special Tribunal for Lebanon Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, 160–1
Banković *v*. Belgium, (2001) 123 ILR 94, 198, 349–50
Banks of Grisbadarna (Norway v. Sweden), (1909) 11 RIAA 147, 73

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:32 Page Number: 35

Barcelona Traction, Light & Power Company, Limited (Spain v. Belgium), Second Phase, ICJ Rep. 1970 p. 3, 40–1, 66, 76–7, 161–3, 364, 368–9, 377, 380, 389–90, 542, 547–52, 568, 570, 577–80, 587–8, 670–1, 693
Bau v. Thailand, UNCITRAL, 1 July 2009, 537–8
Beagle Channel
– Original Award, (1977) 21 RIAA 57, 95
– Proposal of the Mediator, Suggestions and Advice, (1980) 21 RIAA 243, 95
Behrami *v*. France, (2007) 133 ILR 1, 116, 197–204, 207, 346–54
Belgium *v*. Senegal *see* Questions relating to the Obligation to Prosecute or Extradite
Berić *v*. Bosnia and Herzegovina, [2007] ECtHR 36357/04, 202–3, 352–3
Bernardus Henricus Funnekotter and ors *v*. Republic of Zimbabwe, ICSID Case No. ARB/05/6, 22 April 2009, 638
Beshiri *v*. Albania, [2006] ECtHR 7352/03, 262
BG Group *v*. Argentina, UNCITRAL, 24 December 2007, 537–8
Black Tom *see* Lehigh Valley Railroad Co., Agency of Canadian Car and Foundry Co., Ltd *v*. Germany
Blake *v*. Guatemala, [1998] IACtHR Ser. C No. 36, 262–3
Blečić *v*. Croatia, [2006] ECtHR 59532/00, 262
Bolivian Railway (UK/Venezuela), (1903) 9 RIAA 445, 174–5
Border and Transborder Armed Actions (Nicaragua v. Costa Rica), Order, 19 August 1987, ICJ Rep. 1987 p. 182, BNF–650
Border and Transborder Armed Actions (Nicaragua v. Honduras), Order, 27 May 1992, ICJ Rep. 1992 p. 222, BNF–650
Bosnian Genocide case *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide
Bosphorus Hava Yollari Turizm ve Ticaret Anonim Širketi *v*. Ireland, [2006] ECtHR 45036/98, 346–7, 349–50, 431–4
Brannigan *v*. Davison, [1996] 3 WLR 859, 133–4
Brazilian Loans, (1929) PCIJ Ser. A No. 21, 298–9
British Claims in the Spanish Zone of Morocco (UK/Spain), (1925) 2 RIAA 615, 158, 170, 179–80, 297–8, 627
Broniowski *v*. Poland, [2004] ECtHR 31443/96; [2005] ECtHR 31443/96 (Friendly Settlement), 630–7
Brough *v*. Australia (2006) UN Doc. CCPR/C/86/D/1184/2003, 474
Caire *see* Estate of Jean-Baptiste Caire *v*. Mexico
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PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:33 Page Number: 36

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The *Caroline* (1837), 2 McNair, Opinions 211, 309–12
Case Concerning Gold Looted from the Netherlands, (1963) 44 ILR 448, 674, 673–ENF
Case No. A/18, (1984) 75 ILR 175, 575–6
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Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), ICJ Rep. 2008 p. 177, 530, 617–18
Charles S. Stephens and Bowman Stephens *v*. Mexico (US v. Mexico), (1927) 4 RIAA 265, 142
Chevreau (France/Great Britain), (1931) 2 RIAA 1113, 132–3, 297–8
Chevron Corp and Texaco Petroleum Co. *v*. Ecuador, PCA Case No. 34877, Partial Award on the Merits, 30 March 2011, 537–8, 590
Chorzów Factory *see* Factory at Chorzów
Claims of Italian Nationals Resident in Peru, (1901) 15 RIAA 395, 116–17
CME *v*. Czech Republic
Partial Award, (2001) 9 ICSID Reports 121, 481
Final Award on Damages, (2003) 9 ICSID Reports 264, 535–6
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Commonwealth *v*. Tasmania, (1983) 68 ILR 266, 235–8
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– First Decision on Annulment, (2002) 6 ICSID Reports 340, 102–3, 624–5

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:33 Page Number: 37

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Consorts Hovelaque, [1984] Rec. Lebon 726, 178
Continental Casualty *v*. Argentina, ICSID Case No. ARB/03/9, 5 September 2008, 537–8
Continental Shelf (Libya/Malta), Application to Intervene by Italy, ICJ Rep. 1984 p. 3, 652–4, 659–60, 665, 670–1
Continental Shelf (Tunisia/Libya), Application to Intervene by Malta, ICJ Rep. 1981 p. 3, 652–3, 672
Corfu Channel (UK v. Albania)
– Preliminary Objections, ICJ Rep. 1948 p. 15, 655
– ICJ Rep. 1949 p. 4, 117, 158, 217–18, 327, 330–1, 335–6, 342–3, 404–5, 496–8, 518–19, 530, 619, 626–7, 656, 690–1, 519–ENF
– Compensation, ICJ Rep. 1949 p. 244, 517–18, 533
Corn Products International Inc. *v*. Mexico, Decision on Responsibility, (2008) 146 ILR 581, 293–4, 684, 687–8
Customs Régime between Germany and Austria, (1931) PCIJ Ser. A/B No. 41, 283–4
Cyprus *v*. Turkey, (2001) 120 ILR 10, 42-6, 384–5
Cysne (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered the war) (Portugal/Germany), (1930) 2 RIAA 1035, 292–4, 494, 498–9, 685
Dallal *v*. Bank Mellat, [1986] QB 441, 571–2
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Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US), ICJ Rep. 1984 p. 246, 72, 74, 429, 559–60
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Demopoulos *v*. Turkey, [2010] ECtHR 46113/99, 384–5
Denmark *v*. Turkey, Friendly Settlement, [2000] ECtHR 34382/97, 374
Deutsch *v*. Turner Corp, 324 F.3d 692 (9th Cir., 2003), 571–2
Diallo *see* Ahmadou Sadio Diallo
Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Rep. 1999 p. 62, 77–8, 116–17, 121, BNF–595
Différend Héritiers de SAR Mgr le Duc de Guise (France v. Italy), (1951) 13 RIAA 150, 123, 416
Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. UK), Final Award, (2003) 126 ILR 334, 605
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PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:34 Page Number: 38

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Doe *v*. Unocal, 395 F.3d 932 (9th Cir., 2002), 82–3
Dogger Bank (Great Britain v. Russia) (1905), (1908) 2 AJIL 931, 29, 98
Donoghue (or McAlister) *v*. Stevenson, [1932] AC 562, 377–8
Dr Horst Reineccius, First Eagle SoGen Funds, Inc., Mr Pierre Mathieu and la Société de Concours Hippique de la Châàtre *v*. Bank for International Settlements
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– Final Award, (2003) 140 ILR 81; 23 RIAA 252, 1262
DRC *v*. Uganda *see* Armed Activities on the Territory of the Congo
Drozd and Janousek *v*. France and Spain, [1992] ECtHR 12747/87, 134–5
Dudgeon *v*. UK, [1981] ECtHR 7525/76, 261
Dutchbat *see* Nuhanović *v*. Netherlands and Mustafić *v*. Netherlands
Earnshaw *v*. US (The *Zafiro)* (Great Britain/US), (1925) 6 RIAA 160, 62–3, 119–20, 141–2, 497
East Timor (Portugal v. Australia), ICJ Rep. 1995 p. 90, 377–8, 552, 655, 659–64
Eastman Kodak Company *v*. Iran, (1987) 17 Iran–US CTR 153, 162
EC – Bananas III, WT/DS27/AB/R, 25 September 1997, 390, 552–3
EC – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 12 March 2001, 238–9
EC – Tariff Preferences, WT/DS246/AB/R, 7 April 2004, 320
Ecuador *v*. US, PCA Case No. 2012-5, pending, 1209
EDF *v*. Argentina, ICSID Case No. ARB/03/23, 11 June 2012, 537–8
EDF (Services) Ltd *v*. Romania, ICSID Case No. ARB/05/13, 8 October 2009, 44, 118, 128–9, 164–5
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EG *v*. Poland, [2009] ECtHR 50425/99, 633–4
Eis (US/Soviet Union), (1959) 30 ILR 116, 119–20
El Salvador/Honduras *see* Land, Island and Maritime Frontier Dispute
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Enron Corp and Ponderosa LP *v*. Argentine Republic, ICSID Case No. ARB/01/3, Award on Jurisdiction, 14 January 2004, 620–1
Eritrea–Ethiopia Boundary Delimitation Decision (2002) 130 ILR 1, 243–4
Eritrea–Ethiopia Claims Commission
– Prisoners of War: Eritrea's Claim 17, (2003) 135 ILR 199, 694
– Partial Award: Central Front: Eritrea's Claims 2, 4, 6, 7, 8 & 22, (2004) 26 RIAA 115, 497–8

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:34 Page Number: 39

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– Final Award: Eritrea's Damages Claims, (2009) 26 RIAA 505, 481, 483–4, 495, 497–8, 532–3
– Final Award: Ethiopia's Damages Claims, (2009) 26 RIAA 631, 481, 483–4, 497, 532–3
Eritrea and Yemen (Territorial Sovereignty), (1998) 114 ILR 1, 243–4
Estate of Jean-Baptiste Caire *v*. Mexico (France/Mexico), (1929) 5 RIAA 516, 29–30, 137–9
Estate of Ferdinand Marcos, In re, 25 F.3d 1467 (9th Cir., 1994), 82–3
Estate of Hyacinth Pellat (France/Mexico), (1929) 5 RIAA 534, 123
European Media Ventures SA *v*. Czech Republic, UNCITRAL, Award on Jurisdiction, 15 May 2007, 602
European Parliament *v*. Council of the European Communities, Case C-316/91 [1994] ECR I-625, 344
Eurotunnel Arbitration, (2007) 132 ILR 1, 332–3, 339–41, 354
Factory at Chorzów
– Jurisdiction, (1927) PCIJ Ser. A No. 9, 276–7, 467, 480, 508
– (1928) PCIJ Ser. A No. 17, 355, 480–1, 506–7, 509–11, 522, 555, 599–603, 615–16, 619, 624, 643, 680, 1242
Federal Republic of Germany *v*. US, 526 US 111 (1999), 121–2
Ferrini *v*. Federal Republic of Germany, (2004) 128 ILR 658, 385–6
FH Redward (Great Britain) *v*. US, (1925) 6 RIAA 157, 438–9, 442, 445, 447, 455
Finnish Shipowners (UK/Finland), (1934) 3 RIAA 1479, 116–17, 141, 581–2
First National City Bank *v*. Banco Para El Comercio Exterior de Cuba, 462 US 611 (1983), 430
Fisheries (UK v. Norway), ICJ Rep. 1951 p. 116, 99, 320–1
Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), ICJ Rep. 1975 p. 175, 645–6, 669–70
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Flegenheimer, (1958) 25 ILR 91, 573–6
Flexi-Van Leasing *v*. Iran, (1986) 12 Iran–US CTR 335, 161
Foka *v*. Turkey, [2008] ECtHR 28940/95, 384
Foremost Tehran Inc. *v*. Islamic Republic of Iran, (1986) 10 Iran–US CTR 228, 161, 272

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:34 Page Number: 40

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Forti *v*. Suarez-Mason, 694 F.Supp 707 (ND Cal., 1988), 82
France *v*. Commission, Case No. C-327/91, [1994] ECR I-3641, 429
French Company of Venezuelan Railroads (France/Venezuela), (1902) 10 RIAA 285, 179, 307–8
Frontier Dispute (Burkina Faso/Mali), ICJ Rep. 1986 p. 554, 659–60
Frost *v*. Knight, (1872) LR 7 Ex. 111, 233
Funnekotter *v*. Zimbabwe *see* Henricus Funnekotter and ors *v*. Republic of Zimbabwe
Fur Seals Arbitration, (1893) 1 IELR 43, 374
G. L. Solis *v*. Mexico (US/Mexico), (1928) 4 RIAA 358, 170
Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997 p. 7, 41, 51–2, 96, 109, 186–7, 216–17, 224, 234–5, 243–4, 248, 254, 260, 268, 271–2, 281–2, 291–5, 299, 306–7, 310–15, 318–20, 355, 446, 449, 455, 494, 556–7, 616, 666–7, 682–8, 697–700, 703–4, BNF–378, 378–ENF
Gajić *v*. Germany, [2007] ECtHR 31446/02, 202–3, 352–3
Garrido and Baigorria *v*. Argentina, [1998] IACtHR Ser. C No. 39, 124
Gasparini *v*. Italy and Belgium, [2009] ECtHR 10750/03, 432–4
Gemplus *v*. Mexico, ICSID Case No. ARB(AF)/04/3, 16 June 2010, 537–8
Genocide *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide
Gentini, (1903) 10 RIAA 551, 561–2
Georgia *v*. Russia, Admissibility, [2011] ECtHR 38263/08, 463
German Settlers in Poland, (1923) PCIJ Ser. B No. 6, 113
Germany *v*. Italy *see* Jurisdictional Immunities of the State
Gill, (1931) 5 RIAA 157, 296–7
Glamis Gold Ltd *v*. US, UNCITRAL, 8 June 2009, 588
Goetz *v*. Burundi, ICSID Case No. ARB/01/2, 21 June 2012, 614, 621
Gould Marketing, Inc. *v*. Ministry of National Defence of Iran, Interlocutory Award No. ITL 24-49-2 (1983) 3 Iran–US CTR 147, 297–8
Government of Namibia *v*. Cultura 2000, (1993) 103 ILR 104, 454–5
Great Belt *see* Passage through the Great Belt
Grillo, [1999] Rec. Lebon 907, 178
Gulf of Maine *see* Delimitation of the Maritime Boundary in the Gulf of Maine Area
Gunton *v*. Richmond Borough Council, [1980] 3 WLR 714, 233
Guyana/Suriname, Award on the Merits, (2007) 139 ILR 566, 605–8, 691
Harshaw Chemical Company's Patent, Re, (1964) 41 ILR 15, 191
Hawaiian Claims *see* F. H. Redward (Great Britain) *v*. US

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:35 Page Number: 41

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Heirs of the Duc de Guise *see* Différend Héritiers de SAR Mgr le Duc de Guise
Henricus Funnekotter and ors *v*. Republic of Zimbabwe, ICSID Case No. ARB/05/6, 22 April 2009, 537–8
Hespel, [1980] Rec. Lebon 866, 178
HN *v*. Netherlands, LJN: BF0181/265615, 10 September 2008, 206–8
Hochster *v*. de la Tour, (1853) 2 El & Bl 678; 233 ER 922
Hoff *see* Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, Deceased (USA) *v*. Mexico
Home Frontier and Foreign Missionary Society of the United Brethren in Christ *v*. Great Britain (US/UK), (1920) 6 RIAA 42, 170, 179–80
Horimoto *v*. State (Japan), (1959) 32 ILR 161, 571–2
Hutten-Czapska *v*. Poland, [2006] ECtHR 35014/97, 634–6
Hyatt International Corporation *v*. Iran, (1985) 9 Iran–US CTR 72, 128, 130–2
Iceland–Norway Jan Mayen Continental Shelf Delimitation case, (1981) 62 ILR 108; 27 RIAA 1, 95
SS *I'm Alone* (Canada/US), (1935) 3 RIAA 1609, 528–9, 607
Impregilo *v*. Argentina, ICSID Case No. ARB/07/17, 21 June 2011, 537–8
Interhandel (Switzerland v. United States), Preliminary Objections, ICJ Rep. 1959 p. 6, 69–70, 569, 580, 584
Interim Accord case *see* Application of the Interim Accord of 13 September 1995
International Status of South West Africa, ICJ Rep. 1950 p. 128, 364, 376
International Technical Products *v*. Iran, (1985) 9 Iran–US CTR 206, 161
Iran *v*. US, Case Nos. A15(IV) and A24, (1996) 32 Iran–US CTR 115, 222–3
Iran–US Claims Tribunal *v*. AS, (1985) 94 ILR 321, 339–40
Ireland *v*. UK, (1978) 58 ILR 188, 249, 266, 272, 373, 463
Island of Palmas (Netherlands/US), (1928) 2 RIAA 829, 158, 241–7
Italy *v*. Cuba, Interim Award, 15 March 2005; Final Award, 15 January 2008, 591–2
Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, 22 April 1998, 238–9
JH Rayner (Mincing Lane) Ltd *v*. Department of Trade and Industry and ors
– [1989] Ch. 72
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Johnson & Ors *v*. Ireland, [1986] ECtHR 9697/82, 249

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:35 Page Number: 42

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Judge *v*. Canada, (2002) UN Doc. CCPR/C/78/D/829/1998, 474
Jurado, (1964) 40 ILR 296, BNF–595
Jurisdiction of the European Commission of the Danube, (1927) PCIJ Ser. B No. 14, 99
Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), ICJ, 3 February 2012, 385–6, 461–2, 467–8, 473, 478–9, 512, 515–16, 611, 651–3, 659–60, 663–4
Kadić *v*. Karadžić, 70 F.3d 232 (2nd Cir., 1995), 82–3
Kardassopoulos *v*. Georgia, ICSID Case No. ARB/05/18, 3 March 2010, 537–8
Kasikili/Sedudu Island (Botswana/Namibia), ICJ Rep. 1999 p. 1045, 243–4
Kasumaj *v*. Greece, [2007] ECtHR 6974/05, 202–3, 352–3
Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, Deceased (USA) *v*. Mexico, (1929) 4 RIAA 444, 303–5
Kelley *v*. Mexico, (1930) 4 RIAA 608, 297–8
Kingsland *see* Lehigh Valley Railroad Co. and Agency of Canadian Car and Foundry Co., Ltd *v*. Germany
Kiobel *v*. Royal Dutch Petroleum
– 621 F.3d 111 (2nd Cir., 2010), 83
– 132 S Ct 1738 (2012), 83
Klöckner *v*. Cameroon, Decision on Annulment, (1985) 2 ICSID Reports 162, 614, 638
Kopecky *v*. Slovakia, [2004] ECtHR 44912/98, 262
KPMG Peat Marwick *v*. Davison, (1996) 104 ILR 526, 133–4
Kravchenko *v*. Russia, [2009] ECtHR 34615/02, 262
Kren, (1955) 20 ILR 233, 576
Prosecutor *v*. Kupreškić, ICTY Case No. IT-95-16-T, Trial Chamber, 14 January 2000, 682, 688–9, 693–4
La Générale des Carrières et des Mines *v*. FG Hemisphere Associates LLC (Gécamines), [2012] UKPC 27, 162–3
Lac Lanoux (Spain v. France), (1957) 12 RIAA 281, 56–9, 65
LaGrand (Germany v. US)
– Provisional Measures, ICJ Rep. 1999 p. 9, 96, 124
– ICJ Rep. 2001 p. 466, 73, 96, 121–2, 224–5, 355, 413–14, 463–4, 470–3, 476–7, 501, 516, 562, 584–5, 592, 599–600, 616, 622, 592–ENF
Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Application to Intervene, ICJ Rep. 1990 p. 92, 651–4, 658–9, 661–2, 670–1

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:36 Page Number: 43

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)
– Preliminary Objections, ICJ Rep. 1998 p. 275, 659–60
– Order, 30 June 1999, ICJ Rep. 1999 p. 983, 609
– Order, 21 October 1999, ICJ Rep. 1999 p. 1029, 652–3
– ICJ Rep. 2002 p. 303, 243–4, 473, 478, 512, 518, 609, 616–17
Land Reform, 84 BVerfGE 90 (1991); (1991) NJW 1569, 450–1
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Rep. 1971 p. 16, 158, 173–4, 243–4, 248–9, 375, 377, 380, 383–5, 389–90, 607–8, 676, 678, 693, 695, BNF–247
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep. 2004 p. 136, 53–4, 312–15, 368–73, 375, 380, 386–7, 389, 461–2, 511, 552, 690–1
Legality of the Threat or Use of Nuclear Weapons, ICJ Rep. 1996 p. 226, 58–9, 291–2, 305–6, 375, 380, 691, 693–4
Legality of Use of Force cases, 1370, 671–2
Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Rep. 2004 p. 279, 648–9, 671–2
Legality of Use of Force (Serbia and Montenegro v. France), ICJ, Preliminary Objections, 5 July 2000, 196–7, 334–5, 427
Legality of Use of Force (Serbia and Montenegro v. Italy), ICJ, Preliminary Objections, 5 July 2000, 196–7
Legality of Use of Force (Serbia and Montenegro v. Portugal), ICJ, Preliminary Objections, 5 July 2000, 196–7
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Lehigh Valley Railroad Co., Agency of Canadian Car and Foundry Co., Ltd *v*. Germany, (1930) 8 RIAA 84 (Black Tom); (1939) 8 RIAA 225 (Kingsland), 142–3
Letelier *v*. Chile, 502 F.Supp. 259 (1980); 88 ILR 747, 526
Letelier and Moffitt, Re, (1992) 88 ILR 727, 526
LG&E Energy Corporation, LG&E Capital Corporation and LG&E International Inc. *v*. Argentine Republic
– Decision on Objections to Jurisdiction, (2004) 11 ICSID Reports 411, 624–5
– ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 313
Libya/Malta *see* Continental Shelf (Libya/Malta)
Libyan American Oil Company (LIAMCO) *v*. Libya, (1977) 62 ILR 140, 468–9, 522–3

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:36 Page Number: 44

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Lighthouses Arbitration between France and Greece, (1956) 12 RIAA 155; partial reproduction in (1956) 23 ILR 81, 182–3, 185–7, 259–60, 296–8, 441–5, 447–8, 454–5, 561–2
Lighthouses in Crete and Samos, (1937) PCIJ Ser. A/B No. 71, 443, 468–9
Limited Liability Company Amto *v*. Ukraine, SCC Case No. 080/2005, 26 March 2008, 614
Lobban *v*. Jamaica, (2004) UN Doc. CCPR/C/80/D/797/1998, 474
Lockerbie *see* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie
Loizidou *v*. Turkey
– Preliminary Objections, (1995) 103 ILR 622, 249, 384
– (1996) 108 ILR 443, 146–7, 151–2, 258, 262, 383–4
Lupsa *v*. Romania, [2006] ECtHR 10337/04, 521
Lusitania cases, (1923) 7 RIAA 32, 517
M & Co. *v*. Germany. [1990] ECommHR 13258/87, 346–7, 427
Maclaine Watson & Co. Ltd *v*. Council and Commission of the European Communities. (1990) 96 ILR 201, 425–6, 428–9
Maffezini *v*. Spain. (2000) 5 ICSID Report 387, 163
Magee case (1874), Whiteman, 1 Damages in International Law (1937–43), 527
Maine *see* Delimitation of the Maritime Boundary in the Gulf of Maine Area
Malama *v*. Greece, [2001] ECtHR 43622/98, 262
Mallén *v*. US (Mexico/US), (1927) 4 RIAA 173, 123
Marckx *v*. Belgium, (1979) 58 ILR 561, 249
Mariposa Development Company *v*. Panama (US/Panama), (1933) 6 RIAA 338, 257–8
Mauritius *v*. UK, PCA, pending, 1258
Mavrommatis Palestine Concessions, (1924) PCIJ Ser. A No. 2, 69, 77, 96–7, 240, 246, 248, 398, 569–70, 573, 580, 590
Medellín *v*. Texas, 552 US 491 (2008), 225–6
Mergé, (1955) 22 ILR 443, 575–6
Metalclad Corporation *v*. Mexico, (2000) 119 ILR 615, 123
Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, 7 October 2005, 686
Michael Domingues, [2002] IACmHR 62/02, 380
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:37 Page Number: 45

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– Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 96–7, 466–7, 518, 654–5, 658–9, 661–5, 670–1, 690–1, 704, BNF–650
– Memorial of Nicaragua (Merits), 30 April 1985, 148
– ICJ Rep. 1986 p. 14, 113, 125–6, 143–4, 146–9, 151–9, 161, 185, 203–4, 210, 278, 360–1, 380, 401, 618, 678–9, 681–2, 690–1, 697–8, 703–4
Minority Schools *see* Rights of Minorities in Upper Silesia
Minquiers and Ecrehos (France/UK), ICJ Rep. 1953 p. 47, 241–2
Mitsubishi Materials Corp. *v*. Superior Court of Orange County, 130 Cal Rptr 2d 734 (2003), 571–2
Mobil Oil Iran, Inc., et al., Partial Award No. 311-74/76/81/150-3 (1987) 16 Iran–US CTR 3, 299–300
Mondev International Ltd *v*. US, ICSID Case No. ARB(AF)/99/2, 11 October 2002, 588
Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and US), ICJ Rep. 1954 p. 19, 655–ENF
Mortensen *v*. Peters, (1906) 14 SLT 227, 122–3
Moses case, (1871) 3 Moore, *Int. Arb*. 116–17, 3127
Mothers of Srebrenica *v*. The Netherlands and the United Nations, LJN: BL8979, 30 March 2010, 206–7
MOX Plant Case (Ireland v. UK), Order on Request for Provisional Measures, (2001) 126 ILR 259, 603–5, 607
Mukeshimana-Ngulinzira *v*. Belgium, ILDC 1604 (BE 2010), 116, 204–5
Mustafić *v*. Netherlands, LJN: BR5388, 5 July 2011, 50–1, 116, 206–9
Mutua and ors *v*. Foreign and Commonwealth Office, [2011] EWHC 1913 (QB), 436
MV *Saiga* (No. 2) (Saint Vincent and the Grenadines v. Guinea), (1999) 38 ILM 1323; 120 ILR 143, 312–13, 517, 519, 521, 534–6, 606–7
Mwandinghi *v*. Minister of Defence, (1990) 91 ILR 341, 454–5
Mytilineos *v*. Serbia and Montenegro, (2006) 16 ICSID Reports 567, 123
Namibia *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)
National Grid *v*. Argentina, UNCITRAL, 3 November 2008, 537–8
Nationality Decrees issued in Tunis and Morocco (French Zone), (1923) PCIJ Ser. B No. 4, 573–4
Naulilaa (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa) (Portugal/Germany), (1928) 2 RIAA 1011, 685, 691–2, 697–8, 1423

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:37 Page Number: 46

Navigational and Related Rights (Costa Rica v. Nicaragua), ICJ Rep. 2009 p. 213, 243–4, 247–8, 473
Ngulinzira *see* Mukeshimana-Ngulinzira *v*. Belgium
Nicaragua *v*. USA *see* Military and Paramilitary Activities in and against Nicaragua
Niemiec and Niemiec *v*. Białobrodziec and (Polish) State Treasury, (1923) 2 ILR 64, 443
NK *v*. Austria, (1979) 77 ILR 470, 194–5
Noble Ventures Inc. *v*. Romania, ICSID Case No. ARB/01/11, 12 October 2005, 44
North American Dredging Co. Case (US v. Mexico), (1926) 4 RIAA 29, 569–70
North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)
– Order, 26 April 1968, ICJ Rep. 1968 p. 9, 671
– ICJ Rep. 1969 p. 3, 99, 645–6
Northern Cameroons (Cameroon v. UK), Preliminary Objections, ICJ Rep. 1963 p. 15, 240, 252
Norwegian Loans *see* Certain Norwegian Loans
Nottebohm (Liechtenstein v. Guatemala), Second Phase, ICJ Rep. 1955 p. 4, 76, 99, 569, 572, 574–5, 578–9
Nuclear Tests (Australia v. France), ICJ Rep. 1974 p. 253, 503–4, 622, 645–6
Nuclear Tests (New Zealand v. France)
– Memorial on Jurisdiction and Admissibility submitted by the Government of New Zealand, 29 October 1973, 504
– ICJ Rep. 1974 p. 457, 377, 503–4, 645–6
Nuclear Weapons *see* Legality of the Threat or Use of Nuclear Weapons
Nuhanović *v*. Netherlands, LJN: BR5388, 5 July 2011, 50–1, 116, 206–9
Oil Platforms (Iran v. US)
– Preliminary Objection, ICJ Rep. 1996 p. 803, 96–7
– Order on Counter-Claim, ICJ Rep. 1998 p. 190, 272
– ICJ Rep. 2003 p. 161, 235, 237–8, 290, 328–9, 331, 358, 610–11, 655, 662–3, 690–1
Oscar Chinn, (1934) PCIJ Ser. A/B No. 63, 311–12
Otis Elevator Company *v*. Iran, (1987) 14 Iran–US CTR 283, 162
Ottoman Empire Lighthouses Concession (France/Greece) *see* Lighthouses Arbitration between France and Greece
Panevezys-Saldutiskis Railway Co., (1939) PCIJ Ser. A/B No. 76, 572, 581–2

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:38 Page Number: 47

Pantechniki SA Contractors and Engineers (Greece) *v*. Republic of Albania, ICSID Case No. ARB/07/21, 30 July 2009, 626
Papamichalopoulos *v*. Greece, [1993] ECtHR 14556/89, 262, 481
Passage through the Great Belt (Finland v. Denmark)
– Provisional Measures, ICJ Rep. 1991 p. 12, 624
– Order, ICJ Rep. 1992 p. 348, 508, 514, 555
Paushok *v*. Mongolia *see* Sergei Paushok et al. *v*. Government of Mongolia
Pellat *see* Estate of Hyacinth Pellat
Petrolane Inc. *v*. Iran, (1991) 27 Iran–US CTR 64, 138–9
Pfunders *see* Austria *v*. Italy
Phelps Dodge Corp *v*. Iran, (1986) 10 Iran–US CTR 121, 120–1
Phosphate Lands in Nauru *see* Certain Phosphate Lands in Nauru
Phosphates in Morocco
– Preliminary Objections, (1938) PCIJ Ser. A/B No. 74, 240, 255–6, 258, 270
– Observations and Submissions submitted by the Italian Government, (1938) PCIJ Ser. C No. 84, 255–6, 269–70
Pinson *v*. Mexico (France/Mexico), (1928) 5 RIAA 327, 174–5, 179
Preferential Treatment of Claims of Blockading Powers against Venezuela (Germany, Great Britain and Italy v. Venezuela), (1904) 9 RIAA 99, 26
Presbyterian Church of Sudan *v*. Talisman Energy Inc., F.3d 244 (2nd Cir., 2009), 83, 582
Prosecutor *v*. Akayesu, ICTR Case No. 96-4-T, Trial Chamber, 2 September 1998, 173–4
Prosecutor *v*. Aleksovski
– ICTY Case No. IT-95-14/I-T, Trial Chamber, 25 June 1999, 152–3
– ICTY Case No. IT-95-14/I-A, Appeals Chamber, 24 March 2000, 152–3
Prosecutor *v*. Blaškić
– Objection to the Issue of Subpoenae Duces Tecum, (1997) 110 ILR 607, 52–3
– ICTY Case No. IT-95-14/T, Trial Chamber, 3 March 2000, 152–3, 157
Prosecutor *v*. Delalić et al.
– ICTY Case No. IT-96-21-T, Trial Chamber, 10 December 1998, 180–1
– ICTY Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, 152–3
Prosecutor *v*. Thomas Lubanga Dyilo, ICC Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, 642–3
Prosecutor *v*. Kordić and Čerkez
– ICTY Case No. IT-95-14/2-T, Trial Chamber, 26 February 2001, 152–3

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:38 Page Number: 48

– ICTY Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, 152–3
Prosecutor *v*. Mladić, ICTY Case No. IT-09-92-PT, Prosecutor's Fourth Amended Indictment, 16 December 2011, 206–7
Prosecutor *v*. Naletilić, ICTY Case No. IT-98-34-T, Trial Chamber, 31 March 2003, 152–3
Prosecutor *v*. Tadić, Appeal against Conviction, (1999) 124 ILR 63, 114–15, 119–20, 125–6, 144, 146–57, 160, 180–1, 348–9, 360–1
Protopapa *v*. Turkey, [2009] ECtHR 16084/90, 384
PSEG *v*. Turkey, ICSID Case No. ARB/02/5, 19 January 2007, 535–6
Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Rep. 2010 p. 14, 462, 473, 514, 530
Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK), Preliminary Objections, ICJ Rep. 1998 p. 9, 96–7, 648–9, 671–2
Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US), Preliminary Objections, ICJ Rep. 1998 p. 115, 648–9
Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ, 20 July 2012, 159–60, 260, 369, 468–9, 489, 550–1
R *v*. Mafart and Prieur, (1985) 74 ILR 241, 140
R *v*. Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd, Case C-432/92 (1994) 100 ILR 257, 384
R (Al-Jedda) *v*. Secretary of State for Defence *see* Al-Jedda
Raihman *v*. Latvia, (2010) UN Doc. CCPR/C/100/D/1621/2007, 474
Railroad Development *v*. Guatemala, ICSID Case No. ARB/07/23, 29 June 2012, 537–8
Rainbow Warrior (New Zealand/France)
– (1986) 74 ILR 241, 139–40, 185, 252
– (1990) 82 ILR 500; 20 RIAA 215 (Arbitration), 37, 51–2, 56–9, 96, 185, 232, 252–3, 265, 281, 298–9, 302–3, 305–6, 314, 462, 465–7, 507, 526–9, 620–1, 627, 684
Rankin *v*. Iran, (1987) 17 US–Iran CTR 135, 174–5
The *Rebecca see* Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, Deceased (USA) *v*. Mexico
Red Crusader Report, (1962) 35 ILR 485, 98, 607
Renta 4 SVSA et al. *v*. The Russian Federation, SCC Case No. 24/2007
– Award on Preliminary Objections, 20 March 2009, 603, 608, 602–ENF
– 20 July 2012, 537–8

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:39 Page Number: 49

Reparation for Injuries Suffered in the Service of the United Nations, ICJ Rep. 1949 p. 174, 77–8, 101, 188–9, 343–4, 366–9, 424–5, 542, 575–6, 594–6, 648, 594–ENF
Request for interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), ICJ, pending, 2011, 72–3, 511–12
Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. US) (Avena Interpretation)
– Provisional Measures, ICJ Rep. 2008 p. 311, 124
– ICJ Rep. 2009 p. 3, 120–2, 224–6, 413–14, 463–4, 470, 473, 515–16
Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne) *see* Cysne
Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, (2011) 150 ILR 244, 114–15, 374–5, 552–3
Right of Passage over Indian Territory (Portugal v. India), ICJ Rep. 1960 p. 6, 99, 240, 243–4
Rights of Minorities in Upper Silesia (Minority Schools), (1928) PCIJ Ser. A No. 15, 655
Rights of Nationals of the United States of America in Morocco (France v. US), ICJ Rep. 1952 p. 176, 99, 243–4
RJ Reynolds Tobacco Company *v*. Iran, (1984) 7 Iran–US CTR 181, 537
Roach and Pinkerton, [1987] IACmHR 3/87, 380
Robert E. Brown (United States) *v*. Great Britain, (1923) 6 RIAA 120, 415–16, 437–8, 442, 445, 447, 455
Romano-Americana (1916), Hackworth, 5 *Digest of International Law* (1943), 331, 420–1
RosInvestCo UK Ltd *v*. Russia, SCC Case No. V079/2005, Award on Jurisdiction, October 2007, 600–1
Roussalis *v*. Romania *see* Spyridon Roussalis *v*. Romania
Rumeli Telekom *v*. Kazakhstan, ICSID Case No. ARB/05/16, 29 July 2008, 537–8
Russian Indemnity (Russia v. Turkey), (1912) 11 RIAA 421, 71, 284–5, 298–9, 307–8, 558–9, 563
The *Saiga see* MV *Saiga* (No. 2)
Saint Albans Raid (UK/US), (1873) 4 Moore, *Int. Arb*. 4042, 296–7
Saldajeno *v*. Ishihara Sangyo Kaisha, Ltd, 540 US 821 (2003), 571–2
Salem, (1923) 2 RIAA 1161, 575–6

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:39 Page Number: 50

Salini Construttori SpA and Italstrade SpA *v*. Morocco, (2001) 6 ICSID Report 398, 163
Salomon *v*. A Salomon & Co., [1897] AC 22, 29-31, 425
Saluka Investments BV *v*. Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, 611–13
Salvador Commercial Company (El Salvador/US), (1902) 15 RIAA 455, 116–17
Sambaggio, (1903) 10 RIAA 499, 170
Samos (Liability for Torts) Case, (1924) 2 ILR 70, 443, 445
Sanchez-Llamas *v*. Oregon, 548 US 331 (2006), 225–6
Sandline International Inc. *v*. Papua New Guinea, (1998) 117 ILR 552, 130
Saramati *v*. France, Germany and Norway, (2007) 133 ILR 1, 116, 197–204, 207, 346–54
Sarei *v*. Rio Tinto (9th Cir., Docket No. 02-56256/02-56390/09-56381, 25 October 2011) slip op. 19332–3, 19358–80, 82–3
Savarkar (Great Britain/France), (1911) 11 RIAA 243, 284–5
Schering Corporation *v*. Iran, (1984) 5 Iran–US CTR 361, 128, 162
SD Myers *v*. Canada, Second Partial Award, (2002) 8 ICSID Reports 124, 522
SEDCO *v*. National Iranian Oil Co., (1985) 9 Iran–US CTR 248, 163–4
Sempra Energy International *v*. Argentina, ICSID Case No. ARB/02/16, 28 September 2007, 298–9
Serbian Loans, (1929) PCIJ Ser. A No. 20, 298–9, 307–8, 468–9
Sergei Paushok et al. *v*. Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, 612–13
Several British Subjects *v*. US (Iloilo Claims) (UK/US), (1925) 6 RIAA 158, 170
SGS Société Générale de Surveillance SA *v*. Philippines, Jurisdiction, (2004) 8 ICSID Reports 515, 101
Shimoda *v*. State (Japan), (1963) 32 ILR 626, 571–2
Shuster *see* (1912) 6 AJIL 389, 419–21, 537–8
Siag *v*. Egypt, ICSID Case No. ARB/05/15, 1 June 2009,
Siag *v*. Egypt, ICSID Case No. ARB/05/15, 1 June 2009
Siemens *v*. Argentina, (2007) 14 ICSID Reports 518, 535–6
Sistem Mühendislik *v*. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, 9 September 2009, 537–8
Social & Economic Rights Action Centre, Center for Economic & Social Rights *v*. Nigeria, ACHPR Comm No. 155/96, 13-27 October 2001, 374

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:39 Page Number: 51

Société Commerciale de Belgique (Socobelge), (1939) PCIJ Ser. A/B No. 78, 307–8, 468–9
Socony Vacuum Oil Company, (1955) 21 ILR 55, 177, 435–6
Soering *v*. UK, (1989) 98 ILR 270, 249, 335–6
Sosa *v*. Alvarez-Machain, 542 US 692 (2004), 82
South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)
– Order, 20 May 1961, ICJ Rep. 1961 p. 13, 670–1
– Preliminary Objections, ICJ Rep. 1962 p. 319, 552
– Second Phase, ICJ Rep. 1966 p. 6, 78–9, 380, 491, 552, 596–7, 645–6, 691–2, BNF–364
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), ICJ Rep. 2008 p. 12, 72
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application to Intervene by the Philippines, ICJ Rep. 2001 p. 575, 652–3
Spyridon Roussalis *v*. Romania, ICSID Case No. ARB/06/1
– Declaration of Reisman, 28 November 2011, 614
– 7 December 2011, 613–14
SS *I'm Alone* (Canada/US), (1935) 3 RIAA 1609, 528–9, 607
SS *Lotus*, (1927) PCIJ Ser. A No. 10, BNF–678, 673–ENF
SS *Wimbledon*, (1923) PCIJ Ser. A No. 1, 56–7, 93–4, 101, 363, 504, 518, 533–6, 619, 622, 645–8, 651–2
Starrett Housing *v*. Iran, (1983) 4 Iran-US CTR 122, 163–4
Status of Eastern Carelia, (1923) PCIJ Ser. B No. 5, 655
Stephens *v*. Cyprus, Turkey and the United Nations, [2011] ECtHR 45267/06, 203
Stevenson, (1903) 9 RIAA 385, 561–2
Suk Yoon Kim *v*. Ishikawajima Harima Heavy Industries, 540 US 820 (2003), 571–2
Swisslion DOO Skopje *v*. Macedonia, ICSID Case No. ARB/09/16, 6 July 2012, 537–8
Sylvania Technical Systems *v*. Iran, (1985) 8 Iran–US CTR 298, 522–3
Tachiona et al. *v*. Mugabe and ZANU-PF, 234 F.Supp 2d 401 (SDNY, 2002), 82–3
Tagliaferro, (1903) 10 RIAA 593, 561–2
Tasmanian Dam *see* Commonwealth *v*. Tasmania
Tecnicas Medioambientales Tecmed SA *v*. Mexico, (2006) 10 ICSID Reports 130, 120–1
Tehran Hostages *see* United States Diplomatic and Consular Staff in Iran

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:40 Page Number: 52

Telenor Mobile Communications AS *v*. Hungary, ICSID Case No. ARB/04/15, 13 September 2006, 120–1
Temple of Preah Vihear (Cambodia v. Thailand)
– Preliminary Objections, ICJ Rep. 1961 p. 17, 71
– ICJ Rep. 1962 p. 6, 72–4
Tenney *v*. Mitsui & Co., 571–2 US 820 (2003), US 820 (2003)
Territorial and Maritime Dispute (Nicaragua v. Colombia), ICJ, Applications to Intervene by Costa Rica and Honduras, 4 May 2011, 651–4
Texaco *v*. Libya, (1977) 53 ILR 389, 468–9
Tinoco Concessions *see* Aguilar-Amory and Royal Bank of Canada
Tippets, Abbet, McCarthy, Stratton *v*. TAMS-AFFA Consulting Engineers of Iran, (1984) 6 Iran–US CTR 219, 120–1, 163–4, 217–18
Torres *v*. Oklaholma, No. PCD-04-442 (Oklahoma Ct Crim App, 13 May 2004), 225–6
Trail Smelter (Canada/United States), (1938 & 1941) 3 RIAA 1905; (1941) 1 IELR 278, 229, 259–60, 334–5, 492, 517
Tullett Prebon Plc & Ors *v*. BGC Brokers LP & Ors, [2011] EWCA Civ 131, 233
Tunisia/Libya *see* Continental Shelf
Turkey – Restrictions on the Imports of Textile and Clothing Products, WT/DS34/R, 31 May 1999, 134
Tyrer *v*. United Kingdom, [1978] ECtHR 5856/72, 249
Underhill *v*. Hernandez, 168 US 250 (1897), 377–8
Unglaube *v*. Costa Rica, ICSID Case No. ARB/08/1, 16 May 2012, 537–8
Union Bridge Company, (1924) 2 ILR 170, 136
Union Régionale d'Algérie de la CFTC, Re, (1962) 44 ILR 43, 178
United States Diplomatic and Consular Staff in Iran (US v. Iran), ICJ Rep. 1980 p. 3, 71, 113, 144–5, 151–2, 183–7, 217–18, 228–9, 259–60, 263–4, 341–2, 358–9, 447, 466–7, 496–8, 512, 584, 696–8
US – Antidumping and Countervailing Duties
– WT/DS379/R, 22 October 2010, 88–9
– WT/DS379/AB/R, 11 March 2011, 89–90
US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, 15 February 2002, 699
US – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 6 November 1998, 121, 374
US-France Air Services Agreement *see* Air Services Agreement of 27 March 1946 between the US and France

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:40 Page Number: 53

Varnava and Others *v*. Turkey, [2009] ECtHR 16064/90, 526
Vasilescu *v*. Romania, [1998] ECtHR 27053/95, 262
Velásquez Rodríguez, [1989] IACtHR Ser. C No. 7; (1989) 95 ILR 232, 481, 526
Vienna Convention on Consular Relations (Paraguay v. US)
– Provisional Measures, ICJ Rep. 1998 p. 248, 121–2
– Order of 10 November 1998, ICJ Rep. 1998 p. 426, 516
Vivendi Universal *v*. Argentina *see* Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux *v*. Argentina
Vladimir Berschader and Moïse Berschader *v*. Russia, SCC Case No. 080/2004, Award on Jurisdiction, 21 April 2006, 603, 601–ENF
Von Maltzan *v*. Germany, [2005] ECtHR 71916/01, 262, 450–1
Waite and Kennedy *v*. Germany, (1999) 118 ILR 121, 199–200, 427, 430–1
Wall Advisory Opinion *see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
Waste Management *v*. Mexico (No. 2), (2004) 11 ICSID Reports 362, 102–3
Wena Hotels Ltd *v*. Egypt, (2000) 6 ICSID Reports 89, 163
Wesolowska, *see* Meron, (1980) 241–2 Hague *Recueil* 289
Western Sahara, ICJ Rep. 1975 p. 12
Westland Helicopters Ltd *v*. Arab Organization for Industrialization and ors
– (1984) 80 ILR 600, 426–7
– Second Arbitral Award, 21 July 1991, 429–30
Whaling in the Antarctic (Australia v. Japan), ICJ, Application Instituting Proceedings, 31 May 2010, 373
William L Pereira Associates, Iran *v*. Iran, (1984) 5 Iran–US CTR 198, 167–8
Williams *v*. Bruffy, 96 US 176 (1877), 170, 177
Winebox *see* KPMG Peat Marwick *v*. Davison
Wipperman (US/Venezuela), (1889) 3 Moore, *Int. Arb*. 3039, 296–7
Wolkenberg *v*. Poland, [2007] ECtHR 50003/99, 633–4
Wooldrige *v*. Summer, [1963] 2 QB 43, 287
World War II Era Japanese Forced Labor Litigation, Re, 114 F.Supp. 2d 939 (ND Cal, 2000), 571–2
X *v*. Belgium, [1968] ECommHR 2568/65, 261–2
X and Y, [1992] ECtHR 12747/87, 134–5
X and Y *v*. Switzerland, [1977] ECommHR 7289/75, 134
Xenides-Arestis *v*. Turkey, [2005] ECtHR 46347/99, 634
Xhavara *v*. Italy and Albania, [2001] ECtHR 39473/98, 134
Xheraj *v*. Albania, [2008] ECtHR 37959/02, 262

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:41 Page Number: 54

Xuncax *v*. Gramajo, 886 F.Supp. 162 (D. Mass., 1995), 82
Yeager *v*. Iran, (1987) 17 Iran–US CTR 92, 137–9, 146–7, 151–2, 167–9, 174–5
Youmans (US/Mexico), (1926) 3 ILR 223, 119–20, 123
The *Zafiro see* Earnshaw *v*. US
Zhenhuan Ma *v*. Kajima Corp., 540 US 820 (2003), 571–2

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:41 Page Number: 55

Select table of treaties and other instruments

American Convention on Human Rights, 22 November 1969, OAS Treaty Series No 36 (ACHR), 596
Art. 1, 474
Art. 28, 124
Charter of the United Nations (UN Charter), 46, 51, 75, 79–80, 106–8, 284–5, 289–90, 292, 326, 370, 572, 605–8, 667, 684–5, 689–91, 706–8, 715, 721, 723, 751, 756, 774, 777
Ch. VI, 387–8
Ch. VII, 253, 107–8, 160, 289, 315, 343–4, 348–9, 386–7, 707–8, 108–ENF
Ch. VIII, 654
Art. 2(3), BNF–678
Art. 2(4), 289–90, 309–10, 317–18, 334–5, 343, 380, 447, 546, 611
Art. 2(5), 401
Art. 2(7), 106–7
Art. 13(1)(a), 724–7
Art. 14, 709–10
Art. 17(2), 422
Art. 24, 707–8
Art. 24(2), 106–7
Art. 25, 106–7, 707–9
Art. 33, 556–7
Arts. 33 to 38, BNF–678
Art. 36(3), 106–7
Art. 39, 707–8
Art. 40, 707–8
Art. 41, 707–8
Art. 42, 707–8
Art. 51, 188, 278–9, 289, 291

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:42 Page Number: 56

Art. 52, 710
Art. 99, 192
Art. 100, 594
Art. 103, 106–8, 120–1, 200–2
Convention on Cluster Munitions, 3 December 2008 (CCM), 96–7, 113, 143–4, 154–5, 203–4, 218–19, 231, 266–7, 315–17, 330, 367, 375, 380, 401, 403, 449, 473, 481, 512–13, 552, 610–11, 617, 667–8, 688–9
Art. I, 230–1, 267, 342–3
Art. I(c), 337–8
Art. II, 567, 380–1
Art. II(a), 266–7
Art. III, 231, 403–4
Art. III(e), 266–7, 330, 343
Art. XXI, 711
Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (Genocide Convention)
Art. III, 189
Art. IV, 189
Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 (ICSID Convention), 581–2, 589, 613–14, 639
Art. 25(1), 612–13, 638
Art. 26, 581–2
Art. 27(1), 287
Art. 44, 639
Art. 46, 612–14
Art. 54(1), 620–1
European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR), 134–5, 199–200, 249, 261, 266, 348–51, 373–4, 430–4, 463, 630–7
Art. 1, 198, 346–9, 431
Art. 2, 347
Art. 3, 463
Art. 5, 197–8, 347–8
Art. 5(1), 200–2
Art. 6, 347–8
Art. 7, 463
Art. 10, 261
Art. 13, 347–8
Art. 33, 349

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:42 Page Number: 57

Art. 35(1), 384–5
Art. 46, 632
Art. 64, 261
Protocol 1, Art. 1, 632
ILC Articles on Diplomatic Protection 2006, ILC Report 2006, UN Doc A/61/10, 16 (ADP), 75–7, 567–8, 575–6, 579–80, 584, 586, 589–90, 593–4
Pt 1, 728
Pt 2, 728
Pt 2, Ch. 1, 728
Pt 2, Ch. 2, 729
Pt 2, Ch. 3, 730
Pt 2, Ch. III, 1191
Pt 3, 731
Pt 4, 731–2
Art. 1, 75–6, 568–9, 572, 577, 585, 593, 728
Art. 2, 728
Art. 3, 728
Art. 3(1), 573
Art. 3(2), 573
Art. 4, 573–4, 728
Art. 5, 729
Art. 5(2) to (4), 577
Art. 6, 575, 729
Art. 7, 575–6, 729
Art. 8, 573, 728–9
Art. 9, 578–9, 730
Art. 10, 578–9, 730
Art. 11, 579–80, 730
Art. 12, 578, 730
Art. 13, 730
Art. 14, 569–70, 581–2, 731, 1200
Art. 14(1) and (2), 581
Art. 14(3), 584
Art. 15, 581–2, 731
Art. 15(e), 582
Art. 16, 77–8, 571–2, 586, 592–4, 731
Art. 17, 585, 588–90, 731
Art. 18, 78–9, 596, 731
Art. 19, 77–9, 570–1, 732

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:43 Page Number: 58

Art. 24(2), 567–8
ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001, ILC Ybk 2001/II(2), 26 (ARSIWA), 41–4, 52–4, 61, 63, 65, 73–6, 83–94, 96–7, 103–4, 116, 126–9, 153–4, 156, 166, 199, 219–20, 229–31, 234–5, 239, 276–7, 280, 284–5, 287–8, 291–4, 303–8, 314–15, 339, 342–3, 345–6, 355–7, 382, 390–1, 394, 401–3, 408, 418, 422–4, 436–7, 470–1, 481–3, 487–8, 491–4, 496, 500–2, 507–10, 523–4, 529, 531–2, 537, 541–2, 548–50, 554–7, 567, 572, 616, 645, 647, 676–7, 680, 683, 685, 687–8, 706–7, 710–11, BNF–90, BNF–506
Pt 1, 55, 104–5, 459–61, 548–50, 712, 717–ENF
Pt 1, Ch. I, 45, 712
Pt 1, Ch. II, 45, 67–8, 74–5, 94, 113–15, 334, 336–7, 343–4, 355, 413–14, 704–5, 712–14
Pt 1, Ch. III, 46, 67–8, 94, 714, BNF–215
Pt 1, Ch. IV, 46, 94, 333–9, 341–2, 395, BNF–715
Pt 1, Ch. V, 46, 62, 94, 250–1, 274–81, 284–5, 315–17, 320, 417, 558, 565, 680–1, 687–9, 715–17
Pt 2, 46–7, 68–9, 104–5, 110, 459–61, 481, 508, 548–50, 686, 717, BNF–506
Pt 2, Ch. I, 46–7, 548–9, 717–18
Pt 2, Ch. II, 47, 318, 718–19
Pt 2, Ch. III, 41, 47, 371, 393–4, 525, 552, 719
Pt 3, 41, 47–8, 95, 104–5, 110, 541, 719
Pt 3, Ch. I, 47, 541, 547–9, 646, 719–21
Pt 3, Ch. I (draft), 40–1
Pt 3, Ch. II, 46, 48, 235, 292–4, 542, 676–7, 682–6, 715, 721–2
Pt 4, 51, 108, 722
Art. 1, 49–51, 58–60, 83–4, 93–4, 99–100, 217–18, 274–5, 334, 438–9, 441, 488, 548, 572, 645, 712
Art. 2, 49–50, 55, 58–60, 93, 113–15, 215, 218, 274–5, 349–50, 389–90, 395, 403–4, 461–2, 548, 712, BNF–216
Art. 2(b), 93, 504–5
Art. 3, 45, 94, 99–101, 120–1, 712
Art. 4, 45, 117, 119–21, 123–8, 135–6, 140, 142, 148, 158–60, 162, 168, 185, 285–6, 712–13
Art. 4(2), 124–5
Arts. 4 to 7, 115
Arts. 4 to 9, 171–2, 713
Arts. 4 to 11, 334, 343–4

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:43 Page Number: 59

Art. 5, 45, 126–32, 136, 161–2, 168–9, 340, 713
Arts. 5 to 9, 179–80
Art. 6, 45, 132–6, 169, 196, 203–4, 341, 349–50, 713
Art. 7, 45, 117, 119–20, 127–8, 136–8, 140, 167–8, 172, 713
Art. 8, 114–16, 125–7, 129, 141, 143–8, 152–9, 161, 165–8, 203–4, 358–61, 713
Arts. 8 to 11, 45
Art. 9, 116, 143–4, 166–9, 713, 166–ENF
Art. 10, 116, 168, 170–6, 178–80, 435–6, 713, 166–ENF
Art. 10(1), 174–6, 178–9
Art. 10(2), 173, 176–9
Art. 10(3), 179–80
Art. 11, 116, 167–8, 181–3, 185–8, 260, 341–2, 354–5, 358–61, 428, 436–7, 447, 714, 166–ENF
Art. 12, 46, 51, 93, 215–16, 219–20, 224–5, 235, 238, 240, 342–3, 547–8, 714
Art. 13, 46, 240–1, 245–6, 248–52, 714
Art. 13(1), 250–1
Arts. 13 to 15, 240
Art. 14, 46, 219–20, 230, 234–5, 254, 259–60, 262–5, 342–3, 462, 714
Art. 14(1), 253–4, 264–5
Art. 14(2), 253–4, 258–9
Art. 14(3), 227–8, 230–2, 253–4, 259–60, 342–3
Art. 15, 46, 219–20, 253–4, 265–9, 462–3, 714
Art. 15(1), 217–18, 269
Art. 15(2), 269
Art. 16, 46, 88–9, 210, 329–30, 334–5, 337–9, 354–5, 358, 395–7, 399–403, 405–13, 416, 421, 714
Art. 16(a), 338–9, 406
Art. 16(b), 338–9, 409–10, 432
Arts. 16 to 18, 50–1, 328, 333, 336–7, 339, 345–6
Art. 17, 46, 210, 338–9, 395–7, 400–1, 412–18, 421, 715
Art. 17(a), 416
Art. 17(b), 416, 432
Art. 18, 46, 210, 338–9, 395–7, 413, 419, 421–2, 715
Art. 18(a), 421
Art. 18(b), 421
Art. 19, 46, 336–7, 417, 715
Art. 20, 46, 274–6, 284–7, 551, 706–7, 715
Arts. 20 to 25, 50, 61, 65–6, 501–2

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:44 Page Number: 60

Art. 21, 46, 274, 291–2, 715
Arts. 21 to 23, 275–6
Art. 22, 46, 274, 292–4, 683, 685–6, 688–9, 691–2, 702–3, 705–6, 715
Art. 23, 46, 274, 295–6, 298–302, 338–9, 419, 421, 716, 627i
Art. 23(1), 300–1
Art. 23(2), 300–1
Art. 23(2)(a), 300–1
Art. 24, 46, 274, 301–5, 716
Art. 24(1), 301
Art. 24(2)(b), 301–2
Art. 25, 46, 274, 307–13, 716
Art. 25(1), 313
Art. 25(1)(a), 309–11
Art. 25(2), 313
Art. 25(2)(a), 315
Art. 25(2)(b), 307–8, 312–13
Art. 26, 245, 250–1, 274, 276–7, 286, 312–13, 315–17, 565, 688–9, 692–4, 716, 690–ENF
Art. 27, 65–6, 99–100, 274, 282, 313, 318–20, 717
Art. 27(b), 50, 65–6, 280, 318–20
Art. 28, 459–61, 548, 717–ENF
Art. 29, 46–7, 459, 461, 623–4, 717
Art. 30, 46–7, 459–62, 465–6, 469, 476, 489, 623–4, 717
Art. 30(a), 263–4, 459, 461–3
Art. 30(b), 459
Art. 31, 46–7, 54–5, 58–9, 318, 355, 357, 481, 485, 487–8, 492, 494, 496–8, 501–2, 523, 673–4, 717, 673–ENF
Art. 31(1), 438–9, 492, 616, 1042
Art. 31(2), 54–5, 485, 673–4
Art. 32, 46–7, 717
Art. 33, 46–7, 460–1, 548–9, 717
Art. 33(1), 460–1, 548–9
Art. 33(2), 460–1, 548–50, 585
Art. 34, 47, 482–3, 507, 514–15, 718
Art. 35, 47, 465, 468, 507, 509–13, 718
Art. 35(b), 482–3, 514
Arts. 35 to 37, 616
Art. 36, 47, 487–8, 517, 519, 522–3, 528–9, 718, 673–ENF
Art. 36(1), 54–5, 507
Art. 36(2), 54–5

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:45 Page Number: 61

Art. 37, 47, 486–7, 507, 524, 527–9, 718
Art. 37(1), 476, 507
Art. 37(2), 527–9
Art. 37(3), 482–3, 530–1
Art. 38, 47, 531–7, 718
Art. 38(1), 532
Art. 39, 47, 278, 358, 500–3, 719, 1042
Art. 40, 47, 53–4, 85–6, 365–6, 371, 380–1, 385–6, 393–4, 525, 565, 690–4, 704–5, 719
Art. 40 (draft), 40–1
Art. 40(1), 393–4
Art. 40(2), 53–4, 106, 380–1, 393–4
Art. 41, 47, 53–4, 85–6, 88, 106
Art. 4(1), 118, 123
Art. 41, 365–6, 377, 380–1, 385–7, 389, 393–4, 525, 719
Art. 41 (draft), 40
Art. 41(1), 341–2, 381, 386–7
Art. 41(2), 53–4, 338, 381, 385, 387
Art. 41(3), 525
Art. 42, 40–1, 47–8, 59–60, 66, 365–6, 393–4, 491, 541–2, 544–51, 554, 563–4, 566, 646–7, 719
Art. 42 (draft), 40
Art. 42(a), 59–60, 545–6
Art. 42(b), 546
Art. 42(b)(i), 59–60, 369, 546
Art. 42(b)(ii), 59–60, 547
Art. 43, 47–8, 68, 465, 508, 549–50, 553–5, 563, 623–4, 646–7, 720–2
Art. 43(1), 554
Art. 43(2), 555, 622
Art. 43(2)(b), 465, 508, 555, 622–3
Art. 44, 47–8, 68–70, 75–6, 549–50, 556, 567–8, 584, 645–7, 720–1
Art. 44(b), 69–70, 584
Art. 45, 47–8, 67–8, 70–1, 73–4, 287, 317, 549–50, 557–61, 563–5, 622, 646–7, 669, 720–1
Art. 45(a), 70, 668
Art. 45(b), 72, 560–1
Art. 46, 47–8, 325, 503–4, 545, 622–3, 645–8, 674, 720
Art. 47, 47–8, 54–5, 204, 327, 329–31, 334–5, 355–6, 399, 402, 404–5, 565, 648–9, 673–4, 720, 673–ENF
Art. 47(1), 331–2, 334–5, 355–6

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:45 Page Number: 62

Art. 47(2), 334–5
Art. 47(2)(a), 355, 673–ENF
Art. 47(2)(b), 355–6, 673–4
Art. 48, 40–1, 66–7, 71, 85–6, 88, 365–6, 368–72, 389–90, 393–4, 460, 489, 542, 547–55, 557–8, 563–6, 586–7, 596–7, 646–7, 692, 704–6, 720–1
Art. 48(1), 48, 504–5, 550–1, 596–7, 646, 705–6, 722
Art. 48(1)(a), 370, 489, 550–1, 646–7
Art. 48(1)(b), 489, 550–1, 646–7
Art. 48(2), 373, 476, 551, 555, 646, 704–5
Art. 48(2)(a), 489, 564–5
Art. 48(2)(b), 503, 564–5, 596–7
Art. 48(3), 554, 557–8, 646–7
Art. 49, 40–1, 48, 685–8, 698–9, 702–3, 721
Art. 49(2), 48, 292–3, 702–3
Arts. 49 to 53, 686
Arts. 49 to 54, 292–3
Art. 50, 48, 482–3, 688–91, 693–4, 697, 721, 690–ENF
Art. 50(1), 689–90
Art. 50(1)(a), 690–1
Art. 50(1)(b), 482–3, 693
Art. 50(1)(c), 693–4
Art. 50(1)(d), 691–2
Art. 50(2), 689–90
Art. 50(2)(a), 696
Art. 50(2)(b), 697
Art. 51, 48, 697–9, 722
Art. 52, 41, 48, 85–6, 700–2, 722
Art. 52(1), 700
Art. 52(1)(a), 700–1
Art. 52(1)(b), 700–1
Art. 52(2), 701
Art. 52(3), 701–2
Art. 52(3)(a), 702
Art. 52(3)(b), 701–2
Art. 52(4), 702
Art. 53, 48, 85–6, 702–3, 722
Art. 54, 48, 371, 703–7, 709, 722, 706–ENF
Art. 54(3) and (4), 53–4

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:46 Page Number: 63

Art. 55, 48, 65, 99, 103–5, 246, 276–7, 356, 460–1, 647, 706–7, 710–11, 722
Art. 56, 48, 108–10, 277–8, 680, 723
Art. 57, 48, 188, 345–6, 396, 706–7, 723
Art. 58, 48, 667–8, 723
Art. 59, 48, 108, 706–7, 723
ILC Draft Articles on the Responsibility of International Organizations 2011, ILC Report 2011, UN Doc A/66/10, 54 (DARIO), 51, 204, 339–40, 343–5, 349–50, 352–3, 396, 402–3, 405, 423–4
Pt 1, 761
Pt 1, Ch. II, 720
Pt 2, 762, 768
Pt 2, Ch. I, 762
Pt 2, Ch. II, 730, 762–3
Pt 2, Ch. III, 763–4
Pt 2, Ch. IV, 720, 764–5
Pt 2, Ch. V, 765–7
Pt 3, 768, 772–3
Pt 3, Ch. I, 768
Pt 3, Ch. II, 769–70
Pt 3, Ch. III, 770–1
Pt 4, 771–5
Pt 4, Ch. I, 771–3
Pt 4, Ch. II, 766, 773–5
Pt 5, 210, 343–6, 396, 775–7, 210–ENF
Pt 6, 777
Art. 1, 761
Art. 1(2), 343–4
Art. 2, 761
Art. 2(a), 188–9, 425
Art. 2(c), 411
Art. 2(d), 68
Art. 3, 348–9, 762
Art. 3 (draft), 348–9
Art. 4, 348–9, 762
Art. 5, 762
Art. 5 (draft), 195–7, 205–6, 349–50
Art. 6, 68, 762
Arts. 6 to 8, 763

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:46 Page Number: 64

Arts. 6 to 9, 189–90, 343–4
Art. 7, 68, 193–7, 203–6, 209–10, 346–7, 349–50, 352–3, 762
Art. 8, 763
Art. 9, 763
Art. 10, 763
Art. 11, 763
Art. 12, 763
Art. 13, 764
Art. 14, 402–3, 405, 411–12, 764
Arts. 14 to 17, 765
Arts. 14 to 18, 50–1
Arts. 14 to 19, 343–4
Art. 15, 418, 764
Art. 16, 422, 764
Art. 17, 765
Art. 18, 765
Art. 19, 765
Art. 20, 765
Art. 21, 765
Art. 22, 766
Art. 23, 766
Art. 24, 766–7
Art. 25, 767
Art. 26, 767
Art. 27, 767
Art. 28, 768
Art. 29, 768
Art. 30, 768, 772–3
Art. 31, 768
Art. 32, 768
Art. 33, 768
Art. 34, 769
Art. 35, 769
Art. 36, 769
Art. 37, 769
Art. 38, 770
Art. 39, 770
Art. 40, 770
Art. 41, 770–1
Art. 42, 770–1

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:47 Page Number: 65

Art. 43, 771
Art. 44, 771–3, 775
Art. 45, 771–2
Art. 45(2), 772–3
Art. 46, 669, 772–3
Art. 47, 772
Art. 48, 50–1, 772, 730i
Art. 49, 368–9, 772–3
Art. 49(1) to (3), BNF–775
Art. 50, 773
Art. 51, 773–4
Art. 52, 774
Art. 53, 774
Art. 53(2)(b), 68
Art. 54, 774
Art. 55, 775
Art. 56, 775
Art. 57, 210, 210–ENF, 775–ENF
Art. 58, 210, 396, 405, 410–13, 422, 775–6, 210–ENF
Art. 58(1), 411
Art. 58(2), 411, 418
Arts. 58 to 60, 345–6
Arts. 58 to 62, 50–1
Art. 59, 210, 396–7, 417–18, 422, 776, 210–ENF
Art. 59(1), 418
Art. 59(2), 418
Art. 60, 210, 396–7, 422, 776, 210–ENF
Art. 61, 210, 345–6, 396, 422–3, 430–4, 776, 210–ENF
Art. 61(2), 210–ENF
Art. 62, 189, 346, 396, 422–4, 427–30, 777
Art. 62(1), 346
Art. 62(1)(a), 428–9
Art. 62(1)(b), 429
Art. 63, 777
Art. 64, 777
Art. 65, 777
Art. 66, 777
Art. 67, 777
ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in 1996, ILC Ybk 1996/II(2), 58 (1996 Draft

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:47 Page Number: 66

Articles), 37–9, 43, 55, 58, 60–1, 64, 77–8, 88–90, 97–8, 104, 107–8, 113, 137, 181–2, 221–2, 228, 253–4, 288, 303, 305–6, 312–13, 327, 392–4, 402, 481, 485, 503, 507–8, 511, 524, 531–2, 578, 615, 619
Pt 1, 37, 49–50, 54–5, 391–2, 542–4, 743, 751–3
Pt 1, Ch. I, 743
Pt 1, Ch. II, 403, 743–6
Pt 1, Ch. III, 39, 746
Pt 1, Ch. IV, 698, 749–50
Pt 1, Ch. V, 598, 281–2, 750–1
Pt 2, 39–40, 49–50, 391–2, 542–5, 751
Pt 2, Ch. I, 751–3
Pt 2, Ch. II, 753–5
Pt 2, Ch. III, 114, 393–4, 755–6
Pt 2, Ch. IV, 756–7
Pt 3, 49–50, 97, 553–4, 757–8
Art. 1, 37–8, 50, 55–7, 743
Arts. 1 to 35, 49–50
Art. 2, 62, 743
Art. 3, 37–8, 55–7, 743
Art. 4, 743
Art. 5, 116–17, 542–4, 743
Arts. 5 to 10, 745–6
Art. 6, 744
Art. 7, 127, 744
Art. 7(2), 127
Art. 8, 141, 143–4, 146–7, 151–2, 154, 156, 744
Art. 8(a), 166–8
Art. 8(b), 166–8
Art. 9, 133–5, 744
Art. 10, 29–30, 133–4, 137, 143, 152, 454–5, 745
Art. 11, 745
Art. 12, 745
Art. 13, 745
Art. 14, 170, 172, 179–80, 423–4, 693, 745–6
Art. 14(1), 179
Art. 15, 172–3, 181–2, 746
Art. 15*bis*, 181–2
Art. 16, 37, 215, 746
Art. 17, 37, 215, 746
Art. 18, 244, 746–7

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:48 Page Number: 67

Art. 18(1), 245
Art. 18(2), 245, 250–1
Art. 19, 37–40, 47, 52–3, 61, 65–7, 88, 365–6, 391–4, 747, BNF–106
Art. 19(1), 37, 215
Art. 19(4), 391
Art. 20, 220–3, 748
Art. 21, 220–3, 748
Art. 22, 584, 748
Art. 23, 224, 226–31, 342–3, 748
Art. 24, 254–5, 257, 303, 748
Arts. 24 to 26, 244
Art. 25, 270–1, 310–12, 749
Art. 25(1), 232
Art. 25(2), 266, 270
Art. 25(3), 271
Art. 26, 749
Art. 27, 327–8, 337–8, 399–401, 409, 749
Art. 27(b), 400
Art. 28, 328, 413–14, 419, 749–50
Art. 28(1), 413, 415
Art. 28(2), 413, 419
Art. 28*bis*, 328
Art. 29, 285–6, 750–1
Art. 30, 750
Art. 30*bis*, 680
Art. 31, 298–9, 487–8, 750–1
Art. 32, 303, 750–1
Art. 33, 305–8, 314, 751
Art. 34, 277–8, 289, 291–2, 751
Art. 35, 65–6, 751
Art. 36, 751
Art. 37, 487–8, 752
Art. 38, 752
Art. 39, 107–8, 752
Art. 40, 37–8, 67, 365–7, 390–3, 491, 542–5, 549–50, 647, 704, 752–3
Art. 40(1), 393–4
Art. 40(2), 67, 391–4
Art. 40(2)(e)(iii), 392–3
Art. 40(2)(f), 37, 55, 550–1
Art. 40(3), 391–3

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:48 Page Number: 68

Art. 41, 234, 393–4, 464, 753
Arts. 41 to 46, 755
Art. 42, 753
Art. 42(1), 475, 507
Art. 42(3), 482–4
Arts. 42 to 46, 615
Art. 43, 487–8, 508, 510–11, 544–5, 754
Art. 43(c) and (d), 756
Art. 44, 54–5, 495, 648, 754
Art. 44(2), 485, 531–2
Art. 45, 54–5, 517, 754
Art. 45(1), 485
Art. 45(2)(c), 524
Art. 45(3), 756
Art. 46, 470, 475, 755
Art. 47, 686, 704, 755
Art. 48, 702, 755
Art. 48(1), 701
Arts. 48 to 50, 755
Art. 49, 487–8, 544–5, 756
Art. 50, 690–1, 696, 756, 690–ENF
Art. 51, 756
Arts. 51 to 53, 392–4
Art. 52, 756
Art. 53, 756, BNF–757
Art. 54, 86, 96, 704–6, 755, 757
Art. 55, 757
Art. 56, 757–8
Art. 57, 757–8
Art. 58, 758, 760
Art. 58(2), 97
Art. 59, 758
Art. 60, 758
Art. 60(2), 760
Annex I, 757, 759–60
Annex II, 1619, 758, 760
Draft Convention on the International Responsibility of States for Injuries to Aliens 1961, (1961) 55 AJIL 548, 34–5, 38–9, 500
Section A, 104
Section B, 104

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:49 Page Number: 69

Title I, 1543
Title II, 734–8
Title III, 1561
Ch. I, 1544
Ch. II, 734–5
Ch. III, 735–6
Ch. IV, 1554
Ch. V, 737–8
Ch. VI, 738–40
Ch. VII, 740–1
Ch. VIII, 741–2
Art. 1, 35, 733
Art. 1(2)(c) and (d), BNF–735
Art. 2, 35, 734
Art. 3, 736–9, BNF–735
Arts. 3 to 13, 35
Art. 4, 735
Art. 5, 35, 735
Art. 6, 735
Art. 7, 735–6, 738
Art. 8, 736, 738
Art. 9, 736
Art. 10, 736–7
Art. 11, 737
Art. 12, 737
Art. 13, 737
Art. 14, 738
Art. 15, 738
Art. 16, 738
Art. 17, 738
Art. 17(4), 741–2
Art. 18, 738–9
Art. 19, 739
Art. 19(2), 736–7
Art. 20, 739–40
Art. 21, 738–40
Art. 21(1), 740
Art. 22, 739–40, 740–ENF
Art. 22(2), 735–6
Art. 23, 740–ENF

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:49 Page Number: 70

Art. 24, 741
Art. 25, 741
Art. 26, 741–2
Art. 26(4), 738
Art. 27, 738–40, 742
Art. 28, 35
Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 (ICC Statute; Rome Statute), 81, 667–8
Art. 5(1), 367
Art. 6, 46, 266–7, 380–1
Art. 7, 46
Art. 7(1), 298–9
Art. 8, 46
Art. 8*bis*(1) and (2), 667
Art. 25(1), 668
Art. 25(4), 667–8
Art. 27, 667
Art. 75(1) and (2), 641–2
Art. 79(1), 642
Art. 79(2), 642
Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355 (ICJ Statute), 653–4
Art. 31(5), 670
Art. 36, 627–8
Art. 36(2) and (3), 240
Art. 37, 627–8
Art. 38(1), 87
Art. 38(1)(a), 41–2
Art. 38(1)(b), 41–2
Art. 38(1)(c), 41–2, 331
Art. 53(2), 627–8
Art. 59, 654
Art. 60, 225–6
Art. 62, 650–3
Art. 63, 650–4
United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (UNCLOS), 59–60, 608
Art. 18(2), 299–302
Art. 61, 223–4
Art. 110(3), 63

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:50 Page Number: 71

Art. 194, 59–60
Art. 263, 62–3
Art. 282, 603–4
Annex IX, 721
Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95 (VCDR), 228–9, 260
Preamble, 696
Art. 22, 697
Art. 22(1), 263–4
Art. 22(2), 184–6, 228–9, 259–60
Art. 22(3), 263–4
Art. 24, 697
Arts. 25 to 27, 263–4
Art. 29, 263–4, 697
Art. 44, 697
Art. 45, 696–7
Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331 (VCLT), 52, 242, 315–16, 402, 678–9, 682–3
Art. 8, 71
Art. 23, 68
Art. 26, 678–9
Art. 28, 242, 246
Art. 31, 243–4, 249–50
Art. 31(3)(c), 375–6
Art. 34, 409–10
Art. 35, 409
Art. 45, 70, 73–4, 558, 668
Art. 53, 315–16, 379, 390, 552, 690–1
Art. 54(b), 283–4
Art. 60, 52, 271, 282–3, 545, 676, 678–9, 681–4, 695
Art. 60(1), 545–6
Art. 60(2), 646
Art. 60(2)(b), 546
Art. 60(2)(c), 67, 547
Art. 60(3)(a), 233–4
Art. 60(4), 695
Art. 60(5), 547, 682
Art. 61, 282–3, 299–301
Art. 62, 306–7
Art. 64, 250, 315–16

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:50 Page Number: 72

Art. 65, 67–8, 554
Art. 67, 68
Art. 70(1)(b), 52, 251–2
Art. 7(2), 71
Art. 72(1)(b), 52
Art. 73, 52, 290, 684

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:51 Page Number: 73

Table of reports of Special Rapporteurs on State Responsibility

PROOF

1. F. V. García Amador (1955–61)

First Report ILC Ybk 1956/II, 173 36
Second Report ILC Ybk 1957/II, 104 34–6
Third Report ILC Ybk 1958/II, 47 36, 275–6, 567, 569–70, 573, 576–ENF
Fourth Report ILC Ybk 1959/II, 1 36
Fifth Report ILC Ybk 1960/II, 41 36
Sixth Report ILC Ybk 1961/II, 1 36, 38, 292

2. R Ago (1963–79)

First Report ILC Ybk 1969/II, 125 36
First Report Addendum ILC Ybk 1971/II(1), 193 36
Second Report ILC Ybk 1970/II, 177 36, 490, BNF–216
Third Report ILC Ybk 1971/II(1), 199 36
Fourth Report ILC Ybk 1972/II(1), 71 36, 181–2
Fifth Report ILC Ybk 1976/II(1), 3 36, 390–1
Sixth Report ILC Ybk 1977/II(1), 3 36
Seventh Report ILC Ybk 1978/II(1), 31 36, 327–9, 337–8, 343, 401, 403
Eighth Report ILC Ybk 1979/II(1), 3 36, 328, 687–8
Eighth Report Addendum ILC Ybk 1980/II(1), 13 36, 290

3. W. Riphagen (1979–86)

Preliminary Report ILC Ybk 1980/II(1), 107 36–7, 693, 1423
Second Report ILC Ybk 1981/II(1), 79 36–7, 464, 475
Third Report ILC Ybk 1982/II(1), 22 36–7, 390–1, 542–4
Fourth Report ILC Ybk 1983/II(1), 3 36–7, 390–1, 542–6, 678

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: FrontMatter Title Name: CRAWFORD
Date:20/3/13 Time:13:20:53 Page Number: 74

Fifth Report ILC Ybk 1984/II(1), 1 36–7, 678
Sixth Report ILC Ybk 1985/II(1), 3 36–7, 678
Seventh Report ILC Ybk 1986/II(1), 1 36–7

4. G. Arangio-Ruiz (1987–96)

Preliminary Report ILC Ybk 1988/II(1), 6 37
Second Report ILC Ybk 1989/II(1), 1 37, 475, 495, 501–2, 509, 524, 530–1, 536–7
Third Report ILC Ybk 1991/II(1), 1 37, 687–8, 699
Fourth Report ILC Ybk 1992/II(1), 1 37, 699
Fifth Report ILC Ybk 1993/II(1), 1 37
Sixth Report ILC Ybk 1994/II(1), 3 37
Seventh Report ILC Ybk 1995/II(1), 3 37, 390–1
Eighth Report ILC Ybk 1996/II(1), 1 37, 390–1

5. J. Crawford (1997–2001)

First Report ILC Ybk 1998/II(1), 1 51, 60–2, 113–16, 132–3, 137, 141, 143–4, 146–7, 149, 151–2, 154, 161, 172–4, 176–7, 181–2, 390–4, 423–4, 441, 447, BNF–216
Second Report ILC Ybk 1999/II(1), 3 97, 215, 220–3, 230, 233, 245, 249–51, 253–4, 266, 270–9, 281–6, 288, 290–2, 300–1, 305–8, 315–20, 325, 328–9, 337–9, 341, 343, 345–6, 400, 402, 405–6, 408–9, 413, 415–17, 421, 567, 572, 580, 584, 678, 680, 684
Third Report ILC Ybk 2000/II(1), 3 40, 54–5, 72, 105, 108, 110, 276–8, 325, 327–30, 332, 334–5, 343–4, 356–7, 368, 465, 470, 480, 482–3, 487–8, 491, 493, 496, 501, 503, 507–9, 517–18, 524–5, 528–9, 531–2, 537, 544, 555, 560, 567–8, 623–4, 645–8, 657, 668, 673–4, 676–8, 680–9, 691–3, 696, 698–9, 701–5, 709, 1042, BNF–326, BNF–506, 673–ENF, 690–ENF
Fourth Report ILC Ybk 2001/II(1), 3 40, 90–1, 367–8, 371, 485, 487, 544–5, 553–4, 684, 686, 689, 704–6

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-I Title Name: CRAWFORD
Date:8/3/13 Time:16:47:41 Page Number: 1

Part I

The framework of responsibility

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-I Title Name: CRAWFORD
Date:8/3/13 Time:16:47:42 Page Number: 2

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:30 Page Number: 3

1 Historical development

1.1 Introduction

Any system of law must address the responsibility of its subjects for breaches of their obligations. For a long time, however, responsibility was ignored or touched on only incidentally in international law doctrine. Writers concerned themselves with substantive fields such as the law of the sea, the laws of war, diplomatic relations or the law concerning treatment of foreigners. Their main interest was in identifying specific rules and practices associated with each field and, sometimes, in identifying the mechanisms by which states might seek to vindicate their rights, especially through reprisals and war. When they treated responsibility at all, writers treated it as an incident of the substantive law, lacking any systematic order or basis. International responsibility was not a discrete subject for study until the late nineteenth century. By this time it was naturally thought of exclusively in terms of *state* responsibility, states being seen by that time as effectively the only international actors.

Vitoria, Suarez, Bodin and other early writers did not identify responsibility as a legal category. They tended to approach the question from a theological point of view: the sovereign by definition answered to no temporal authority, answering only to God.[1] Pierino Belli and Alberico Gentili gave some consideration to the issue of the responsibility of citizens for the wrongs of the sovereign (and vice

This introduction is drawn in part from a paper co-authored with Thomas Grant and Francesco Messineo entitled 'Towards an International Law of Responsibility: Early Doctrine', which appeared in Boisson de Chazournes and Kohen (eds.), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (2010) 377. Their contribution is gratefully acknowledged.

[1] Bodin, *Six livres de la République* (1576), Bk I, Ch. VIII (trans. Tooley 1955, 25ff.).

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:31 Page Number: 4

versa).[2] Both, however, lacked any secure concept of representation of the citizen by the sovereign and as such could treat issues of responsibility only in a contingent, ad hoc way. Much the same is true of Grotius, that paradigm intermediary between old and new. It is only with Zouche and Pufendorf that tentative ideas of international obligations and their breach (especially breach of treaty) come to be considered, although still unsystematically.[3] Indeed, it is not before the second half of the nineteenth century that a recognizably modern conception of responsibility appeared,[4] and even later a monograph concerned wholly with the responsibility of states in international law.[5]

1.2 Intimations of responsibility in early international law writings

1.2.1 Italian precursors of Grotius: Belli and Gentili

Bodin is of no particular interest here, given that he proceeded along the lines of earlier writers such as Vitoria and Suarez. A secular approach was needed before responsibility could be considered as a legal topic.[6] The relevant pre-Grotian authors here were Belli and Gentili.[7] Neither identified international responsibility as a legal category, but both addressed the question of the bond between prince and people with regard to obligations towards other princes: why were citizens to be held responsible for the wrongs of their princes?

[2] Belli, *De Re Militari et Bello Tractactus* (1563), Pt X, Ch. II (trans. Nutting 1936, 296–8); Gentili, *De Legationibus* (1594), Bk II, Ch. VI (trans. Laing 1924, 72–6); Gentili, *De Jure Belli* (1612), Bk III, Chs. XXIII–XXIV (trans. Rolfe 1933, 421–9).

[3] See e.g. Zouche, *Iuris et judicii fecialis* (1650), Pt I, §§V, X (trans. Brierly 1911, 27, 53); Pt II, §V (106–11); Pufendorf, *Elementorum jurisprudentiae universalis* (1672), Bk I, Defs. XII, XXI (trans. Oldfather 1931, 71–112, 199ff.); Bk II, Axiom I, §9 (215–16). See also, later on, van Bynkershoek, *Questionum juris publici* (1737), Bk II, Ch. X (trans. Frank 1930, 190–5); and, more explicitly Wolff, *Jus gentium methodo scientifica pertractatum* (1764), Ch. III, §§315–318 (trans. Drake 1934, 161ff.).

[4] See e.g. Heffter, *Le droit international public de l'Europe* (1857).

[5] Eagleton, *The Responsibility of States in International Law* (1928).

[6] See e.g. Bodin (1576), Bk I, Ch. VIII (35): 'the prince is bound as much by the law of nations, but no more, than by any of his own enactments. If the law of nations is iniquitous in any respect, he can disallow it within his own kingdom, and forbid his subjects to observe it, as was done in France in regard to slavery. He can do the same in relation to any other of its provisions, so long as he does nothing against the law of God. If justice is the end of the law, the law the work of the prince, and the prince the image of God, it follows of necessity that the law of the prince should be modelled on the law of God.'

[7] See e.g. Belli (1563), Pt X, Ch. II (296–8); Bodin (1576), Bk I, Ch. VIII (25ff.); Gentili (1594), Bk II, Ch. VI (72–6); Gentili (1612), Bk III, Chs. XXIII–XXIV (421–9).

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:31 Page Number: 5

Pierino Belli of Alba (1502–75) is considered by some to be a precursor of Gentili and Grotius, by others to be the scrappy author of a botched collection of ancient authorities mixed with personal anecdotes. The latter view owes much to Gentili, who deprecated Belli's work even as he apparently made unacknowledged use of it.[8] Belli's role has recently been re-evaluated in the light of his observations concerning cruelty and the absolute prohibition against torturing prisoners of war.[9]

Belli did not address international responsibility as a separate legal category, nor did he have any consistent theory of the state. However, he did consider the question whether 'a sovereign of a free state may make peace and, by its terms, remit payment for losses inflicted upon its own citizens and subjects':[10]

> Baldus cites Hostiensis as saying that this is not permissible, unless the populace and those who have suffered the loss give their consent, and Panormitanus, too, seems to agree; but, although this is generally true, there is exception if the sovereign takes such action for reasons that concern the public weal, for example in the present case, when he so acts in order to secure the blessing of peace. Decio warns that the above must not be forgotten, citing many passages in its confirmation, and declaring that it is the commonly accepted view, from which no one dissents. But Joannes Lupus states that if peace cannot be made on other terms, the populace must acquiesce in the action of a ruler who remits losses; for, although he thereby acts much to the disadvantage of his subjects, on the other hand he benefits them largely in securing peace for them.[11]

Thus the principle is that the consent of the population is required before entering into a peace treaty waiving payment of war damage. This implies that the ruler is still only exercising a form of individual power dependent on agency: responsibility relations are in principle individual, not communal. But this is qualified by something like an agency of necessity – the necessity to make peace and thereby benefit the people.

Belli took his argument a step further, in order to consider responsibility of the sovereign for losses suffered by the enemy. If the sovereign can be responsible towards his subjects when he wages an unjust war or carries on an unjust resistance to a just war,

> [m]uch less, therefore, will he be free from responsibility for losses inflicted by his soldiers upon the opposing party, whatever may be said in the compact and terms of the peace.

[8] Cavaglieri, in Belli (1563), Vol. II (11a–28a).
[9] Comba and Vidari (eds.), *Un giurista tra principi e sovrani: Pietrino Belli a 500 anni dalla nascita* (2004).
[10] Belli (1563), Pt X, Ch. II (296). [11] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:32 Page Number: 6

And here applies a remark of Barbazza, who cites Petrus de Ancharano, to the effect that even though states by compact have agreed that reparation be not made for the plundering on either side, the plunderers will nevertheless not be safe on the score of conscience; in fact, as he says, the owner of the stolen property may sue for it, the pact notwithstanding.[12]

The religious argument (on which Belli dwells further, suggesting recourse to the ecclesiastical tribunal to recover losses against one's sovereign) and the legal one are conflated; and one should be wary of an English translation of 1936 rendering the Latin *civitates* unequivocally as 'states'.[13] But, again, this passage shows the complex relationship between the sovereign and its population. Belli sought to clarify this with an example:

> [At times, war] is made [between an independent and free sovereign and its] subject – e.g. if the King of France were at war with the Duke of Bourbon, [he] would not be able in the peace pact to excuse the Duke and his followers for losses which had been inflicted upon the subjects of the King – unless the King were willing to reimburse them out of his own treasury.[14]

Another form of responsibility applies in time of war:

> [S]tates which in time of war occupy strongholds [taken from others than the enemy] that they afterward refuse to restore except on payment of money, do wrong in extorting this price; and they may be sued for the money, notwithstanding the terms of the peace that has ensued.[15]

Nor can one look to Alberico Gentili (1552–1608) for an autonomous concept of responsibility. In his work on fetial law Gentili devotes a chapter to the question of countermeasures in the specific case of 'one who has injured the ambassador of another'.[16] He holds that 'the right of embassy does not hold for the envoy of a sovereign who has violated that right':

> To withhold rights from one who has violated them is believed to be not a violation but a rendering of justice. Francis I, the French king, when he heard that his ambassador was being detained by the Emperor Charles, retaliated by detaining the ambassador of the Emperor.[17]

This rule was to be applied restrictively – that is, only when the ambassadors had been injured, because '[u]nder other circumstances no violence should be done to ambassadors, not even if other laws of

[12] Ibid. (297). [13] Ibid. Cf. Vol. I (130b, line 11) with Vol. II (297, line 16).
[14] Ibid. (298). [15] Ibid. [16] Gentili (1594), Bk II, Ch. VI (72ff.). [17] Ibid. (73).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:32 Page Number: 7

nations have been violated, for none is to be compared with this in majesty and prestige.'[18]

In response to the question 'what reason is there for punishing the guilty in the person of the innocent?',[19] Gentili replies,

> But how can he be called innocent who is the personal representative of one who is notoriously guilty? If this were possible, it would never be permissible to take action against the subjects of a sovereign on account of an offense committed by the sovereign, and there would be no war.[20]

This remark underlines the problem of the relationship between the individual and his sovereign, common to Pierino Belli and in general to all early attempts to detach that relationship from theological considerations. Gentili recognized that it was problematic to hold subjects responsible for their sovereign's acts (which Vitoria and perhaps Bodin did not), but none of the early writers had a solution, perhaps because this would have required a radical rethinking of just war theory.

In *De Jure Belli*, Gentili deals at one point with the relation between the conduct of the sovereign and the conduct of the population. When a peace treaty is signed, will the actions of the subjects constitute a breach of the treaty if they are contrary to the obligations undertaken by the prince?

> [T]he question arises, whether not only the people as a whole but also individuals should be regarded as included in a treaty, when no mention is made specifically of individuals. Decio decided that if the Venetians promised not to do something, the promise was understood to mean that the people as a whole would not do it; for an arrangement which looks to a large number as a whole does not have regard to individuals. Therefore individuals do not break a peace, as was decided by Baldus. 'Private individuals do not harm the whole body politic.' ... That is, unless it was expressly stipulated in the treaty, that not even private individuals should offend; for in that case, the peace would certainly be broken.[21]

In the last chapter (XXIV) of book III, Gentili addressed the concept of violation of a treaty:

> A treaty is not violated if one departs from its provisions for a legitimate reason, as Ulpian and Pomponius say of a partnership of individuals ... If one of the conditions on which a partnership was based is not observed by one of the partners, or if it is not permitted to enjoy the benefits for which the partnership was formed, there is good reason for dissolving the partnership ... It is to

[18] Ibid. (74). [19] Ibid. (73). [20] Ibid. (73–4).
[21] Gentili (1612), Bk III, Ch. XXIII (421).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:32 Page Number: 8

be understood, however, that this one thing must be a matter of prime importance . . .; and reason also tells us (whatever some may also maintain about trivial causes) that an important contract should not be annulled because of an insignificant matter. Trivial things are always happening, simply because they are trivial, and therefore all contracts would be most unstable, if it were lawful to withdraw from them on account of some trivial and unimportant matter. The justice of the law of nations does not allow this. But is war to be made because of a trivial reason? The law in that case is buried under the syllables and fine distinctions of the pettifoggers.[22]

Gentili mentions some reasons why some actions might not constitute a breach of treaty, or are to be excused:

Certainly necessity and superior force will excuse an ally from being considered a breaker of treaties . . . Furthermore, the peace will not be said to be broken if the failure to observe a given condition does not result in offence; for example, if it was promised that something should be done within a given number of days, and it was not done.[23]

1.2.2 Grotius: civil law obligations with no equivalent in the law of nations

Not even Hugo Grotius (1583–1645) identifies international responsibility as a legal category, despite his more systematic approach. He deals with responsibility for war but in the context of individual leaders and their punishment.[24] In a chapter 'Of the Communication of Punishments' he discusses *inter alia* 'the distinction between that which is inflicted directly and that which comes as a consequence'.[25] In keeping with his rudimentary approach to the state, he makes no clear distinction between individual and state responsibility.[26]

This can be seen in Chapter XVII of Book II, entitled 'Of the Damage done by an Injury, and of the Obligation thence arising'. The chapter is largely devoted to obligations under the law of nature or under the civil laws. As to the former, Grotius refers to

that Right, which arises by the Law of Nature from an Injury received. We here call any Fault or Trespass, whether of Commission or Omission, that is contrary

[22] Ibid., Ch. XXIV (427). [23] Ibid. (428–9).

[24] Grotius, *De Iure Belli ac Pacis* (1625), Bk III, Ch. XI, §§V–VII (ed. Tuck 2005, 1431–9).

[25] Ibid., Bk II, Ch. XXI (1053); also Bk II, Ch. XXI, §II, heading (1055) ('The State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so').

[26] See Onuma, in Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (1993) 57, 88–90.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:33 Page Number: 9

to a Man's Duty, either in respect of his common Humanity, or of a certain particular Quality, an Injury. From such a Fault or Trespass there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done.[27]

There follows a rather miscellaneous discussion of property, rights and compensation within civil society. Only two paragraphs deal with issues of the law of nations, and in each the point is to distinguish such issues from those governed by the law of nature or the civil law. Thus whereas one who 'procures a Contract or Promise by Force, Fraud or unjust Terror, is bound to release the Person who made the Contract or Promise, from any Obligation of Performance',[28] the same is not true for public wars:

[A]s it is established by the Consent of Nations, that all Wars declared in Form, and carried on by the Authority of the supreme Powers on both Sides, shall be accounted lawful, as to the outward Effects or Consequences of them, ... so likewise is the Fear whereby one has been induced to do any Thing in such a War, so far to be accounted just, that if any Advantage be obtained, it cannot be required by the adverse Party. And in this Sense may be admitted the Distinction made by *Cicero*, between an Enemy in Form, with whom, says he, we have many Rights in common, that is, by the Consent of Nations, and Pirates, and Robbers. For if these extort any Thing from us by Fear we may require it, unless we bind ourselves by an Oath not to require it; but of an Enemy we cannot. Wherefore, what *Polybius* saith of the *Carthaginians*, that they had just Cause to enter into the second *Punick* War, because the *Romans* had declared War against them, and extorted from them the Island *Sardinia*, and a great Sum of Money, while they were engaged in Quelling a Sedition of some People they had taken into their Service, has indeed some Shew of Equity according to the Law of Nature, but is contrary to the Law of Nations.[29]

The point emerges even more clearly when considering the obligations of sovereigns to make reparation for damage done by their soldiers; such obligations, done without the superior's individual fault, are compensable only under the civil law:

Nor are Kings bound to make Reparation, if their Soldiers, either by Sea or Land, shall do their Allies any Damage, contrary to their Command; which is proved by the Testimonies of *France* and *England*. But if any one be bound to make Reparation for what his Minister or Servant does without his Fault, it is not according to the Law of Nations, which is the Point now in Question, but according to the Civil Law, and even that Rule of the Civil Law is not general; it regards only the Masters of Ships, and some others, for particular Reasons.[30]

[27] Grotius (1625), Bk II, Ch. XVII, §I (884).
[28] Ibid., Bk II, Ch. XVII, §XVII (892).
[29] Ibid., Bk. II, Ch. XVII, §XIX (893–4).
[30] Ibid., Bk. II, Ch. XVII, §XX.2 (895).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:33 Page Number: 10

By contrast, Grotius's work on civil (Roman-Dutch) law contains a general account of obligation: obligations can either arise from 'the duty of benevolence', 'the duty of keeping faith' or 'the duty of making amends for wrongdoing'.[31] This is further explained, and the kinds of obligation arising from delict and generally from an unlawful act are considered.[32]

One reason why none of the early writers identified responsibility as a legal category, or dealt with it other than incidentally, was the virtual absence of procedures and institutions at the international level that might have required clear distinctions to be drawn between the state and its nationals, or that might have focused on excuses for non-performance or on the content of the obligation of reparation. Such institutions as there were – short of war itself – tended to create more difficulties than they resolved and were prone to abuse – measures against ambassadors, for example, or the system of letters of marque.[33]

Another reason was the rudimentary treatment of the law of obligations in Roman law. Ibbetson notes that by the time of Justinian there had developed a fairly elaborate classification of rights as *in rem* or *in personam*; within the latter category, contract, delict, quasi-contract and quasi-delict were distinguished.[34] Nonetheless, according to Zweigert and Kötz,

> Roman lawyers . . . never arrived at the general principle that everyone is responsible for the harm he is to blame for causing. This principle had to wait until the seventeenth and eighteenth centuries for its promulgation by the great natural lawyers, especially GROTIUS and DOMAT. Thereafter it made its way into many of the codes of Europe.[35]

While Grotius may have promulgated such general principles in his work on the civil law, they are not to be found in his work on the law of nations.

[31] Grotius, *Inleiding tot de Hollandsche Rechts-geleertheyd* (1631, ed. and trans. Lee, Oxford University Press, 1926), Bk III, Ch. I, §3 (293).
[32] Ibid., ch. XXXII (459ff.).
[33] Letters of marque and reprisal were rejected over the course of the nineteenth century. The European states, by the Declaration of Paris, 30 March 1856, 15 NRG (1st ser.) 791, had agreed that letters of marque were unlawful. The United States declared in the Civil War (1861–5) and the Spanish-American War (1898) that it would not issue letters of marque. See Winthrop, (1894) 3 Yale LJ 116; Maclay, *A History of American Privateers* (1899), xxiii.
[34] Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), 1–10, esp. 6–10.
[35] Zweigert and Kötz, *An Introduction to Comparative Law* (1998), 597. See also von Bar, *The Common European Law of Torts* (1998), Vol. 1, 1–5.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:33 Page Number: 11

In the period after Grotius, the notion of international obligations arising from the breach of treaties and other wrongs gradually found its way into legal thinking, but the process was slow, hesitant and uneven. Zouche conceptualized wrongs among states either at peace or at war, and identified certain questions of the imputability of actions to the sovereign and of excuses for breach of treaties and other wrongs.[36] Pufendorf did not separate international law from other natural law governing relationships between citizens: he provided in his *Elementa* an account of the law of obligations and of the rules governing 'bad actions' (violations of such obligations) and 'demerit', and made use of examples drawn from relations between princes. But his framework is not the law of nations as such; it is the universal natural law which governs both nations and individuals.[37] On the other hand, Rachel[38] and Textor[39] did not give any account of a general law of the obligation of states (and they would have rejected Pufendorf's universalistic method).

A more practical approach was taken by van Bynkershoek, who criticized the Machiavellian approach to the law of treaties, and identified *pacta sunt servanda* as a special type of non-legal but morally and practically binding rule which must be observed by princes.[40] He also considered justifications for non-performance, but concludes with some disenchanted remarks on the actual practice of sovereigns with regard to treaties.[41] Finally, it is with Wolff that the concept of reparation to a sovereign for a wrong done by another (or by one of its citizens) is expressed, albeit still without clarity or system.[42]

1.2.3 *Zouche: breaches of treaties*

Richard Zouche (1590–1661) sought to expose the basic elements of *jus inter gentes* of his time. He described 'wrongs' among states as being either 'between those at Peace' or 'between Belligerents'. Zouche described the former as follows:

[36] See e.g. Zouche (1650), Pt I, §§V, X (27, 53), Pt II, §V (106–11).
[37] Pufendorf (1672), Bk I, Def XII and XXI (71–112, 199ff.), Bk II, Axiom I, §9 (215–16).
[38] Samuel Rachel (1628–91) emphasized the importance of treaties among nations, but he did not give the question of responsibility for breach autonomous consideration: *De Jure Naturae et Gentium Dissertationes* (1676).
[39] Johann Wolfgang Textor (1638–1701) dedicated a chapter of his *Synopsis* to treaties and breach of treaty, but he did not identify either responsibility or reparation as separate legal concepts: *Synopsis juris gentium* (1680), chs. XXIV–XXV (trans. Bate 1916, 258ff.).
[40] Van Bynkershoek (1737), Bk II, Ch. X (190–5). [41] Ibid. (193–4).
[42] Wolff (1764), Ch. III, §§315–18 (161ff.).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:34 Page Number: 12

There is a wrong between those at peace when an injury is inflicted on persons, or when property is seized or carried off, or when duties arising by law, or under a convention or treaty, are not performed.[43]

On the other hand,

[t]here is a wrong between belligerents (1) when war is unjustly begun; (2) when the right of military congress or embassy is violated; (3) when military conventions and treaties are not observed; (4) when a victor exceeds moderation in following up his victory.[44]

He went on to address certain practical questions. Section V of Part II deals with 'questions of wrong between those at peace',[45] considering issues of imputability ('whether injuries inflicted by subjects affect a prince or people?'; 'whether a wrong is to be imputed to a prince who receives one who does wrong elsewhere?'; 'whether successors are liable for the wrong of a community?'),[46] and of excuses ('whether the property of others may ever be taken against the will of the owners?'; 'whether the promises in a treaty may ever be broken?').[47] Among the latter, the issue of breach of treaty is the most relevant:

If one party to a treaty has broken it, the other may abandon it; because each clause of a treaty has the force of a condition. Thus Thucydides says: 'The blame of destroying a treaty lies not with those who, on being deserted, resort to others, but with those who do not afford the help which they have promised.' Moreover, necessity or superior forces will excuse one who is bound by a treaty, and he is not to be regarded as a treaty-breaker.[48]

So at least some of the relevant modern conceptual categories (e.g., breach, imputation, excuse) are visible in Zouche's work.

1.2.4 Pufendorf: a perfect system of natural law

Of greater historical significance is Samuel von Pufendorf (1623–94). His *Elementa*, 'the first useful text-book of natural law',[49] is a systemised account of universal legal concepts which are exposed deductively (definition, axioms, observations). International law is not separated from the general exposition, but is entangled with other concepts, especially natural law, which Pufendorf understood to be the basis of the law of

[43] Zouche (1650), Pt I, §V (27). [44] Ibid., §X (53). [45] Ibid., Pt II, §V (106ff.).
[46] Ibid. (106–7). [47] Ibid. (110–11).
[48] Ibid. (111), where he quotes Grotius (1625), Bk II, Ch. XV, §15; Gentili (1612), Bk III, Ch. XXIV; Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri Tres* (1792), Bk I, Ch. VI, §17.
[49] Wehberg, in Pufendorf (1672), Vol. II (xiv).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:34 Page Number: 13

nations. This left no room for positive international law, the existence of which Pufendorf did not accept.[50]

Pufendorf's account of the law of obligations and of the rules governing 'bad actions' and 'demerit' constitute one of the first conceptualizations of responsibility in international law. In Definition XII, while discussing the definition of obligation ('Obligation is an operative moral quality by which some one is bound to furnish, allow, or endure something'),[51] he considers the interplay between individuals and society:

> (1) Certain obligations arise from convention or from some pact; certain others from a transgression. (2) Among pacts some are terminated directly and ultimately in the individual person, as it were, of the party to the pact; and certain others tend indirectly or directly to the society and its affairs, and exercise their ultimate efficacy therein. (3) In a transgression there is either guilt extending to the person of the delinquent, or else obligation to make restitution for the injury done, which comes upon the good of the delinquent.[52]

But not every pact binds both the individual and the community as a whole.

> Thus, for example, a marriage pact ... will not bind other persons at all. From this it follows that if a prince has promised marriage to some woman, no one in the whole state beside himself will be bound to take her to wife.[53]

Indeed, in principle 'guilt' is only attached to the person, unless there is some form of participation in the misdeed:

> In transgression guilt does not pass to other persons included in the society, unless they have themselves agreed to it by an efficacious consent, by rendering aid, or by some other means ... So a prince or a magistrate, if he has not neglected to announce a moral prohibition, contracts no guilt from the fact that a transgression has been committed by an old subject or a new-comer, or by one who, after committing a crime in one state, flees to another ... Nor, indeed, do subjects contract guilt from the misdeed of princes, unless they themselves have directly contributed to it.[54]

Nonetheless, the special relationship between 'subjects and their rulers' means that the former are responsible for some of the obligations arising from treaties, depending on the purpose of the pacts considered:

> (III) Obligations arising from a pact made by the prince or the directors of a society as such, or obligations arising from a transgression of the same, bind the whole society and the individual members, each for his proper share, to the

[50] Ibid. [51] Pufendorf (1672), Bk I, Def. XII (71). [52] Ibid., Bk I, Def. XII, §28 (103–4).
[53] Ibid. (104). [54] Ibid. (104–5).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:34 Page Number: 14

extent of making restitution for the damage done. The basis for this assertion is to be sought in the pact between subjects and their rulers. For those who commit to some person authority and the care of the public safety, as well as full power to make disposition of the same, by that very act obligate themselves to contribute, each his own share, to what he has enjoined upon them as necessary or advantageous for the public safety . . . From this it is clear that subjects are bound to pay any and all debts contracted by princes for the public good. But as far as concerns the private indebtedness of the same . . . on the basis of the law of nature it seems that subjects are not directly and immediately bound to pay such indebtedness, and that creditors have the right to bring an action only against the private property of princes.[55]

Pufendorf also addressed the debts of the state owed to non-citizens[56] and the binding force of treaties signed by the previous sovereign.[57] Applying the natural law of obligations, he said that debts owed to non-citizens are an undifferentiated collective responsibility; he rejected automatic succession of treaties except for obligations 'inherent' in the property of the prince.

In Definition XXI ('Demerit is an estimative moral quality resulting to a man from a bad action through which he is under obligation to make amends for the injury done to a second person thereby')[58] Pufendorf goes on to consider obligations arising not from a pact, but from an injury. He identifies the general principle that

> every man whatsoever is bound to make amends to the other party for damage done him in any way at all by his own fault, and, if that damage has proceeded from malice, he is bound to give bond not to offend in the future.[59]

In the first Axiom of book II, Pufendorf analyses the concept of imputability of actions to persons, a concept which also applies to commonwealths of citizens under a prince:

> 9. Now it is to be observed that the deeds of some can be imputed to others, then, and then only, if there exists a certain mutual community among them in regard of the same. [This happens because they carried out a certain deed either jointly or concurrently], or else if they constitute one body, so united to one another by a pact, that whatever the whole body as such wishes, each and all also of the same body are understood to wish, because, in the case of those things which concern the whole body, they have each made their own will to depend entirely upon the will of the body, or of those who rule it. For, as is shown elsewhere at greater length, those who unite to form a society having the likeness of a single moral

[55] Ibid. (105). [56] Ibid., §29 (106–8). [57] Ibid., §31 (110–12).
[58] Ibid., Bk I, Def. XXI (199). [59] Ibid., §1 (199).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:35 Page Number: 15

person, each and all obligate themselves to be willing to hold valid whatever that person or council upon which authority to transact the public business of the society has been conferred, has done regarding the affairs of the society, and so, to recognize its acts as their own. And these are no more mere legal fictions than that all men united in a society can be obligated by orders of a single person ... Thus, when a prince or a commonwealth makes war upon a second prince or commonwealth, the separate individuals living under the commonwealth are all regarded as enemies.[60]

De Jure Naturae et Gentium Libri Octo (3rd edition, 1688), monumental though it is, does not add much to what Pufendorf said in the *Elementa* from the point of view of an international law of obligations. True, the intellectual framework is clearer: the few arguably positive rules of the law of nations, on ambassadors, the courtesies of war, and so on, are not 'of such importance that they should form a special field of law, since they can very easily find place in the system of natural law'.[61] Furthermore, treaties should be considered more like civil law contracts between individuals than public law:

It seems to us quite incongruous for some to refer to the law of nations special agreements of two or more peoples, usually defined by leagues and agreements of peace. For although the natural law about the keeping of faith orders that such agreements be maintained, they still do not properly fall under the term of laws.[62]

That treaties do not constitute law, that there is no positive international law distinct from natural law, does not mean that sovereigns or states live in anarchy. On the contrary, in Pufendorf's view, natural law pervades all aspects of the life and of the law of peoples.

1.2.5 *Van Bynkershoek: the honour of the sovereign and* pacta sunt servanda

In his *Questionum juris publici*, Cornelius van Bynkershoek (1673–1743) dealt with the observance of treaties in a separate chapter of book II.[63] He opened categorically by saying that '[c]ivil law guards the contracts of individuals, considerations of honour, those of princes.'[64] Such honour, or good faith, is norm-creating:

If you destroy good faith, you destroy all treaties; you even destroy international law, which has its origin in tacitly accepted and presupposed agreements founded upon reason and usage.[65]

[60] Ibid., Bk II, Axiom I, §9 (215–16).
[61] Pufendorf, *De Jure Naturae et Gentium Libri Octo* (3rd edn, 1688), Bk II, Ch. III, §23 (trans. Oldfather 1934, 229).
[62] Ibid. [63] Van Bynkershoek (1737), Bk II, Ch. X (190–5). [64] Ibid. (190). [65] Ibid.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:35 Page Number: 16

Accordingly, *pacta sunt servanda* is a rule recognized 'even by those who have learned nothing but treachery'.[66]

However, there are cases in which a breach of a treaty may be permitted. For Bynkershoek this is a 'very difficult question':

> Seneca makes the general statement about the human race: 'Hardly anywhere is good faith found when its observance is inexpedient.' The master of iniquity in his *Principe* teaches that treachery is lawful for princes, saying that any and every method of securing the safety of the state is honourable provided only it makes a pretence at being honourable.[67]

While Machiavelli's doctrine is disavowed by most, the common adherence to an implicit *rebus sic stantibus* doctrine is no less treacherous:

> By [this] argument no promise binds unless the results are advantageous, and if war is profitable you will reject the peace you have made. In this way a man who buys goods will repudiate the purchase if the price of them should go down, since he would change his mind with the change of price. Thus the result would be that a pledge which is binding according to all law would have no value whatsoever either in public or private affairs.[68]

On the other hand the norm-creating factor of good faith does not produce legal rules, but moral ones:

> Between the several independent nations there is no legal compulsion since the laws do not apply to international affairs, and the sole source of compulsion lies in the law. But the dictates of good faith and expediency require that international agreements should be observed, and to these must be attributed as much force as to the strongest pledge. In fact no pledge has more force than one that rests wholly upon greatness of soul.[69]

Good faith has an almost existential force:

> Even expediency obliges the several princes to keep their word, even though there are no laws between them, for you cannot conceive of empires without sovereigns, nor of sovereigns without compacts, nor of compacts without good faith. One must promise because one approves of the terms, and one must observe the terms because one has promised.

Against this background, Bynkershoek goes on to consider some reasons for possible non-performance of treaty obligations, including impossibility ('a prince is not bound beyond his capacity to perform the act promised').[70] But loss of honour and war are the only sanctions for those

[66] Ibid. [67] Ibid. [68] Ibid. (191). [69] Ibid. [70] Ibid. (193).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:35 Page Number: 17

who do not comply, and princes are very often in breach of their obligations:

> Such is the degradation of the human race, that 'there is hardly one who scruples to break his word and violate his pledge provided he finds it expedient to do so' ... 'It is a crime for a man in private station to violate his bond, while in princes and rulers it is a requirement of prudence to break treaties.' *Horresco referens*, but I could give a thousand instances in proof that this is wholly true. ...
>
> I recall a case in point: in 1595 the States-General admonished Elisabeth, the Queen of England, that she should observe the terms of the treaty made in 1585 if she wished to consider her own good name. The woman made the most absurd answer, saying that 'the contracts of princes rested only upon a pledge, and they were not binding if they resulted in detriment to the state,' and other things of the same kind.[71]

In the face of such practice Bynkershoek was resigned:

> I shall only add, that, in general, nations are usually so constituted that while you cannot charge them with flagrant treachery, you will not readily find in them striking examples of magnanimity.[72]

1.2.6 Wolff and Vattel: elements of a law on responsibility

In his *Ius Gentium* Christian Wolff (1679–1754) addressed the whole of international law of his time. While he set out no separate account of responsibility distinct from specific substantive obligations, he nevertheless touched on some aspects of responsibility. For example, when dealing with 'Ownership by Nations',[73] Wolff dealt with the attribution of the conduct of private citizens to the state:

> Since, if a citizen of one nation injures the citizen of another nation of his own intent or does him harm in any way, that cannot be imputed to the nation; the one nation cannot be said to have injured the other nation or done it wrong. The acts of a private citizen are not the acts of the nation to which he is subject, since they are not done as by a subject or so far as he is a subject. Therefore they have no relation to the state of which the doer of the deed is a member. The situation is different if he acts by order of the ruler of the state, whom he obeys as a superior.[74]

It is also different if the sovereign ratifies or approves of the misdeed: this becomes an injury not only to the citizen of the other state, but to the other state itself.[75]

[71] Ibid. (194). [72] Ibid. (195). [73] Wolff (1764), Ch. III (140ff).
[74] Ibid., Ch. III, §315 (161). [75] Ibid., Ch. III, §316 (161).

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:36 Page Number: 18

Wolff considered the duty of reparation a general duty:

Since the ruler of a state ought not to allow any of his subjects to cause a loss or do a wrong to a citizen or subject of another state, and since he who has caused a loss is bound to repair it and he who has injured another is rightly punished and those who do things which are not to be allowed in a state must be restrained by penalties, if any one of his subjects causes a loss to the subject of a foreign state or does him a wrong, the ruler of the state in the former case ought to compel him to repair the loss caused, and in the latter case ought not to punish him.[76]

But with regard to treaties, Wolff draws the conclusion that

[s]ince a perfect right is acquired from treaties, he who violates a treaty violates a perfect right of the other party. Therefore, since the violation of a perfect right is a wrong, he who violates a treaty does a wrong to the other party. This is to be noted, that it may be understood what right belongs to a party to a treaty against the violator of a treaty. It is plain without my saying it, that a treaty is violated if anything is done which is contrary to it, or if anything is not done which is to be done by virtue of it.[77]

This approaches the modern concept of the secondary obligation arising from breach: from a violation, a 'right belongs to a party . . . against the violator'. The violator thus acquires a new obligation – that is, to make reparation to the party violated.

Emerich de Vattel (1714–67), drawing on Wolff, articulated certain aspects of an international law of responsibility – though still in a disconnected way. First, he asserted a general obligation not to injure other states:

If every man is, by his very nature, obliged to assist in promoting the perfection of others, much more cogent are the reasons which forbid him to increase their imperfection and that of their condition. The same duties are incumbent on nations . . .. No nation ought therefore to commit any actions tending to impair the perfection of other nations, and that of their condition, or to impede their progress, – in other words, to injure them. And since the perfection of a nation consists in her aptitude to attain the end of civil society, – and the perfection of her condition, in not wanting any of the things necessary to that end . . . – no one nation ought to hinder another from attaining the end of civil society, or to render her incapable of attaining it. This general principle forbids nations to practise any evil manoeuvres tending to create disturbance in another state, to foment discord, to corrupt its citizens, to alienate its allies, to raise enemies against it, to tarnish its glory, and to deprive it of its natural advantages.[78]

[76] Ibid., Ch. III, §318 (162). [77] Ibid., Ch. III, §378 (195).

[78] Vattel, *Le Droit des Gens* (1758), Bk II, Ch. I, §18 (ed. B. Kapossy and R. Whatmore, trans. T. Nugent, 2008, 271–2).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:36 Page Number: 19

Second, as Wolff put it, '[t]he breach of a treaty is ... a violation of the perfect right of the party with whom we have contracted; and this is an act of injustice against him.'[79] Furthermore, acts against a citizen may also be deemed to be injuries to their state:

> Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not attain the grand end of the civil association, which is safety.[80]

But the question is one of imputability: while it cannot be said 'in general, that we have received an injury from a nation, because we have received it from one of its members',[81] there are some cases in which states are held responsible for the actions of their citizens. Here, Vattel took a view which is broader than that under modern law: when another state or one of its citizens is injured, not only states may be held responsible for actions they approve of or ratify, but they also have a general duty to punish the offender or relinquish him (*aut dedere aut judicare*):

> The sovereign who refuses to cause reparation to be made for the damage done to his subject, or to punish the offender, or, finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.[82]

More generally, however, the obligation not to injure another state or its citizens is not absolute. There are cases when a state should not be held responsible for its misdeeds:

> It must further be observed, that when we are making use of our right, when we are doing what we owe to ourselves or to others, if, from this action of ours, any prejudice results to the perfection of another, – any detriment to his exterior condition, – we are not guilty of an injury: we are doing what is lawful, or even what we ought to do. The damage which accrues to the other, is no part of our intention: it is merely an accident, the imputability of which must be determined by the particular circumstances. For instance, in case of a lawful defence, the harm we do to our aggressor is not the object we aim at: – we act only with a view

[79] Ibid., Bk II, Ch. XII, §164 (343); compare with Wolff (1764), Ch. III, §378 (195), quoted above.

[80] Vattel (1758), Bk II, Ch. VI, §71 ((2008) 298).

[81] Ibid., §73 (299).

[82] Ibid., §77 (300). See also, with respect to private property, Bk II, Ch. VII, §81 (302: 'the property of the individuals is in the aggregate, to be considered as the property of the nation, with respect to other states').

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:36 Page Number: 20

to our own safety: we make use of our right; and the aggressor alone is chargeable with the mischief which he brings on himself.[83]

Moreover, a state has both the 'perfect right' to prevent harm to itself and to complete reparation in case harm occurred:

> It is safest to prevent evil, when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honourable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.
>
> When the evil is done, the same right to security authorises the offended party to endeavour to obtain a complete reparation, and to employ force for that purpose, if necessary.[84]

Vattel discussed a range of lawful and useful means of enforcing the right to reparation which should be considered before going to war, in particular retaliation, retorsion and reprisals.[85]

1.3 Nineteenth- and early-twentieth-century developments

1.3.1 Nineteenth-century writers: from Wheaton to Heffter

Many of these elements are subsumed in later international law texts, though with variations and refinements. But, like Vattel's, the major treatises of the first half of the nineteenth century did not contain any separate treatment of responsibility. Henry Wheaton's *Elements of International Law* (1836), the best of these in English, did examine certain problems in a manner consistent with modern understandings of responsibility, but it did so in connection with specific areas of law – in particular the law of prize. Wheaton had professional experience of that subject. As US representative in Copenhagen, he had negotiated the Treaty of Indemnity by which Denmark made reparation for the capture and condemnation of certain American vessels at Kiel during the Napoleonic Wars.[86] In the first edition of *Elements* Wheaton discussed the case

[83] Ibid., Bk II, Ch. I, §18 (272).

[84] Ibid., Bk II, Ch. IV, §§50–51 (288–9). See also Bk II, Ch. V, §66 (297: 'This right is a perfect one, – that is to say, it is accompanied with the right of using force in order to assert it').

[85] Ibid., Bk II, Ch. XVIII, §§338–54 (458–67).

[86] Claims Convention (United States–Denmark), 28 March 1830, 80 CTS 463. This became a model for other US indemnity treaties: see Dana, in Wheaton, *Elements of International Law* (8th edn, 1866), v, viii.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:37 Page Number: 21

in some detail. American vessels had been convoyed with British vessels in the Baltic, a practice a Danish edict of 1810 declared to be a justification for capture. Wheaton emphasized that the lawfulness of conduct in the light of internal law, such as the Danish edict, did not cure it of unlawfulness under international law.[87]

The distinction between breach of a substantive rule and responsibility for its breach can also be seen in Wheaton's consideration of an earlier prize case. The case had arisen in the High Court of Admiralty in 1675, after a French privateer had come into English territorial waters in possession of a Hamburg merchant vessel. As a neutral state, England was obliged to make restitution of vessels coming within its jurisdiction after having been seized by a belligerent. The parties contested whether the privateer and its prize really had been in English waters – that is, whether there had been a violation of the substantive rule. Sir Leoline Jenkins found that the vessels had been 'in his Majesty's chambers' and that restitution was required. Wheaton recognized the distinction between the primary rule and the principle of reparation:

> Whatever doubts there may be as to the extent of the territorial jurisdiction thus asserted as entitled to the neutral immunity, there can be none as to the sense entertained by this eminent civilian as to the right and the duty of the neutral sovereign to make restitution where his territory is violated.[88]

It was not until the 1850s that a writer would begin to use recognizably modern language of responsibility in a systematic way. It has been said that while August Wilhelm Heffter 'collected and organized' relevant material, he did not 'contribut[e] much to the analysis of the subject' as a distinct field.[89] Certainly Heffter did not present a comprehensive system of state responsibility. But his *Le Droit International Public de L'Europe* (1857) is notable for its section on 'Faits illicites', which not only used terminology which was to become familiar in the context of state responsibility but also foreshadowed some central debates. For example, he asked whether certain acts could incur criminal responsibility of the state under international law; his answer was negative, but he recognized the importance of the problem. He went on to assert that

[87] Wheaton, 2 *Elements of International Law: with a sketch of the history of the science* (1836), Vol. , §29, 260–78.

[88] Ibid., §§9, 141–3; the paragraph concerns the restitution by the neutral state of property captured within its jurisdiction or otherwise in violation of its neutrality.

[89] Eagleton (1928), 19.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:37 Page Number: 22

[le droit international] regarde comme fait illicites ou comme lésions les atteintes portées sans motifs légitimes aux droits fondamentaux des personnes par lui sauvegardées, notamment à leur liberté, à leur honneur et à leur propriété. Toute lésion semblable oblige l'auteur à la réparer: car les lois de la justice prescrivent que l'équilibre social soit rétabli chaque fois qu'il a été dérangé par une iniquité quelconque.[90]

Heffter also discussed obligations owed to 'the international community as a whole'. He included among these a putative obligation not to attempt world domination ('une tentative sérieuse d'établir un empire universel sur les ruines des États particuliers'), but also the inviolability of diplomats and obligations to suppress piracy and the slave trade.[91] The rights of foreigners were extensively treated in *Le Droit International Public de L'Europe*, but they did not, so to speak, constitute the field of responsibility.

1.3.2 The early twentieth century: Triepel and Anzilotti

From a doctrinal point of view, the treatment of state responsibility as a discrete topic is usually credited to Heinrich Triepel and Dionisio Anzilotti. In Triepel's case, the responsibility of a federal state for the acts of its subordinate territorial units was an influential consideration.[92] The position of the federal state under international law was the subject of his major work, *Völkerrecht und Landesrecht* (1899);[93] Triepel also wrote about German federalism in detail elsewhere.[94] *Völkerrecht und Landesrecht* presented elements of the modern organization of the topic of responsibility, addressing imputation to the state of the conduct of various entities, including individuals,[95] state organs,[96] self-administering public bodies (i.e. public law organizations not part of the state apparatus)[97] and the component units of a federal state.[98] Triepel's focus on imputation was a marked advance. For a federal state, questions of imputation of the acts of the constituent units to the state

[90] Heffter (1857), §101 ('Faits illicites'), 203–4.
[91] Ibid., §104 ('Violations du droit international réprimées partout'), 207–8.
[92] See e.g. Borchard, *The Diplomatic Protection of Citizens Abroad* (1916), 177 n. 1; Eagleton (1928), 20; Strupp, 1 *Éléments du Droit International Public* (2nd edn, 1930), 25; Ago, (1939) 68 Hague *Recueil* 419.
[93] Triepel, *Völkerrecht und Landesrecht* (1899), 359ff., 366ff. Triepel's examination of the application of international law in federal states, including the United States, was identified by his contemporaries as a distinctive contribution: e.g. Bilfinger, (1950) 13 ZaöRV 1, 6.
[94] Triepel, *Unitarismus und föderalismus im Deutschen Reiche* (1907).
[95] Triepel (1899), 324–48. [96] Ibid., 348–55. [97] Ibid., 355–9. [98] Ibid., 359–71.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:37 Page Number: 23

invite formulations of principle, independent of the character of the conduct in question: these units are general governments with fiscal and police powers. A constituent unit may engage in conduct with implications at the international level; to hold that the central government was not responsible for its conduct would have produced a marked inequality between federal and unitary states. Elsewhere Triepel was concerned with the distinction between national law and international law. For example, he stressed that certain rules, although significant for the position of the state as an international legal person (*völkerrecht bedeutsam*), are not themselves rules of international law.[99] He was interested in the distinction between national and international rules, but also with the implications one might have for the other. Thus federalism encouraged thinking about responsibility in a more systematic way.

Anzilotti, writing in the same period, also saw responsibility as a distinct field. Responsibility for injuries to foreigners was Anzilotti's main concern, but within those limits he identified the principal elements of a modern law of state responsibility. Like Triepel, Anzilotti stressed the importance of the rules of attribution:

> La notion de la responsabilité internationale implique l'idée d'un rapport unissant à un État la violation du droit international. En d'autres termes, il faut qu'un acte illicite puisse être rapporté à un État, qu'on puisse le considérer comme son acte à lui, le lui *imputer*.[100]

The existence of an unlawful act Anzilotti treated as prior to attribution. But both elements were required. The prevailing idea that attribution of an act to the state is in all or most cases self-evident, plain from the facts, Anzilotti recognized as erroneous. Instead, he presented attribution as a process of law with its own rules:

> C'est une caractéristique de l'imputation juridique que d'être un pur effet de la règle; une volonté, un acte, sont imputables à un sujet donné seulement parce que la règle l'établit ainsi. L'imputation juridique se distingue nettement par là du rapport de causalité; un fait est juridiquement propre à un sujet, non parce qu'il a été produit ou voulu par ce dernier, dans le sens que ces mots auraient en physiologie ou en psychologie, mais parce que la règle le lui attribue.[101]

[99] An example was the law of imperial succession in the Austro-Hungarian Empire – a rule with international implications but in itself strictly municipal: Triepel (1899), 273.

[100] Anzilotti, (1906) 13 RGDIP 285, 285–6 (emphasis in original).

[101] Anzilotti, *Corso di diritto internazionale: Vol. I: Introduzione e teorie generali* (3rd edn, 1928), 228, as quoted by Ago (1939), 450 n. 1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:38 Page Number: 24

Anzilotti also addressed rules of exception – especially concerning state of necessity – under which otherwise wrongful acts attributed to a state might not attract responsibility;[102] and he outlined the consequences of responsibility, in particular, the obligation to make reparation.[103]

1.3.3 Borchard and Eagleton and the legacy of the Great War

Thus Anzilotti and Triepel had come to see state responsibility as a distinct topic, not just an incident of specific substantive areas of law. But it was during the period from 1914 to 1930 that Anzilotti's and Triepel's appreciation was generalized and more intensive research was directed toward state responsibility. Two of the most significant systematizers were Americans – Edwin Borchard and Clyde Eagleton.

Borchard's 1916 work, *The Diplomatic Protection of Citizens Abroad*, was the outgrowth of his 1914 Ph.D. thesis of the same title. It included five chapters on state responsibility. The organization seems to have owed something to Triepel, although the impetus was Borchard's concern with diplomatic protection, as compared with Triepel, who sought to relate the internal law of a federal system to the international obligations of the state. Borchard began by addressing state responsibility in general outline,[104] and then examined the topic with reference to each of four categories of conduct that might give rise to responsibility: acts of individuals,[105] acts in wartime,[106] breaches of contract[107] and denial of justice.[108] He was alert to the problem of a one-sided portrayal of responsibility: a law of state responsibility deriving its main incidents from investment protection could all too easily be presented as a law for the investor without regard for other interests. Borchard denied that the state is 'a guarantor of the safety of aliens. It is simply bound to provide administrative and judicial machinery which would normally protect the alien in his rights.'[109]

Eagleton added to the development of the topic with his treatise, *The Responsibility of States in International Law* (1928), the first monographic study under that rubric in English. He characterized the topic at the same time as central to international law and as only newly formed:

> States, like individuals, have ever been concerned with their rights rather than their duties. It is nevertheless surprising that so little attention has been given to

[102] Anzilotti (1906), 303–7.
[103] Ibid., 308–9. Anzilotti's first book on the subject was his *Teoria generale della responsabilità dello stato nel diritto internazionale* (1902). See also Marinoni, *La responsabilità degli stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (1913).
[104] Borchard (1916), 177–212. [105] Ibid., 213–45. [106] Ibid., 246–80.
[107] Ibid., 281–329. [108] Ibid., 330–43. [109] Ibid., 179.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:38 Page Number: 25

the subject of the responsibility of states in international law. Only in this century have efforts been made to give it a detached treatment.[110]

Eagleton was clear that state responsibility was not to be explained by straightforward analogy to municipal law concepts of the liability of individuals. Rather, it was a distinct topic of international law, centrally concerned with attribution:

> The duties, as well as the rights, attendant upon territorial jurisdiction, are stated by international law. As a matter of practical operation, then, the responsibility of the state is to be ascertained from the duties of control within its territorial limits and over its agents laid down for it by positive international law. But while the responsibility of a state is . . . based upon the control which it exercises within its borders, it does not follow that the state may be held responsible for any injury occurring therein. The law of nations does not make the state a guarantor of life and property. It is answerable, under international law, only for those injuries which can be fastened upon the state itself.[111]

The structure of his treatise reflects this focus. Chapter II defines different classes of responsible persons; Chapter III addresses attribution to the state through its agents; Chapter IV, the acts of individuals;, Chapter VI, mobs and insurgents. Chapter V discusses the local remedies rule, relating this in particular to diplomatic protection. Chapter VIII deals with reparation. Only Chapter VII, on contractual claims, including denial of justice, strays into what would later be termed the 'primary' or substantive rules of responsibility. Despite the absence of distinct discussion of invocation, countermeasures or circumstances precluding wrongfulness, Eagleton's work involves a recognizable plan of the topic. In doing so it drew on the jurisprudence of the late nineteenth and early twentieth century claims tribunals, whose decisions both created a practical need for a developed law of state responsibility and furnished materials for its distillation.

At a deeper level the law of responsibility was a reaction against theories of auto-limitation and the emphasis on unfettered notions of state sovereignty. The treatise writers of the 1920s saw state responsibility as against a notion of sovereign supremacy which was the effective negation of external responsibility – the nation-state ultimately responsible only to itself. Rather, the emphasis was on state equality as involving subjection to law and respect for the rights of other states. According to Eagleton,

> This exclusive territorial control, which is a legal possession of the state, logically results in the acceptance by that state of responsibility for illegal acts occurring

[110] Eagleton (1928), vii. [111] Ibid., 8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:38 Page Number: 26

within the range of its control. If one nation allows to another a monopoly of jurisdiction within the boundaries of the latter, and thereby excludes itself from the possibility of protecting its own rights therein, this can only be upon the assumption that the latter state makes itself responsible for all internationally illegal acts committed within its control against the former state … The exclusive territorial jurisdiction of the state, which is a concomitant of its independence, is the chief source of its responsibility.[112]

The matter was here presented as an implicit bargain: the state's 'exclusive territorial control' entailed that the state give something back – namely, responsibility 'for all internationally illegal acts committed within its control'. In his 1939 Hague lectures, Roberto Ago saw the whole field of state responsibility as a system of imputation, derived from the claim of the state to hold a special if not exclusive position as legal actor at the international level: 'un fait illicite peut être imputé même à un subjet-personne juridique'.[113]

But if state responsibility was the result of a bargain between states, it was an unspoken bargain, a jural construction: there is little evidence of undertakings between states seen as giving rise to any *general* relation of responsibility. Moreover the question remains why writers came to consider state responsibility as a discrete topic when they did. Eagleton had spent the last years of the First World War in Britain; he saw first-hand the impact of the war on one of the societies severely affected by it. Continental writers felt its impact even more strongly. The logic of responsibility as described by Eagleton, Ago and their contemporaries was not just an internal one – states trading exclusive jurisdiction for a tacit promise to accept responsibility for breaches. It may be seen as a response to the ruinous world of the Great War, and a recall of the practice of responsibility as applied in the last decades of the nineteenth century, from the *Alabama* arbitration[114] to the Venezuela claims[115] and the two Hague peace conferences.[116]

[112] Ibid., 7, citing to similar effect Hall, *International Law* (1880), §11; Hyde, 1 *International Law Chiefly as Interpreted and Applied by the United States* (1922), §266.

[113] Ago (1939), 462.

[114] *Alabama Arbitration (Great Britain v. US)* (1872), in Moore, 1 *Int. Arb.*, 495.

[115] See e.g. *Preferential Treatment of Claims of Blockading Powers against Venezuela (Germany, Great Britain and Italy v. Venezuela)* (1904) 9 RIAA 99. More generally, on the history of the European powers' blockade and bombardment of Venezuelan ports and subsequent claims, see McBeth, *Gunboats, Corruption, and Claims: Foreign Intervention in Venezuela, 1899–1908* (2001).

[116] International Peace Conference, The Hague, 18 May–29 July 1899 and Second International Peace Conference, The Hague, 15 June–18 October 1907. For the

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:38 Page Number: 27

Although already immanent in the discipline, the term 'responsibility' was given wider circulation by the post-war settlement.[117] The Treaty of Versailles of 28 June 1919 fixed on Germany 'responsibility ... for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war'.[118] Article 231 was a political act of the victors; its legal status was questioned, and not only by German revisionists. No one could doubt the vast 'loss and damage' arising from the war, but it was a further step to say that the injuries and costs flowed from Germany's breaches of international obligations, still less that they *all* did. War had been a feature of European politics for centuries, and large financial exactions by the victor after a successful war were not unprecedented: thus Germany had exacted 5 billion gold francs from France in 1871.[119] The First Hague Peace Conference proposed a regime to prevent spoliation by occupying armies but contained no bar on indemnities after war.[120] There were calls from various quarters for a moratorium on war indemnity at the end of the First World War,[121] but Article 231 was a war indemnity disguised in legal language, one which caused endless trouble in the 1920s until it was effectively abandoned in 1932.[122] At the same time it placed issues of responsibility for the major events of

proceedings and the texts of the Conventions adopted, see Scott (ed.), *The Proceedings of the* Hague *Peace Conferences* (1920–1).

[117] In 1919 the word 'responsibility' was not, of course, new. As a legal term it can be traced to the late 18th century. The first use of the word 'responsibility' in French dates from around 1783 – attributed to the French Finance Minister Necker. Hamilton and Madison used it later in the same decade in the Federalist Papers, referring for example to the 'due responsibility in the government to the people' and its relation to the frequency of elections: see Henriot, (1977) 22 APD 59, 60–1. The term derived from the verb *répondre*, to answer to, and it only acquired a distinct legal connotation – the requirement to answer for a breach of an obligation – in the nineteenth century. The Treaty of Versailles, 28 June 1919, 225 CTS 189 nevertheless was a conspicuous use of the word in a context of general political interest.

[118] Art. 231 read as follows: 'The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.'

[119] Ibid., Art. 2. This was confirmed, and the schedule for payment elaborated, in Art. 7 of the Treaty of Frankfurt, 10 May 1871, 143 CTS 164.

[120] Second Hague Convention, 29 July 1899, 187 CTS 429, Arts. 49–51.

[121] E.g. the Social Democratic Party in Germany, which adopted the phrase 'no annexations, no indemnities': Paxson, Corwin and Harding (eds.), *War Cyclopedia* (1918), 196.

[122] See Kent, *The Spoils of War* (1989), for a detailed account of the diplomatic history.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:39 Page Number: 28

international war and peace irrevocably within the domain of the 'legal'; and virtually no textbook after 1919 lacked a separate chapter on the subject. It was against this background of doctrine and practice that the 1930 League of Nations Conference for the Codification of International Law began the task of official codification, a process which would take the rest of the century.

1.3.4 *The* Hague *Codification Conference of 1930*[123]

In 1920, the Advisory Committee of Jurists in charge of drafting the Statute of the Permanent Court of International Justice recommended that the work of the Hague conferences of 1899 and 1907 be continued with a view to codifying and otherwise developing the law of nations.[124] This recommendation was acted upon by the League in 1924, with the Assembly suggesting that the Council convene a committee of experts to identify those areas of international law with respect to which international agreement was 'most desirable and realizable' and, after receiving the comments of states, to report back to the Council on those areas 'sufficiently ripe' for development.[125] The Council responded by establishing the committee, composed of seventeen jurists drawn from a variety of legal traditions.[126]

The committee of experts met in three sessions, in April 1925, January 1926 and April 1927. At its first session, eleven fields of international law were identified for further inquiry by a dedicated subcommittee.[127] One of these was the topic of state responsibility, allocated to a subcommittee of Guerrero (Rapporteur), de Visscher and Wang Chung Hui.[128] The following questions were asked of the subcommittee:

(1) Whether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners;
(2) Whether, and, if so, in what terms it would be possible to contemplate the conclusion of an international convention providing for the ascertainment of the facts which may involve liability on the part of a State

[123] See Rosenne (ed.), 1 *League of Nations: Committee of Experts for the Progressive Codification of International Law* (1972), ci–cii.
[124] Resolution of 24 July 1920, reproduced in (1947) 41 AJIL Supp. 102.
[125] Resolution of 22 September 1924, reproduced in (1947) 41 AJIL Supp. 103.
[126] Resolution of 12 December 1924, reproduced in (1947) 41 AJIL Supp. 104. The chairman of the committee was Hjalmar Hammarskjöld, a former prime minister of Sweden (1914–1917) and a member of the Permanent Court of Arbitration in The Hague. His son, Dag Hammarskjöld, served as the second UN Secretary-General (1953–1961).
[127] LN Doc. C.275.1925.V, reproduced in (1926) 20 AJIL Spec. Supp. 13.
[128] Ibid., 15.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:39 Page Number: 29

> and forbidding in such cases recourse to measures of coercion before the means of pacific settlement have been exhausted.[129]

At the second session[130] the committee considered the reports of the various subcommittees, including that on state responsibility.[131] The report, prepared by Guerrero and Wang Chung Hui,[132] addressed at length both the questions identified above. With respect to the first,[133] it was said:

> As regards the protection of foreigners, customary law lays down certain rules which clearly express the definite will of States regarding the rights which they agree to accord to foreigners, the manner in which foreigners are to be treated, the method of determining the State which is responsible for their protection, and the means of ensuring such protection.[134]

Although focusing on the international minimum standard of treatment for aliens, this first part of the subcommittee's report dealt with a number of general issues including attribution. The subcommittee noted that the internal separation of powers made little difference in identifying the state as the perpetrator of an international act,[135] a principle applicable also to federal subdivisions,[136] and affirmed that while the

[129] Ibid., 14.

[130] LN Doc. C.44.M.21.1926.V, reproduced in (1926) 20 AJIL Spec. Supp. 17.

[131] Ibid., 176–203.

[132] De Visscher was prevented from taking part for reasons undisclosed: ibid., 176 n. 2. The text annexed to the committee's report contained amendments made by Guerrero as Rapporteur following discussions with the committee as a whole: ibid., 176 n. 3.

[133] In the second part of its analysis, the subcommittee considered the possible models for the resolution of disputes arising out of state responsibility. It endorsed the 'international commission of enquiry' as the preferred model (ibid., 198–200), influenced by the role of such a commission in defusing the Dogger Bank affair in 1904, in which a Russian fleet on its way to the Far East (and to defeat at the hands of the Japanese Navy at the Battle of Tsushima in 1905) mistakenly shelled a British fishing fleet: see *Dogger Bank (Great Britain v. Russia)* (1905), reproduced in (1908) 2 AJIL 931.

[134] Ibid., 181.

[135] LN Doc. C.44.M.21.1926.V, reproduced in (1926) 20 AJIL Spec. Supp. 17, 184:
> When we speak of an international act committed by the State, we mean an act done by organs through which the State performs its functions and which enable it to fulfil its international duties ... Every one of these organs, whether it be legislative, administrative [i.e. executive] or judicial can commit an illegal act, contrary to the rights of another State, imputable to the State to which the organs belong, and consequently involving that State's responsibility ...

On the subject of specifically judicial acts (and denial of justice) see ibid., 190–3.

[136] Ibid., 184–5:
> In composite States, the infraction of an international rule by one of the component States of the federation involves the responsibility of the central power, which represents the State in its international relations. The central power may not advance

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:39 Page Number: 30

actions of private individuals (e.g. in the course of a riot or insurrection) could not be directly attributed to the state,[137] states remained obliged to take reasonable steps to prevent injury to foreign persons and their property.[138] The subcommittee further considered the responsibility of the state for the illegal acts of officials, arguing that liability in such a case was dependent on whether or not the official was acting within the scope of their authority[139] – a position contrary to the modern rule.[140]

At the close of the second session, a number of governments commented on the subcommittee's report. Their views were considered by the committee as a whole at its third session. With respect to state responsibility, some twenty-five replied affirmatively and without reservation to the report, including to the question whether codification should be attempted.[141] Four – France, Japan, the Netherlands and Venezuela – registered their opposition, with France arguing that the subject 'too closely affects the internal and external policy of States, their social life and the stability of their institutions' to be a candidate for codification.[142] It was ultimately decided by the committee of experts that 'generally speaking, [all] the above questions, within the limits indicated in the respective questionnaires, are now, in the words of the terms of reference "sufficiently ripe"'.[143]

In September 1927, the Assembly of the League voted to submit the topics of nationality, territorial waters and state responsibility to the 'first' codification conference. It also asked the Council to prepare The Hague to be the venue of the conference, and to secure the appointment of a Preparatory Committee of five experts to prepare an advanced report 'comprising sufficiently detailed bases of discussion on each question'.[144] The Preparatory Committee met in early 1928 to begin the

> the argument that the component State is autonomous; it cannot, more than a centralised State, plead the independence and autonomy of authorities of a member State in order to avoid responsibility . . ..

[137] See also ibid., 189–90, 193–7. [138] Ibid., 185. [139] Ibid., 187–8.

[140] Three years later, the decision of the French-Mexican Claims Commission in *Estate of Jean-Baptiste Caire* v. *Mexico (France/Mexico)*, (1929) 5 RIAA 516, was handed down, later described as a 'precise, detailed and virtually definitive formulation of the principles applicable' on this point: Draft Articles Commentary, Art. 10, §14. Further: Chapter 4.

[141] Including the British Empire, Spain and the United States: ibid., 15.

[142] Ibid., 21. [143] (1928) 22 AJIL Spec. Supp. 1, 3.

[144] Resolution of 27 September 1927, reproduced in (1928) 22 AJIL Spec. Supp. 231. The Preparatory Committee ultimately comprised Jules Basdevant (France), Carlos Castro-Ruiz (Chile), M. J. P. A. François (Netherlands), Sir Cecil Hurst (UK) and Massimo Pilotti (Italy). On its establishment, see Rosenne (ed.), 1 *League of Nations Conference for the Codification of International Law (1930)* (1975), xiii–xvi.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:40 Page Number: 31

process, and in May 1929 completed bases of discussion on the three issues[145] which were in equal parts restatement and progressive development of the law. The bases of discussion on responsibility included a number of now familiar principles. It was unanimously accepted that a state could not plead a provision of its municipal law to escape international responsibility.[146] Legislative, judicial and executive acts were all capable of giving rise to responsibility.[147] State responsibility was held to result from federal subdivisions, such as communes or provinces,[148] but not from the acts of private persons, save in circumstances where the state in question was remiss in its duty to protect the property and person of aliens.[149] The Preparatory Committee also made early forays into justifications and excuses for internationally wrongful acts – considering 'immediate necessity of self defence'[150] and 'the exercise of reprisals against the State to which the foreigner belongs' (i.e. countermeasures)[151] – and remedies.[152]

Following the work of the Preparatory Committee, representatives of forty-eight states met at the Conference proper and debated the bases of discussion through three committees with a view to adopting codifying conventions. State responsibility was allocated to the Third Committee, which held sixteen meetings between 17 March and 11 April 1930.[153] It elected J. Basdevant (France) as Chairman, A. Diaz de Villar (Cuba) as Vice-Chairman, and de Visscher (Belgium) as Rapporteur. A drafting committee composed of Edwin Borchard (United States), G. de Vianna Kelsch (Brazil) and Arrigo Cavaglieri (Italy) was also appointed.[154] It proved to be a comprehensive failure.[155] Despite the encouraging signs in the state responses to the work of the Preparatory Committee, no final agreement could be reached on issues of state responsibility. While some ten of the thirty-three original bases of discussion were adopted, the committee foundered on the issue of whether foreigners were entitled to preferential treatment over nationals of the receiving state. Moreover, the period allocated for the Conference – which was expected to prepare

[145] For the material on state responsibility, see LN Doc. C.75.M.69.1929, reproduced in 2 Rosenne (1975), 423.
[146] Ibid., 439–41 (on which basis it was decided to omit the principle from any proposed convention).
[147] Ibid., 447–511. [148] Ibid., 512–14, 543–6. [149] Ibid., 515–25.
[150] Ibid., 550–2. [151] Ibid., 552–4. [152] Ibid., 568–74.
[153] LN Doc. 351(c).M.145(c).1930.V, reproduced in 4 Rosenne (1975), 1425–661.
[154] 1 Rosenne (1975), xxxiv.
[155] Crawford and Grant, in Grant and Barker (eds.), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (2007) 77, 88.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:40 Page Number: 32

three conventions in a single month – was simply inadequate.[156] The Final Act of the committee indicates that it was simply unable to complete its study of the question, or make any report to the Conference as a whole.[157]

1.3.5 The Harvard Draft Research[158]

The Harvard Draft Research on state responsibility can only be understood in relation to the efforts of the 1930 Hague Conference.[159] Following the identification in 1927 of nationality, territorial waters and state responsibility as the three topics to be considered, the Harvard Law School took it upon itself to assist the Conference through the preparation of draft conventions anticipating the Conference's work.[160] The Faculty appointed Manley O. Hudson as Director of Research, and empanelled an Advisory Committee of fifteen experts to guide the project, which was to be 'undertaken along the general lines followed by the *Institut de Droit International* and the American Law Institute, with a director of research, with a reporter for each of the subjects to be considered . . . and with advisers to assist each of the reporters'.[161] With respect to state responsibility, the Advisory Committee appointed Edwin Borchard as reporter. Ten advisers were then appointed for each topic, and between late 1928 and early 1929 three draft conventions were produced with an accompanying commentary:[162] these were specifically stated to be 'recommended' by the Advisory Committee and 'authorized' by the Faculty of the Harvard Law School.[163]

1.3.5.1 The 1929 Draft

The 1929 Harvard Research Draft for the Responsibility of States for Damage done in their Territory to the Persons or Property of Foreigners[164] was one of the first proposed codifications of the law

[156] 1 Rosenne (1975), xlii. [157] 4 Rosenne (1975), 1600–1.
[158] See Crawford and Grant, in Crawford and Grant (2007).
[159] Grant and Barker (2007), 7–11.
[160] See the editorial comment by M. O. Hudson, 'Editorial Comment: Research in International Law', (1928) 22 AJIL 151, 151.
[161] Ibid., 152.
[162] With respect to state responsibility, these were Phillip Marshall Brown, Charles K. Burdick, William C. Dennis, Clyde Eagleton, Charles E. Hughes, Charles Cheney Hyde, Ellery C. Stowell, George W. Wickersham and Quincy Wright: M. O. Hudson, 'General introduction', (1929) 23 AJIL Spec. Supp. 1, 8.
[163] Ibid., 9. [164] (1929) 23 AJIL Spec. Supp. 131.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:40 Page Number: 33

of state responsibility. In Borchard's introductory comment to the Draft, it was stated that

> This draft has been framed with a desire to depart as little as possible from the existing rules of international law. In some cases it has been recognized that existing practice, while to some extent uniform, has not been accepted as law by all states. In such cases modifications of the prevailing rules have been proposed in order to reconcile, if possible, differences between opposing points of view ... The underlying idea of the draft, therefore, is to combine a restatement of the existing law with proposals for moderate changes which seem necessary to secure the acceptance of the convention by all countries.[165]

The Draft was limited in terms of substance, making '[n]o attempt ... to deal with the responsibility of a state for injuries to other states' that arose out of an armed conflict.[166] It was modest in scope, consisting of some eighteen articles with no organizational headings: '[i]t contained enough to suggest an outline of the topic but not enough to indicate precisely how a fuller codification might proceed.'[167] Notably, it did not extricate the 'primary' rules of investor protection from the now-familiar 'secondary' questions of the attribution of acts of state – a choice reflected in the work of the Preparatory Committee of the Hague Conference and in the work of the Third Committee itself.

But now familiar features were again present. Draft Article 2 provided that '[t]he responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.' Draft Article 3 stated that '[a] state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions'. Draft Article 11 provided that '[a] state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury'; Draft Article 12 made similar provision with respect to the acts of insurgents. Draft Article 13(a) stated that '[i]n the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from the act of the revolutionists committed after their recognition as belligerents',[168] but that it would be responsible if the insurrection was successful.

[165] Ibid., 140. [166] Ibid. [167] Ibid.

[168] States remain free of formal responsibility for the actions of revolutionaries, though the concept of recognition of belligerency is now thoroughly obsolete – a textbook phenomenon sustained against an erratic practice by the notoriety of the American Civil War: W. L. Walker, 'Recognition of belligerency and grant of belligerent rights', (1937) 23 GST 177; Crawford, in Lauterpacht, *Recognition in International Law* (1947, repr.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:41 Page Number: 34

1.3.5.2 The 1961 Draft

State responsibility was one of the fourteen original topics originally selected by the International Law Commission (ILC) for 'codification and progressive development'.[169] That selection was based on a survey of the field undertaken by Hersch Lauterpacht:[170] it identified the 1929 Harvard Research Draft and the 1930 Hague Codification Conference as making a 'notable' contribution to the development of the law, although the results were still self-evidently 'inconclusive'.[171] A further effort was required.

In the course of preparing his second report, the first Special Rapporteur, F. V. García-Amador (Cuba), conferred with the directors of the Harvard Draft Research Project, which by that stage had expanded well beyond its original mandate of assisting the Hague Codification Conference, and become an influential codification project in its own right.[172] By that stage, work had already started in Harvard on the preparation of a revision of the 1929 Draft,[173] which eventually became, in the words of Ago, 'an entirely new draft'.[174] The project was under the general direction of Milton Katz, Louis B. Sohn and Richard Baxter, with Herbert Briggs, Quincy Wright and Philip Jessup providing further advice.[175] The new Draft was, again, intended to be a work of codification in the classic sense,[176] and sought to develop state responsibility through the specific substantive medium of investor protection. As stated in the introductory note,

> It is the purpose of the law of State responsibility to extend the protection of international law to those who travel or live abroad and to facilitate social and economic ties between States. No State, regardless of its political or economic

2013), xxi, xxix. Also L. Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002), 11ff.

169 ILC Ybk 1949/I, 281.

170 A/CN.4/1/Rev.1, 10 February 1949, reproduced in Lauterpacht, 1 *International Law, Being the Collected Papers of Hersch Lauterpacht* (ed. Lauterpacht, 1970–2004) 445.

171 Ibid., 512–13.

172 Grant and Barker (2007), 10–16.

173 As a result of a 1954 suggestion by Yuel-li Liang, Secretary to the ILC and Director of the Codification Division: Crawford and Grant, in Crawford and Grant (2007), 90–1.

174 ILC Ybk 1961/I, 196.

175 The final work was very much a reflection of Sohn and Baxter's vision for the field: Crawford and Grant, in Crawford and Grant (2007), 91. For the full Advisory Committee of the Harvard Draft Research Project as it existed at that time, see L. B. Sohn and R. R. Baxter, 'Responsibility of states for injuries to the economic interests of aliens', (1961) 55 AJIL 545, 546.

176 Sohn and Baxter (1961), 547: '[The purpose of the Draft was] to obviate, as far as possible, the necessity of looking to customary international law'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:41 Page Number: 35

philosophy, can remain indifferent to the mistreatment of its nationals abroad. In an interdependent world the well-being of many countries rests upon an influx of foreign and managerial skills, the owners of which must be given effective protection against unjust persecution or discrimination.[177]

Compared with the 1929 Draft, the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens[178] represents a far more ambitious undertaking.[179] Section A (general principles and scope) contained two provisions on the basic principles of state responsibility (Draft Article 1) and the primacy of international law (Draft Article 2). Beyond this, the Draft reflected the concern with investor protection. Section B (Draft Articles 3–13) was a catalogue of investor rights, concerning areas such as arrest and detention, due process, expropriation, preservation of means of livelihood and the concept of denial of justice. This was further reflected in the provisions dealing with compensation, which were stated not as general principles, but in terms of exactly which investor protection had been breached – thus, Draft Article 5 on arrest and detention corresponded to Draft Article 28 on damages for personal injury and the deprivation of liberty.[180]

The 1961 (and to a lesser extent, the 1929) Draft had a certain influence on the work of the ILC.[181] In particular, their continued conceptualization of state responsibility as a facet of investor protection defined García-Amador's approach to the subject. But this proved unacceptable, a road not taken:[182] under Roberto Ago (Italy) (1963–80), the focus shifted to developing a comprehensive set of secondary rules that would underpin international law as a whole, leaving questions of investor protection to be developed in other ways.[183]

1.4 The work of the International Law Commission

1.4.1 The first reading: 1949–1996

Following the establishment of the ILC in 1947, state responsibility was identified as deserving of early attention. But the issues associated with

[177] Ibid., 545. [178] (1961) 55 AJIL 548.
[179] Crawford and Grant, in Crawford and Grant (2007), 93. [180] Further: ibid., 92–3.
[181] Ibid., 94–100.
[182] See, most evocatively, the criticism of El-Kouri (United Arab Republic), who saw the approach as 'reminiscent of the capitulations system applied in the territories of the Ottoman Empire in the nineteenth century, where aliens were almost a privileged class when compared to nationals': ILC Ybk 1959/I, 141. Further: ibid., 149 (Tunkin); ibid. (Erim); ibid., 150 (Bartoš).
[183] Crawford and Grant, in Crawford and Grant (2007), 102–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:41 Page Number: 36

the responsibility – indeed, the very definition of the field – were to prove intractable.

Work began in 1956 under García-Amador as Special Rapporteur.[184] At this time, the ILC (influenced heavily by the work of the Harvard Research) was particularly focused on state responsibility for injury to aliens and their property, that is to say the content of the substantive rules of law in that sub-field. Six reports were submitted between 1956 and 1961, but the ILC barely considered them, ostensibly due to the demands of other topics including diplomatic immunities, the law of the sea and the law of treaties. It was felt that the disagreement and division that this conception of the field of responsibility attracted would stunt progress, and the topic was set aside. Indeed, García-Amador's reports prompted substantial criticism on matters of both substance and overall approach.[185]

This false start was reversed in 1962, when an intercessional subcommittee of the ILC, chaired by Ago, recommended a focus not on injuries to aliens in particular, but rather on 'the definition of the general rules governing the international responsibility of the state'. In so doing,

> there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.[186]

Ago was appointed Special Rapporteur in 1963, and produced eight reports between 1969 and 1980, including a further substantial addendum to his final report on the subject after his election to the International Court of Justice (ICJ). During his tenure, the ILC provisionally adopted thirty-five articles, together comprising Part I (Origin of state responsibility) of the Draft Articles on State Responsibility.[187]

In 1979, William Riphagen (Netherlands) was appointed Special Rapporteur, presenting seven reports between 1980 and 1986. Ago's achievements were reinforced, with Riphagen presenting a complete set of Draft

[184] On the work of García-Amador, see further Müller, in Crawford, Pellet and Olleson (2010) 69. For his proposals see Appendix 4.

[185] Notably, García-Amador's championing of the individual as a subject of international law was the cause of substantial criticism: First Report, ILC Ybk 1956/II, 197ff. Further: Crawford and Grant, in Crawford and Grant (2007), 89–90; Müller (2010), 72–4.

[186] ILC Ybk 1963/II, 228.

[187] Ago's contribution to the law of state responsibility was prodigious: see Pellet, in Crawford, Pellet and Olleson (2010) 75, 76–83.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:42 Page Number: 37

Articles on Parts II (Content, forms and degrees of international responsibility) and III (Settlement of disputes). However, again owing to the priority given to other topics, only five articles from Part II were adopted by the ILC during this period.

On Riphagen's retirement from the ILC in 1987, Gaetano Arangio-Ruiz (Italy) was appointed Special Rapporteur, presenting eight reports from 1988 to 1996. During this time, the Drafting Committee was able to deal with the remainder of Parts II and III. In 1996 Arangio-Ruiz resigned as Special Rapporteur under curious circumstances,[188] but this did not prevent the ILC from adopting a full set of Draft Articles on first reading (hereafter 'the 1996 Draft Articles').[189]

The 1996 Draft Articles were a significant statement, already much cited by the courts and discussed in the literature. A number of the features of the text could be considered as established, forming basic assumptions for the second reading. The first concerned the general coverage of the text. Part I of the Draft Articles concerned questions of responsibility arising from the breach of any international obligation. No attempt was made to limit the scope of the Draft Articles to obligations owed by states to other states. The Draft Articles did not distinguish between treaty and non-treaty obligations, excluding the notion that international law draws any distinction between responsibility *ex delicto* and *ex contractu*.[190] Nor did they distinguish between obligations of a bilateral or multilateral character. This general approach was affirmed in Draft Article 19(1), which provided that 'An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached'. Later paragraphs of Draft Article 19 drew a highly controversial distinction between international 'crimes' of states and other delicts, but this carried no consequences – beyond the stigma of a state being labelled as 'criminal' – within the text of Part I itself.

Another basal presumption laid down in 1996 concerned the principle of 'objective responsibility', in the sense that the law as codified in the Draft Articles contained no requirement of *mens rea* on the part of a

[188] ILC Ybk 1996/I, 30–1, 46–7. See Arangio-Ruiz, (1998) 81 RDI 110.

[189] ILC Ybk 1996/II(2), 58ff. For the text see Appendix 5.

[190] See e.g. Draft Articles, Arts. 16, 17, the latter proclaiming the irrelevance of 'the origin, whether customary, convention or other' of the obligation breached. Cf. Draft Articles, Art. 40(2)(f), which drew a barely defensible (and wholly inconsistent) distinction between treaties and other rules of international law established for the protection of collective interests. Further *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 550.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:42 Page Number: 38

delinquent state: an act incurring state responsibility could occur even where a state did not undertake the act intentionally or through a failure of due diligence.[191] This superficially formal move in fact addressed a number of problems which, left unresolved, could have caused great doctrinal controversy. It was again consistent with the universal approach to the field, freeing state responsibility from particular categories of rules such as those concerning diplomatic protection and injury to aliens. But too much should not be read into this position.[192] As a set of secondary rules, the silence of the Draft Articles did not indicate an outright prohibition on the attachment of subjective fault to breaches of state responsibility: the position taken was neutral, and while no *mens rea* was ordinarily required on the part of the state, the primary rule could introduce such a requirement in a given context.

This raises the third presumption of the 1996 *acquis*, the distinction between primary and secondary rules.[193] The rules of state responsibility are considered to be secondary rules, governing the application of the primary rules, being those international legal obligations incumbent on states by way of custom or treaty. The necessity of such a distinction was evident from García-Amador's final proposals.[194] Without it, the project was in constant danger of trying to do too much, in effect telling states what obligations they could and could not have.

The Draft Articles, however, contained a number of unresolved difficulties, chief among which was the criminalization of international law contained in Draft Article 19. Reservations as to the terminology of 'crimes' and the implications of Draft Article 19 more generally led to vocal opposition from various states, with the United Kingdom's position being illustrative:

> There is no basis in customary international law for the concept of international crimes. Nor is there a clear need for it. Indeed it is entirely possible that the concept would impede, rather than facilitate, the condemnation of egregious breaches of the law. The proposed draft articles are likely to make it more difficult for the international community to frame the terms of the condemnation so as to match precisely the particular circumstances of each case of

[191] See e.g. Draft Articles, Arts. 1, 3, 40. [192] Gattini, (1999) 10 EJIL 397.
[193] See further David, in Crawford, Pellet and Olleson (2010) 27.
[194] See e.g. ILC Ybk 1961/II, 46. García-Amador's proposals tended towards the hubristic, and included, *inter alia*, a truncated code of human rights, a parallel statement of the rights of aliens and their property and of the relationship between international responsibility and contractual liability, and a rule about the relations of foreign parent companies and local subsidiaries.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:42 Page Number: 39

wrongdoing. By establishing the category of international crimes, the danger of polarizing moral and political judgments into a crude choice between crimes and delicts is increased. There is a real possibility of dissipating international concern with the causes and consequences of wrongful acts by focusing debates on the question whether or not those acts should be classified as international crimes, rather than on the substance of the wrong. There is also a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not.[195]

Other states continued to support the broad notion behind Draft Article 19, but without being wedded to the terminology.[196] Indeed, the ILC footnoted that it was not wedded to it itself.[197]

Further problems which arose out of the Draft Articles included a certain excess of prescription and refinement in Part I, Chapter III, which sought to establish a typology of obligations in international law. In addition, structural problems existed within the provisions of Part II, including in particular

(a) the identification of states entitled to invoke responsibility, either as an 'injured State' or as a state with a more general legal interest in the breach of the obligations;
(b) the implementation of responsibility by injured states and states with a legal interest in the breach (e.g. such issues as the invocation of responsibility and cases involving a plurality of states); and
(c) the legal consequences flowing from the commission of an 'international crime' as defined in Draft Article 19.

Thus, at the close of its forty-eighth session in 1996, the ILC had been presented with a complete set of draft provisions on the law of state responsibility for the first time since the project was slated for codification in 1947. However, the articles so presented exposed a number of controversial issues such that their adoption was, as they stood, impossible. Substantial effort and compromise by the Commission would be required during the second reading.

1.4.2 The second reading: 1998–2001

In 1997 the ILC appointed the author as Special Rapporteur and committed to completing the second reading of the Draft Articles by 2001.[198]

[195] ILC Ybk 1998/II(1), 120.
[196] See e.g. ibid., 113 (Austria), 114 (Czech Republic), 115 (Denmark, on behalf of the Nordic countries), 115–16 (France), 116–18 (Ireland).
[197] ILC Ybk 1996/II(2), 63. [198] On the process see further Pellet (2010), 83–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:43 Page Number: 40

Three major issues were identified as requiring reconsideration: international crimes of states, the regime of countermeasures and settlement of disputes.[199]

Unsurprisingly, a great deal of discussion took place within the Commission on the vexed question of Draft Article 19 and the concept of international crimes of states. Initially put to one side to enable consensus to be reached on other issues, the provision was ultimately deleted outright. However, the idea of a hierarchy of international legal norms did not disappear entirely from the project. Within the framework of Part II of the Draft Articles, provision was made for special consequences applicable to 'serious breaches of obligations owed to the international community as a whole': these included the possibility of aggravated damages as well as certain obligations on the part of third states not to recognize a breach of such norms or a state of affairs arising therefrom as lawful. All states were also under an obligation to co-operate in order to suppress such situations.[200] But this formulation proved too broad and had to be narrowed further still to secure adoption: the concept of aggravated damages was abandoned outright and the duties of non-recognition and of co-operative suppression were limited to circumstances in which the breach complained of was of a peremptory or *jus cogens* norm.[201] Finally, it was recognized that every state had the capacity to invoke state responsibility for breaches of obligations owed to the international community as a whole, irrespective of their seriousness.

Another suite of issues addressed by the ILC during the second reading concerned Part III, Chapter I, and the invocation of responsibility. The first such problem was Draft Article 40, which considered the invocation of responsibility by 'non-injured' states where an *erga omnes* norm was breached. Concerned that the provision of standing to all states in such cases would lead to a tsunami of international litigation, the ILC created two entirely new provisions. The first, which when finally adopted became Article 42, defined in narrower and more precise terms the concept of the injured state, drawing on the analogy of Article 60(2) of the Vienna Convention on the Law of Treaties.[202] The second, finally adopted as Article 48, dealt with the invocation of responsibility in the collective interest – particularly in relation to obligations *erga*

[199] ILC Ybk 1997/II(2), 11, 58.
[200] See Draft Arts. 41, 42 adopted in 2000: Crawford, Third Report, 106–9.
[201] Crawford, Fourth Report, 12–4. [202] 22 May 1969, 1155 UNTS 331.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:43 Page Number: 41

omnes – thus giving effect to the dictum of the International Court in the *Barcelona Traction* case.[203] Of additional concern was whether reparation was available to injured and non-injured states alike in the case of a breach of multilateral or communitarian norms. The ILC decided that the position of the broader class of states interested in the breach of a collective or community obligation was subsidiary to that of a state which had suffered actual damage: thus, although 'non-injured' states possessed standing with respect to the breach of a communitarian norm, their remedies were limited under the terms of what would become Article 49 to the right to call for cessation of the act in question and to seek assurances of non-repetition. The right of such states to reparation was limited to doing so only in the name of the injured state – that is, the state most interested in the outcome of the dispute.

The second reading also saw substantial amendments to the Draft Articles' consideration of countermeasures, with the relevant provisions moved from Part II, Chapter III, to a new Part III dealing with the implementation of responsibility. There, they were refined and developed further to stress the instrumental function of countermeasures in ensuring compliance[204] to prohibit certain categories of countermeasures[205] and to clarify the procedural conditions for their exercise.[206] These amendments would prove to be the most controversial aspect of the provisional text adopted by the ILC in 2000.

On 31 May 2001, the ILC adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), a set of fifty-nine provisions and associated commentary.[207] On 12 December 2001, the United Nations General Assembly (UNGA) took note of the Articles, annexed the text to GA Resolution 56/83 and recommended it to all governments without prejudice to their future adoption or other appropriate action.[208] This was in line with the ILC's recommendation that the ARSIWA be annexed to a resolution of the General Assembly pursuant to Article 23(b) of the ILC Statute,[209] and that the Assembly

[203] *Barcelona Traction, Light & Power Company, Limited (Spain v. Belgium)*, Second Phase, ICJ Rep. 1970 p. 3, at 32.
[204] A position endorsed by the International Court in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, at 56–7.
[205] Ultimately adopted as ARSIWA, Art. 50 (Obligations not affected by countermeasures).
[206] Ultimately adopted as ARSIWA, Art. 52 (Conditions relating to resort to countermeasures).
[207] ILC Ybk 2001/II(2), 26ff. [208] GA Res. 56/83, 12 December 2001, §§3–4.
[209] GA Res. 174(II), 21 November 1947.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:43 Page Number: 42

then consider 'at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles ... with a view to concluding a convention on the topic'.[210] The ILC's recommendation was a compromise between those members of the Commission who believed that the ARSIWA would serve the international legal order best as simply evidence of international law,[211] and those who thought that the potential of the Articles could only be realized via their adoption as an international convention – that is, a source of law in its own right.[212]

1.4.3 Responses to the 2001 Articles

The General Assembly in 2004 adjourned its decision as to the final form of the Articles,[213] deferring again in 2007[214] and in 2010.[215] On each occasion, the Assembly requested that the Secretary-General solicit comments from members as to how the matter was to proceed. Those few states that were minded to comment (usually Western) were generally opposed to the idea of subjecting the ARSIWA to a full diplomatic convention, which would have the potential to introduce disagreement and compromise additional to that which had already delayed by some forty years the codification of state responsibility.[216] The opinion of the United Kingdom is illustrative:

> It is difficult to see what would be gained by the adoption of a convention ... The draft articles are already proving their worth and are entering the fabric of international law through State practice, decisions of courts and tribunals and writings. They are referred to consistently in the work of foreign ministries and other Government departments. The impact of the draft articles on international law will only increase with time, as is demonstrated by the growing number of references to the draft articles in recent years.
>
> This achievement should not be put at risk lightly ... [T]here is a real risk that in moving towards the adoption of a convention based on the draft articles old

[210] ILC Ybk 2001/II(2), 25.
[211] That is: not a source of law proper within the meaning of Statute of the International Court of Justice, 26 June 1945, 2187 UNTS 3, Art. 38(1)(a)-(c), but a 'subsidiary means for the determination of rules of law' within the meaning of Art. 38(1)(d).
[212] See further Pellet (2010), 86–7.
[213] GA Res. 59/35, 16 December 2004.
[214] GA Res. 62/61, 6 December 2007.
[215] GA Res. 65/19, 6 December 2010. The subject is due for reconsideration at the 68th session of the GA (2013).
[216] See e.g. UN Doc. A/62/63; UN Doc. A/62/63 Add.1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:44 Page Number: 43

issues may be reopened. This would result in a series of fruitless debates that may unravel the text of the draft articles and weaken the current consensus. It may well be that the international community is left with nothing . . . Even were a text to be agreed, it is unlikely that the text would enjoy the wide support currently accorded to the draft articles . . . If few States were to ratify a convention, that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterized by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect, may serve to undermine the current status of the draft articles and may be a 'limping' convention, with little or no practical effect.[217]

Accompanying the various state views in 2007 on the Articles was a document containing no less than 129 cases before international or domestic courts and tribunals where the ARSIWA or the Draft Articles on first reading were referred to with approval.[218] The Articles are an active and useful part of the process of international law. They are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility,[219] as demonstrated, for example by the International Court in the *Bosnian Genocide* case:

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.[220]

[217] UN Doc. A/62/63, 6. See also the comments of the Nordic countries per Norway (ibid., 4) and the US (UN Doc. A/62/63 Add.1, 2).

[218] These were collected by the Secretary-General in applying the terms of GA Res. 59/35, 2 December 2004: UN Doc. A/62/62; UN Doc. A/62/62 Add.1.

[219] See e.g. Hober, in Muchlinski, Ortino and Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 549, 553 ('there is a general consensus the [ARSIWA] accurately reflect customary international law on state responsibility.').

[220] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, at 209 (emphasis added). Application of the ARSIWA as reflective of custom has been particularly prevalent in the field of investor-state arbitration: see e.g. *Noble Ventures Inc*. v. *Romania*, ICSID Case No. ARB/01/11, 12 October 2005, §69 ('While [the ARSIWA] are not binding, they are widely regarded as a codification of customary international law.'); *EDF (Services) Ltd* v. *Romania*, ICSID Case No. ARB/05/13, 8 October 2009,

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 1 Title Name: CRAWFORD
Date:18/3/13 Time:10:46:44 Page Number: 44

Until such time as the General Assembly reaches a definite position as to the final form of the ARSIWA, they will continue to contribute to international law, and be further consolidated and refined through their application by courts and tribunals.

§187 n. 7 ('The [ARSIWA] have been frequently applied by courts and arbitral tribunals as declaratory of customary international law'). On the question of a Convention on State Responsibility see further Chapter 2.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:25 Page Number: 45

2 Key concepts

2.1 The modern synthesis[1]

2.1.1 The International Law Commission's codification

The ILC Articles represent the modern framework of state responsibility. The fifty-nine articles are divided into four parts and ten chapters. Part One, Chapter I sets out certain general principles of state responsibility which are well established – even axiomatic. For example, Article 3 provides that a state may not rely on its internal law to justify failure to comply with its international obligations. That principle emerged first in the *Alabama* arbitration in 1871,[2] and thus was present at the beginning of the modern era of international dispute settlement. Part One, Chapter II deals with the important topic of attribution of conduct to a state – in effect defining the public sector for the purposes of responsibility. Article 4 states the basic rule that conduct of any state organ is attributable to that state as a matter of international law. Article 5 deals with persons or entities empowered to exercise elements of governmental authority. Article 6 addresses the special situation in which the organs of one state are placed at the disposal of another state. Article 7 deals with *ultra vires* acts of organs or entities: conduct by a state organ, person or entity exercising governmental authority is to be considered an act of state under international law even if it exceeds its authority or disobeys instructions. Articles 8–11 deal with additional cases in which conduct is attributable by analogy with the concept of agency (though the term 'agent' is not used).

[1] See also Crawford, 'State responsibility', (2006) MPEPIL; *Brownlie's Principles*, chs. 25–27.
[2] *Alabama Arbitration (Great Britain v. US)* (1872), in Moore, 1 *Int. Arb.*, 495. Further: Bingham, (2005) 54 ICLQ 1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:26 Page Number: 46

Part One, Chapter III is concerned with certain general aspects of the breach of international obligations. Article 12 defines in an abstract way what may be considered the breach of an obligation by a state – that is, when an act is not in conformity with an obligation incumbent on that state under international law. Article 13 sets out the principle that a state is only responsible for a breach if the obligation in question was in force for the state at the time at which the act was committed. Article 14 introduces the concept of continuing breach of obligations. Article 15 deals with breaches consisting of composite acts, a significant topic when considering systemic conduct such as certain war crimes,[3] crimes against humanity[4] and genocide.[5]

Part One, Chapter IV is concerned with additional elements of state responsibility in connexion with the acts of other states – what under systems of municipal law would be described variously as aiding and abetting, complicity and so on. Article 16 deals with the provision of aid or assistance by one state with a view to assisting in the commission of a wrongful act by another state. Article 17 is concerned with the situation where a state exercises direction or control over another state in the commission of a wrongful act, Article 18 dealing with the more extreme case of outright coercion between states. Article 19 affirms that the attribution of responsibility to an assisting, directing or coercing state is without prejudice to the responsibility of the state that actually committed the internationally wrongful act.

Part One, Chapter V establishes six 'defences' – circumstances precluding the wrongfulness of conduct which would otherwise be in breach of a state's international obligations. These are to be distinguished from the grounds for suspension or termination of the obligation itself, for example suspension or termination of a treaty obligation under the law of treaties.[6] These exculpatory grounds are: consent (Article 20), self-defence in conformity with the UN Charter (Article 21), countermeasures in accordance with Part III, Chapter II (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25).

Part Two of the ARSIWA, entitled 'Content of the international responsibility of a state', is concerned with the consequences which flow by operation of law from the commission of an internationally wrongful

[3] Further: Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, Art. 8.
[4] ICC Statute, Art. 7. [5] ICC Statute, Art. 6.
[6] Further: Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Pt V, §§3–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:26 Page Number: 47

act. Chapter I expresses certain – largely uncontroversial – basic principles: the responsible state is under a duty to continue to perform an obligation breached (Article 29) and to cease the wrongful act (Article 30). That state must make full reparation for any injury suffered, whether material or moral, that flows from its wrongful conduct (Article 31). Consistent with Article 3, it may not plead the provisions of its internal law as a defence (Article 32). It is affirmed that the obligations set out in Part Two may be owed by the responsible state to another state, to several or many states, or to the international community as a whole (Article 33).

Chapter II of Part Two is concerned with the various aspects of reparation for injury suffered, addressing the forms of reparation (Article 34), restitution (Article 35), compensation (Article 36), satisfaction (Article 37), interest (Article 38) and the contribution of the injured state to the eventual injury (Article 39).

Chapter III concerns the controversial subject of serious breaches of peremptory norms of international law, the compromise reached by the ILC following the conclusion that the concept of 'international crimes' contained in Draft Article 19 (1996) was functionally unworkable. Article 40 sets out the scope of the chapter, and is followed by provisions regarding consequences of breach under the chapter (Article 41), which include obligations on all states: (1) to bring any continuing situation caused by the breach of a peremptory norm to an end through lawful cooperation; and (2) to withhold recognition of any such continuing situation as lawful.

Part Three concerns the implementation of the international responsibility of a state. Chapter I is concerned with the invocation of responsibility itself – an issue which might be analogized to municipal law concepts of standing or the possession of an actionable claim or cause of action. Article 42 proved a point of controversy during the second reading. It provides that a state is entitled to invoke the responsibility of another state where the norm allegedly breached is owed: (a) to that state individually; or (b) to a group of states including that state (a multilateral norm) or to the international community as a whole (a communitarian norm or obligation *erga omnes*) and the breach of the obligation (i) specifically affects that state, or (ii) is of such a character as radically to change the position of all other states to which the obligation is owed with respect to the future performance of the obligation. It is paired conceptually with Article 48, which reiterates the capacity to claim for breach of multilateral or communitarian norms, but limits the remedies

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:26 Page Number: 48

available to non-injured states to cessation of the unlawful act combined with assurances of non-repetition; a non-injured state may only claim reparations in the interest of an injured state or any beneficiary of obligation breached. The balance of the chapter deals with consequential and procedural issues – including notice of claim (Article 43), admissibility (Article 44), waiver and acquiescence (Article 45), joint claims (Article 46) and joint responsibility (Article 47).

Part Three, Chapter II deals with countermeasures. The subject proved a vexed one, with some states questioning the wisdom of including them in the ILC's work at all. Countermeasures are measures, otherwise unlawful, taken against another state in response to an unlawful act by that state and with a view to obtaining cessation and/or reparation. This definition was not included in the final text, but Article 49 sets out the object and limits of countermeasures, restricting them in paragraph (2) to 'the non-performance *for the time being* of international obligations of the State taking the measures towards the responsible State' (emphasis added), language that emphasizes the temporary and remedial character of countermeasures. Article 50 reserves several categories of international obligations – that is, human rights, humanitarian and peremptory norms – from suspension by way of countermeasures and affirms that countermeasures do not relieve the suspending state from any obligation of dispute settlement with the target state. Article 51 stipulates that countermeasures must be proportionate, and Article 52 places further conditions on the taking of countermeasures. Article 53 deals with the termination of countermeasures. The right of 'non-injured' states to take countermeasures under Article 48(1) is expressly reserved in Article 54.

Part Four contains certain general provisions. Article 55 provides that the ARSIWA do not prevail over any *lex specialis*, that is to say any more specific provision, dealing with an issue otherwise covered by the Articles but in terms or in a manner which indicates that the special provision is to prevail. Article 56 is a saving clause, providing that the international law rules of state responsibility continue to govern questions of state responsibility to the extent not regulated by the ARSIWA. Articles 57 and 58 note that the content of the ARSIWA is without prejudice to the question of responsibility for international organizations[7]

[7] The ILC concluded its work on the responsibility of international organizations for internationally unlawful acts in 2011, adopting a set of draft articles with commentary: DARIO and Commentary.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:27 Page Number: 49

and individuals under international law.[8] Article 59 reserves issues arising under the United Nations Charter.

2.1.2 *The modern concept of state responsibility*

The essential premise of the ARSIWA – the concept of state responsibility itself – is introduced in Article 1:

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

On an initial reading, Article 1 seems to state the obvious. But there are several things it does not say, and its importance lies in these silences. First, it does not spell out any general preconditions for responsibility in international law, such as 'fault' on the part of the wrongdoing state, or 'damage' suffered by any injured state.[9] Second, it does not identify the state or states, or the other international legal persons, to which international responsibility is owed.[10] It thus does not follow the tradition of treating international responsibility as a secondary legal relationship of an essentially bilateral character (a relationship of the wrongdoing state with the injured state or, if there happens to be more than one injured state, with each of those states separately). Rather, it appears to present the situation of responsibility as an 'objective correlative' of the commission of an internationally wrongful act.

Before turning to these two aspects, certain less controversial points may be noted about Article 1. First, the term 'internationally wrongful act' is intended to cover all wrongful conduct of a state, whether it arises from positive action or from an omission or a failure to act.[11] This is

[8] The position of the individual in international law has not as yet been taken up by the ILC as a whole, though it has considered and concluded draft articles on certain related sub-topics, notably on questions of nationality, including statelessness: ILC Ybk 1954/II, 147. For a review of the question as whole, see Parlett, *The Individual in the International Legal System* (2011).

[9] These silences pertain to ARSIWA, Art. 2, as much as, or even more than, Art. 1, since they relate to the question whether there has been a breach of an international obligation. For the sake of convenience, the issues are discussed here.

[10] Although phrased in terms of statehood, this basal notion is applicable to all international legal persons; thus, in its work on the responsibility of international organizations, the ILC has used precisely the same formulation as ARSIWA, Art. 1. Those entities which are not as such subjects of international law – i.e. individuals, corporations and non-governmental organizations – are not yet covered by the general regime.

[11] Draft Articles Commentary, Art. 1, §14. The Draft Articles were adopted sporadically during the tenures of Special Rapporteurs Ago, Riphagen and Arangio-Ruiz, and while the commentary to Part I is collected in Rosenne (ed.), *The International Law Commission's*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:27 Page Number: 50

more clearly conveyed by the French and the Spanish than by the English text, but the point is made clear also in Article 2, which refers to 'conduct consisting of an action or omission'.

Second, conduct which is 'internationally wrongful' entails international responsibility. ARSIWA Articles 20–25 deal with circumstances which exclude wrongfulness and, thus, international responsibility in the full sense. Article 27(b) reserves the possibility that compensation may be payable for harm resulting from acts otherwise unlawful, the wrongfulness of which is precluded under certain of these articles. The commentary to Draft Article 1 went further, suggesting that it leaves open the possibility of '"international responsibility" – if that is the right term – for the harmful consequences of certain activities which are not prohibited by international law'.[12] Since 1976 the ILC had grappled with the question of 'liability' for harmful consequences of acts not prohibited by international law. Its relative lack of success in that endeavour was due, in part at least, to the failure to develop a terminology in languages other than English which is capable of distinguishing 'liability' for lawful conduct causing harm, on the one hand, and responsibility for wrongful conduct, on the other. That experience tends to suggest that the term 'state responsibility' in international law is limited to responsibility for wrongful conduct, even though Article 1 was intended to leave that question open. Obligations to compensate for damage not arising from wrongful conduct are best seen either as conditions on the lawfulness of the conduct concerned, or as discrete primary obligations to compensate for harm actually caused. In any event, except in the specific and limited context of Article 27(b), such obligations fall outside the scope of the ARSIWA.[13]

Third, in stating that every wrongful act of a state entails the international responsibility of *that* state, ARSIWA Article 1 affirms the basic

Draft Articles on State Responsibility: Part 1, Articles 1–35 (1991), the commentary to Parts II and III is scattered throughout the yearbooks from 1983 to 1996, as listed in the table of abbreviations.

[12] Draft Articles Commentary, Art. 1, §13.

[13] Between 1974 and 1997, the ILC considered the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The topic was eventually subdivided into two further topics: the prevention of transboundary damage from hazardous activities (draft articles and commentary adopted in 2001: ILC Ybk 2001/II(2), 144), and international liability in case of loss from transboundary harm arising out of hazardous activities (draft articles and commentary adopted in 2006: ILC Report 2006, UN Doc. A/61/10, 101). For commentary see Boyle, in Crawford, Pellet and Olleson (2010) 95.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:27 Page Number: 51

principle that each state is responsible for its own wrongful conduct. The commentary notes that this is without prejudice to the possibility that another state may also be responsible for the same wrongful conduct, for example if it has occurred under the control of the latter state or on its authority.[14] Some aspects of the question of the involvement or implication of a state in the wrongful conduct of another are dealt with in Articles 16 to 18. There is also the possibility of concurrent responsibility between a state and an international organization.[15]

2.2 The language of state responsibility[16]

2.2.1 Typology of state responsibility

Municipal legal systems will often distinguish types or degrees of liability according to the source of the obligation breached – for example crime, contract, tort or delict.[17] No such general distinction appears in international law. As was said in *Rainbow Warrior*,

> [T]he general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that the violation of a State of any obligation, of whatever origin gives rise to State responsibility . . .[18]

[14] Draft Articles Commentary, Art. 1, §§7, 11.

[15] E.g. the decisions of the Hague Court of Appeal in *Nuhanović* v. *Netherlands*, LJN: BR5388, 5 July 2011; *Mustafić* v. *Netherlands*, LJN: BR5386, 5 July 2011; DARIO, Arts. 14–18, 48, 58–62.

[16] The Draft Articles were expressed in terms of 'the State which has committed an internationally wrongful act'. Aside from being cumbersome, this terminology was deficient in that its tense impliedly captured only those acts which had already occurred, while excluding situations created by illegal actions which had commenced but had not been abated, e.g. the occupation of territory unlawfully acquired. The Court in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, at 52, 56, preferred the term 'wrongdoing State'; the ILC settling on 'responsible State', which has the further advantage that it does not seem to prejudice the question of wrongdoing. See Crawford, First Report, 24–6.

[17] Cf. the division of obligations in Roman law between contract, delict and quasi-contract/unjust enrichment: 'Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere' ('The precepts of the law are these: to live honestly, to injure no one, and to give every man his due'): *Institutes of Justinian* (533), Bk 1, Title 1, §3 (trans. Moyle, 5th edn, 1913).

[18] *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 551. For the arguments of the parties: ibid., 547–50. See also *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, at 38–9: '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', citing what is now ARSIWA, Art. 12: 'There is a breach of an international obligation by a State

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:28 Page Number: 52

To this extent the rules of state responsibility form a single system, without any precise comparator in national legal systems. The fact is that international law has to address a wide range of needs on the basis of a few basic tools and techniques. For example, treaties may perform a variety of functions – legislative or quasi-constitutional (e.g. by establishing international institutions or organizations in the global public interest) or contractual (e.g. via a bilateral trade or loan agreement). The obligation arises from the same species of legal instrument; unlike national law, there is no categorical distinction between the legislative and the contractual.

The tribunal in the *Rainbow Warrior* arbitration[19] and the International Court in *Gabčíkovo-Nagymaros*[20] both held that in a case involving the breach of a treaty obligation, the general defences available under the law of state responsibility coexist with the rules of treaty law, laid down in the Vienna Convention on the Law of Treaties (VCLT). However, the two perform different functions. The rules of treaty law determine when a treaty obligation is in force for a state and what it means – that is, how it is to be interpreted. Conversely, the laws of state responsibility determine the legal consequences of the breach in terms of such matters as reparation. A state faced with a material breach of a treaty obligation may choose to suspend or terminate the treaty in accordance with the applicable rules of treaty law, thereby freeing itself from the burden of reciprocity,[21] but such an act does not prevent it from making a claim for reparation flowing from the breach.[22]

National legal systems commonly distinguish 'civil' from 'criminal' responsibility, although the relations between the two differ markedly between various systems and may well overlap – particularly in fields such as competition law and other 'regulatory' spheres. By contrast, there is little or no state practice to support 'punitive' or 'penal' consequences for breaches of international law. Although the ILC's Draft Articles as adopted on first reading in 1996 sought to introduce a notion of 'international crimes' of states in Draft Article 19, the concept was not supported by state practice, and caused substantial disagreement within the Commission and in the UNGA Sixth (Legal)

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*' (emphasis added).

[19] (1990) 82 ILR 500, 551. [20] ICJ Rep. 1997 p. 7, at 38–9.

[21] VCLT, Art. 60.

[22] Thus a state may terminate a treaty for breach while claiming damages for breaches which have already occurred: VCLT, Arts. 70(1)(b), 72(1)(b), 73.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:28 Page Number: 53

Committee.[23] The concept was set aside in 1998 and dropped definitively in 2001, clearing the way for the ARSIWA to be adopted without opposition. This episode again suggests that state responsibility eschews any division between 'criminal' and 'civil' illegality. That approach was explicitly endorsed by the International Court in the *Genocide* case in the following passage:

> The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide . . . [has] been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity . . . Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction . . . to find a State responsible if genocide . . . [is] committed by its organs, or persons or groups whose acts are attributable to it . . . Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.[24]

But this does not prevent international law from responding appropriately to different kinds of breach and their different impacts on other states, on people and on the international legal order. First, individual state officials have no impunity if they commit crimes against international law, even if they may not have been acting for their own individual ends but in the interests or perceived interests of the state. Second, the ARSIWA make special provision for the consequences of certain serious breaches of peremptory norms of international law: see Articles 40, 41. A breach is serious where it involves a 'gross or systemic

[23] No state has ever been accused of criminal conduct before an international court, even where the conduct in question was redolent of genocide, aggression or any other form of acknowledged international crime: de Hoogh, *Obligations* Erga Omnes *and International Crimes* (1996); Abi-Saab, (1999) 10 EJIL 339; Jørgensen, *The Responsibility of States for International Crimes* (2000); Pellet, (2001) 32 NYIL 55; J. Crawford, 'International crimes of states', in Crawford, Pellet and Olleson (2010) 405.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 119–20. See also *Prosecutor* v. *Blaškić*, Objection to the Issue of *Subpoenae Duces Tecum*, (1997) 110 ILR 607.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:28 Page Number: 54

failure by the responsible State to fulfil' such an obligation.[25] The main consequence of such a breach is the obligation of all other states to refrain from recognizing as lawful the situation thereby created, or from rendering aid or assistance in maintaining it.[26] In addition, states should co-operate to bring the serious breach to an end 'through any lawful means'.[27] The principal avenues for such co-operation are the international organizations, most notably the UN Security Council, whose powers to take non-forcible and even forcible measures to restore international peace and security substantially overlap with these provisions.[28] But the possibility remains of individual state action seeking remedies against states responsible for such serious breaches as genocide, war crimes, or the denial of fundamental human rights.[29]

2.2.2 Prerequisites for the invocation of responsibility

2.2.2.1 The debate over 'damage' and 'injury'

A key question in the drafting of the ARSIWA was that of the prerequisites to the invocation of responsibility – that is, the extent of the harm, damage or injury required for a state to invoke the responsibility of another state for an internationally wrongful act. Although the responsibility of a state arises independently of its invocation by another state, it is necessary to specify what other states faced with a breach of an international obligation may do to secure the performance of the obligations of cessation and reparation incumbent on the responsible state.

Following the adoption of Part I of the Draft Articles during Ago's tenure as Special Rapporteur, it became clear that the two terms 'damage' and 'injury' were problematic. Both terms were ultimately preserved in the ARSIWA, which use 'injury' and 'injured State' throughout; with 'injury' defined (perhaps not very felicitously) in Article 31(2) to include 'any damage, whether moral or material, caused by the internationally wrongful act of a State'. As to the basic distinction between 'injury' and

[25] ARSIWA, Art. 40(2). [26] ARSIWA, Art. 41(2).

[27] See further *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136, 200.

[28] Further Koskenniemi, (2001) 72 BYIL 337.

[29] E.g. states may adopt measures which are not inconsistent with their international obligations (retorsion). In addition, a right may exist allowing states which themselves are not injured to take countermeasures in the case of breach of certain types of obligations. See, e.g., the catalogue of state practice discussed in the commentary to ARSIWA, Art. 54(3) and (4), which may be evidence of such a customary rule. The question was ultimately left open by the ILC for future development in Art. 54. See Chapter 11.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:29 Page Number: 55

'damage', it is clear that 'injury' involves the concept of a 'legal injury' or *iniuria*, whereas the term 'damage' refers to material or other loss suffered by the injured state. Thus the term 'damage' is used to refer to actual harm suffered;[30] a further distinction, drawn between 'economically assessable damage' and 'moral damage' in Draft Articles 44 and 45, was eventually discarded.[31] Equally clearly, an injured state is one whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act.

Following the adoption of Part I, a number of governments questioned whether a specific requirement of actual 'damage' should not be included in the basic definition of state responsibility in Draft Articles 1 and/or 3[32] – put another way, whether the mere breach of an international obligation should be considered as not actionable per se. In the view of Argentina,

> in the case of a wrongful act caused by one State to another ... the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim. In a similar vein, it has been stated that even in the human rights protection treaties ... the damage requirement cannot be denied. What is involved is actually a moral damage suffered by the other States parties ... [T]he damage requirement is, in reality, an expression of the basic moral principle which stipulates that no one undertakes an action without an interest of a legal nature.[33]

Similarly, France argued that responsibility could only exist vis-à-vis another injured state, which must have suffered moral or material injury. In relation to the Draft Articles, it stated:

> [T]he existence of damage is an indispensable element of the very definition of State responsibility ... International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State. Accordingly, if the wrongful act of State A has not injured State B, no international responsibility of State A with respect to State B will be entailed. Without damage, there is no international responsibility.[34]

France thus proposed the addition to Draft Article 1 of the words 'vis-à-vis injured States', and a comprehensive redrafting of Draft Article 40 to incorporate the requirement of 'material or moral damage' in all cases except breaches of fundamental human rights.[35]

[30] See ARSIWA, Arts. 31, 36(1) and (2), 47. [31] Crawford, Third Report, 54.
[32] Later ARSIWA, Art. 2. [33] ILC Ybk 1998/II(1), 103. [34] Ibid., 101.
[35] Ibid., 101–2, 138–9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:29 Page Number: 56

A number of other governments, by contrast, approved the principles underlying what would become Articles 1 and 3. They included Austria, Germany, Italy, Mongolia, the Nordic countries and the United Kingdom. Germany, for example, regarded Draft Article 1 as expressing a 'well-accepted general principle'.[36] Similarly, the position taken in Draft Articles 1 and 3 was generally approved of in the literature on these articles following their initial adoption by the ILC in 1973.[37] The case law prior to the adoption of the Draft Articles as a whole was similarly supportive, the most directly relevant decision prior to 1996 being the *Rainbow Warrior*, which concerned the failure by France to keep two of its agents in confinement on the island of Hao, as had been previously agreed between France and New Zealand. It was argued by France that its failure to return the agents to the island did not entitle New Zealand to any relief. Since there was no indication that 'the slightest damage has been suffered, even moral damage', the argument ran, there was no basis for international responsibility. New Zealand referred, *inter alia*, to Draft Articles 1 and 3, and denied that there was any separate requirement of 'damage' for the breach of a treaty obligation. In oral argument France accepted that in addition to material or economic damage there could be 'moral and even legal damage'. The France–New Zealand Arbitration Tribunal held that the failure to return the two agents to the island 'caused a new, additional non-material damage ... of a moral, political and legal nature'.[38]

Although the *Rainbow Warrior* tribunal was thus able to avoid pronouncing directly on Draft Articles 1 and 3, the breadth of its formulation ('damage ... of a moral, political and legal nature') suggested that there was no logical stopping place between, on the one hand, the traditional and relatively narrow concept of 'moral damage' and, on the other hand, the broader conception of legal damage arising from the breach of a state's right to the performance of an obligation. The reasoning behind this conclusion is clear enough. It had at that stage long been accepted that states may assume international obligations on virtually any subject and having, in principle, any content.[39] Within

[36] Ibid., 101 (Austria, Denmark on behalf of the Nordic countries), 102 (Germany, United Kingdom), 104 (Mongolia).

[37] See e.g. Reuter, in 2 *Estudios de derecho internacional: Homenaje al profesor Miaja de la Muela* (1979) 837; Tanzi, in Spinedi and Simma (eds.), *United Nations Codification of State Responsibility* (1987) 1.

[38] *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 569.

[39] See e.g. *SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 25: 'the right of entering into international engagements is an attribute of State sovereignty'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:29 Page Number: 57

those broad limits, how can it be said that a state may not bind itself, categorically, not to do something? On what basis is that obligation to be reinterpreted as an obligation not to do that thing only if one or more other states would thereby be damaged? The other states that are parties to the agreement, or bound by the obligation, may be seeking guarantees, not merely indemnities. But as soon as that possibility is conceded, the question whether damage is a prerequisite for a breach becomes a matter to be determined by the relevant primary rule. It may be that many primary rules do contain a requirement of damage, however defined. Some certainly do.[40] But there is no warrant for the suggestion that this is necessarily the case, that it is an *a priori* requirement.

Similar reasoning was set out, albeit rather briefly, in the commentary to Article 31.[41] This pointed out that all sorts of international obligations and commitments are entered into covering many fields in which damage to other individual states cannot be expected, would be difficult to prove or is not of the essence of the obligation. This is not only true of international human rights (an exception allowed by France), or of other obligations undertaken by the state to its own citizens. It is true in a host of areas, including the protection of the environment, disarmament and other 'preventive' obligations in the field of peace and security, and the development of uniform standards or rules in such fields as private international law. For example, if a state agrees to take only a specified volume of water from an international river or to adopt a particular uniform law, it breaches that obligation if it takes more than the agreed volume of water or if it fails to adopt the uniform law, and it does so irrespective of whether other states or their nationals can be shown to have suffered specific damage thereby. In practice, no individual release of chlorofluorocarbons (CFCs) or other ozone-depleting substances causes identifiable damage: it is the phenomenon of diffuse, widespread releases that is the problem, and the purpose of the relevant treaties is to address that problem.[42] In short, the point of such obligations is that they constitute, in themselves, standards of conduct for the parties. They are not only concerned to allocate risks in the event of subsequent harm occurring.

[40] E.g. *Lac Lanoux (Spain v. France)*, (1957) 12 RIAA 281.
[41] ARSIWA Commentary, Art. 31, §12.
[42] Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 324; Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 28. Further: Held, Fane-Hervey and Theros (eds.), *The Governance of Climate Change* (2011).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:30 Page Number: 58

There is, however, a corollary, not pointed out in the commentary to ARSIWA Article 2. If damage were to be made a distinct prerequisite for state responsibility, the onus would be on the injured state to prove that damage, yet in respect of many obligations this may be difficult to do. A state could proceed to act inconsistently with its commitment, in the hope or expectation that damage might not arise or might not be able to be proved. This would tend to undermine and render insecure international obligations establishing minimum standards of conduct. There is also the question by what standard 'damage' is to be measured. Is any damage at all sufficient, or is 'appreciable' or 'significant' damage required? This debate already occurs in specific contexts;[43] to make damage a general requirement would inject it into the whole field of state responsibility.

It may be argued that failure to comply with international obligations creates a 'moral injury' for other states in whose favour the obligation was assumed, so that the requirement of damage is readily satisfied.[44] But the traditional understanding of 'moral damage' was much narrower than this. The reason why a breach of fundamental human rights is of international concern (to take only one example) is not because such breaches are conceived as assaulting the dignity of other states; it is because they assault human dignity in ways which are specifically prohibited by international treaties or general international law.

For these reasons the decision not to articulate in either ARSIWA Article 1 or 2 a separate requirement of 'damage' in order for there to be an internationally wrongful act was clearly right in principle. But too much should not be read into that conclusion for the following reasons:

[43] E.g. the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, GA Res. 51/229, 21 May 1997, Annex, Art. 5.

[44] Cf. the French response in *Rainbow Warrior*, (1990) 82 ILR 500, 545–7. In its comments on the Draft Articles, the French government noted that it:

> is not hostile to the idea that a State can suffer legal injury solely as a result of a breach of a commitment made to it. However, the injury must be of a special nature, which is automatically so in the case of a commitment under a bilateral or restricted multilateral treaty. By contrast, in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule. A State cannot have it established that there has been a violation and receive reparation in that connection if the breach does not directly affect it. (ILC Ybk 1998/II(1), 138–9)

This amounts to saying that a state cannot guarantee its performance of a multilateral treaty – a doctrinal a priori if ever there was one.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:30 Page Number: 59

(a) First, particular rules of international law may require actual damage to have been caused before any issue of responsibility is raised. To take a famous example, Principle 21 of the Stockholm Declaration of 1972 is formulated in terms of preventing 'damage to the environment of other States or of areas beyond national jurisdiction'.[45] This is consistent with *Lac Lanoux*: whether there should be responsibility for environmental risk if no damage occurs is a separate, vexed, question.[46]

(b) Second, Articles 1 and 2 do not take a position as to whether and when obligations are owed to 'not-directly injured States', or to states generally, or to 'the international community as a whole'. That question is dealt with in Article 48. The requirement of damage as a prerequisite to a breach could arise equally in a strictly bilateral context, as it did in the *Rainbow Warrior* arbitration.

(c) Third, Articles 1 and 2 do not, of course, deny the *relevance* of damage, moral and material, for various purposes of responsibility. They simply deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility.

The ILC's decision not to make mention of 'damage' in ARSIWA Articles 1 and 2 did not mean that it was not aware of the wider considerations of the concept. This may be seen from ARSIWA Article 42, which dealt with and thereby defined the concept of 'injured state'. Three cases were identified in Article 42. In the first case, in order for an injured state to invoke the responsibility of another, that 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 (Article 42(a)). Second,

[45] Declaration of the UN Conference on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14/Rev. 1. Similar language is used in Principle 2 of the Rio Declaration on Environment and Development, 12 August 1992, UN Doc. A/CONF.151/26, Vol. I. Cf. the International Court's formulation of the principle in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 p. 226, 241–2.

[46] As the ARSIWA Commentary notes, '[i]n some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs': ARSIWA Commentary, Art. 31, §6. It will depend on the formulation of the primary obligations, but if a state is under an obligation not to cause *risk* of harm, and it causes risk, then it is in breach of its international obligations regardless of whether damage ultimately ensues. The ILC separated responsibility for risk from the main study of state responsibility because '[o]wing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp' (ILC Ybk 1970/II, 178). The principle of preventing and minimizing risk is of particular importance in the area of international environmental law; see e.g. Sands, *Principles of International Environmental Law* (2nd edn, 2003), 246–9, 266–79.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:30 Page Number: 60

a state may be specially affected – although not injured per se – 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 (Article 42(b)(i)) – for example the pollution of the high seas in violation of the United Nations Convention on the Law of the Sea (UNCLOS)[47] Article 194 'may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed'.[48] Those states so affected would then be considered injured by the breach, independently of any general or collective interest of the states parties to UNCLOS. Third, it may be that the performance of the particular obligation by the responsible state is a necessary condition of its performance by all the other states (Article 42(b)(ii)): these are so-called 'integral' or 'interdependent' obligations.[49] In terms of multilateral treaties such obligations will usually arise under treaties establishing particular regimes, where the forbearance of each is based on the forbearance of all; for example, were one state party to the Antarctic Treaty[50] to claim sovereignty over the remaining unclaimed area of Antarctica contrary to Article 4, all other states parties would be considered injured thereby and equally entitled to seek cessation, reparation (in the form of the annulment of the claim) and assurances of non-repetition. Other commonly cited examples include treaties on disarmament or arms control, which are based on the assumption of similar obligations by the other contracting states.[51]

2.2.2.2 The principle of 'objective responsibility'

Throughout the period in which the Draft Articles were before the ILC, no government argued in favour of the specification of a general requirement of fault as a prerequisite to state responsibility.[52] The point was made, for example, by Denmark on behalf of the Nordic countries:

> To accept fault as a general condition in establishing responsibility would considerably restrict the possibility of a State being held responsible for the breach of

[47] 10 December 1982, 1833 UNTS 3. [48] ARSIWA Commentary, Art. 42, §12.

[49] The notion of 'integral' obligations was initially developed by Fitzmaurice as Special Rapporteur on the Law of Treaties, although he used the term as referring to non-reciprocal 'absolute' or 'self-existent' obligations, e.g. human rights or environmental law obligations, which are not owed on an 'all or nothing' basis: Fitzmaurice, ILC Ybk 1957/II, 16, 54. The terminology has accordingly given rise to confusion on occasion, and the term 'interdependent obligation' is more appropriate.

[50] 1 December 1959, 402 UNTS 71.

[51] For further on the concept of 'injured State' see Chapters 11, 15, 17 and 21.

[52] Crawford, First Report, 28.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:31 Page Number: 61

an international obligation. Moreover, proof of wrongful intent or negligence is always very difficult. In particular, when this subjective element has to be attributed to the individual or group of individuals who acted or failed to act on behalf of a State, its research becomes uncertain and elusive. If the element of fault is relevant in establishing responsibility, it already follows from the particular rule of international law governing that situation, and not from being a constituent element of international responsibility.[53]

Nonetheless, the question of 'fault' figured prominently in the literature,[54] and was seen in 1998 as a question of the same order as the question whether 'damage' was a prerequisite for responsibility. Ultimately, the two questions were decided the same way, and no general requirement of fault was to be articulated.

A key factor behind this conclusion was that, following the abandonment of Draft Article 19, the Articles should not deal with the concept of international crimes of states. Were they to have done so, there would have been good reasons for spelling out a requirement of fault: a state could not possibly be considered responsible for a crime without fault on its part. Equally, there would be compelling reasons not to add any distinct requirement of damage or harm to other states. State conduct would not be considered criminal by reason of the damage caused to particular states but by reason of the character of the conduct itself.

Once more, it should be stressed, state responsibility is predicated on a principle of 'objective' liability,[55] in the sense that once the breach of an obligation owed under a primary rule of international law is established, this is *prima facie* sufficient to engage the secondary consequences of responsibility. Unless otherwise provided, no delinquency, *culpa* or *mens rea* need be proved, although certain manifestations of the 'intention' or 'design' behind state action may be relevant to the justifications and excuses contained within ARSIWA Articles 20–25, for example in cases of duress or coercion. And this conclusion is desirable as a matter of policy, since the 'intention' underlying state conduct is a notoriously difficult idea, quite apart from questions of proof.

[53] ILC Ybk 1998/II(1), 101.

[54] See Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), 38–48, and authorities there cited.

[55] Although the term itself is regrettable, it appears nowhere in the ARSIWA and is – owing to the lack of a viable opposite number in the sense of a 'subjective' responsibility – generally to be avoided. The correct view is that there is no such thing as 'objective' responsibility or 'subjective' responsibility – there is only responsibility properly so called. See further Chapter 3. On the theory of responsibility see Crawford and Watkins, in Besson and Tasioulas (eds.), *The Philosophy of International Law* (2010) 283.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:31 Page Number: 62

2.2.3 *'Delictual capacity'*

On their adoption in 1996, the Draft Articles contained Draft Article 2, which provided that '[e]very State is subject to the possibility of being held to have committed an international wrongful act entailing its international responsibility.' This curious formulation – concerning the possibility of responsibility rather than responsibility itself, was a truism: by definition no state can be immune from the principle of international responsibility. Any proposition to the contrary would be a denial of international law and a rejection of the principle of state equality.

The commentary to Draft Article 2[56] discussed a range of questions: the problem of 'delictual capacity' in international law (cf. the position of minors in national law); the responsibility of the component units of a federated state; and the responsibility of a state on whose territory other legal actors are operating. It concluded – obviously enough – that none of these situations constituted an exception to the general principle of state responsibility.

As to the first of these, the ILC decided in 1973 not to formulate Draft Article 2 in terms of 'delictual capacity'; it was paradoxical to assert that international law could confer the 'capacity' to breach its own rules.[57] A further difficulty with the notion was the undue focus on the question of breach. In the case of non-state entities, a bundle of questions about their legal personality, to what extent international law applies to them and their international accountability for possible breaches do indeed arise. But insofar as states are concerned, the position is clear: all states are responsible for their own breaches of international law, subject to generally available defences enumerated in ARSIWA Part One, Chapter V. As the ARSIWA deal only with states, it was unnecessary to discuss the wider questions raised by Draft Article 2: the provision was accordingly deleted.[58]

2.2.4 *'Responsibility' and 'liability'*

Lawyers in the civilian tradition sometimes consider the common law to contain two separate concepts, responsibility and liability.[59] The first

[56] Draft Articles Commentary, Art. 2. [57] Ibid., Art. 3, §9.
[58] See Crawford, First Report, 31; ILC Ybk 1998/I, 199–200.
[59] For example, UNCLOS, Art. 263 is entitled 'Responsibility and liability', and the English text makes reference to the two terms – apparently interchangeably – throughout. The other language texts, however, make reference only to one term apiece, thus in French

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:31 Page Number: 63

term is thought to mean legal responsibility in the ordinary sense; the second to mean responsibility for which no *culpa* or fault need be identified: what in the common law would be referred to as 'strict' or 'absolute' liability. In fact, the presence of the term 'liability' on its own means no more or less than the term 'responsibility' would, and it is only the inclusion of an adjective that makes a difference. Thus contractual, tortious or criminal liability under the common law means exactly that: responsibility incurred under the law of contract, tort or crime.

The ARSIWA make no reference to 'liability', although the term does appear occasionally in the commentaries. Extensive reference was, however, made to 'liability' in the ILC's work on the prevention of transboundary harm from hazardous activities and the allocation of loss in the case of transboundary harm arising out of hazardous activities, both of which formed part of the primordial topic 'International liability for injurious consequences arising out of acts not prohibited by international law'.[60] As a purely linguistic matter, 'responsibility' as used in the ARSIWA and 'liability' as it appears in the ILC's work on transboundary harm bear the same meaning. As was noted in its commentary to the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities,[61] the topics were separated not due to any categorical distinction between 'responsibility' and 'liability', but to make it clear that state responsibility is concerned with acts which were unlawful under international law, whereas the ILC's work on transboundary harm was concerned with activities which *prima facie* were not, but which might give rise to harm in operations for which (absent due diligence) responsibility/liability might arise.[62]

and Spanish, respectively, 'Responsabilité' and 'Responsabilidad'. See further Boyle, (2008) 39 ICLQ 1, 8–10; Boyle (2010).

[60] For the history of the liability topic see Special Rapporteur Pemmaraju Sreenivasa, First Report, UN Doc. A/CN.4/531, 5–20; Boyle (2010), 95–7.

[61] ILC Ybk 2001/II(2), 150. See also ILC Ybk 1977/II(2), 6.

[62] For criticism of the terminological confusion underlying the 'liability' topic see, e.g., Boyle (2010). One possibility – probably linguistically foreclosed – would be to confine the term 'liability' to those special cases where actual loss is compensable for the exercise of a legal right (sometimes referred to as qualified privilege): e.g. at common law, certain rights of entry on to land, or, in international law, the obligation to indemnify for losses incurred in searching an innocent vessel on the high seas (UNCLOS, Art. 110(3)).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:32 Page Number: 64

2.2.5 Rights and obligations

2.2.5.1 'Primary' and 'secondary' obligations[63]

When it reconsidered the issue in 1962–3, the ILC saw state responsibility as concerning 'the definition of the general rules governing the international responsibility of the State', by which was meant responsibility for wrongful acts. The emphasis was on the word 'general'. The draft articles were to concern themselves with the *framework* for state responsibility, irrespective of the content of the substantive rule breached in any given case. The distinction between 'primary' and 'secondary' rules was formulated by Roberto Ago as follows:

> The Commission agreed on the need to concentrate its study on the determination of 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. Consideration of the various kinds of obligations placed on States in international law and, in particular, a grading of such obligations according to their importance to the international community, may have to be treated as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it 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 consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper . . .[64]

The source of the distinction between primary and secondary rules within the terminology of state responsibility is unclear. Potential sources include an adaptation of H. L. A. Hart's famous distinction between primary and secondary rules,[65] continental jurisprudence,[66] or simply organic development within the ILC itself.

The distinction has had its critics. It has been said, for example, that the 'secondary' rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific

[63] See David (2010). [64] ILC Ybk 1970/II(2), 306.

[65] Hart, *The Concept of Law* (2nd edn, 1994), 79–99; cf. Kelsen, *General Theory of Law and State* (1945), 61 ('law is the primary norm, which stipulates the sanction').

[66] See Ross, *On Law and Justice* (1958), 209–10; and generally Goldie, (1978) 12 IL 63.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:32 Page Number: 65

secondary rules, and that the Articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.[67]

On the other hand, it is far from clear what alternative principle of organization could have been adopted, since the substantive rules of international law, breach of which may give rise to state responsibility, are innumerable and include substantive rules contained in treaties as well as under general international law. Given rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification, even if that were desirable in principle.

The distinction between primary and secondary rules has a number of advantages. It allows some general rules of responsibility to be restated and developed without having to resolve a myriad of issues about the content or application of particular rules the breach of which may give rise to responsibility. Take, for example, the debate about whether state responsibility can exist in the absence of damage or injury to another state or states. If by damage or injury is meant economically assessable damages, the answer is clearly that this is not always necessary. On the other hand, in some situations there is no legal injury to another state unless it has suffered material harm.[68] The position varies, depending on the substantive or primary rule in question. It is only necessary for the ARSIWA to be drafted in such a way as to allow for the various possibilities. A similar analysis would apply to the question whether some *mens rea* or fault element is required to engage the responsibility of a state, or whether state responsibility is 'strict' or even 'absolute', or depends upon 'due diligence'.

There remains a question whether the ARSIWA are sufficiently responsive to the impact that particular primary rules may have. The regime of state responsibility is, after all, not only general but also residual. The issue arises particularly in relation to ARSIWA Article 55 concerning *lex specialis*.[69]

Finally, there is a question whether some of the articles do not go beyond the statement of secondary rules to lay down particular primary

[67] Special Rapporteur Riphagen remarked that the distinction, while methodologically useful, 'should not be carried so far as to dissimulate the essential unity of the structure of international law as a whole' (ILC Ybk 1981/II(1), 82 (§31); see further Bodansky and Crook, (2002) 96 AJIL 773, 779–81; Caron, (2002) 96 AJIL 857, 870–2; David (2010).

[68] See e.g. *Lac Lanoux,* (1957) 12 RIAA 281.

[69] See ARSIWA Commentary, Art. 55; Bodansky and Crook (2002), 774–5; Caron (2002), 872–3; Simma and Pulkowski, in Crawford, Pellet and Olleson (2010) 139.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:33 Page Number: 66

rules. This was certainly true of the definition of 'international crimes' in the abandoned Draft Article 19. Another article which, it has been suggested, infringes the distinction between primary and secondary rules is ARSIWA Article 27(b), dealing with compensation in cases where the responsibility of a particular state is precluded by one of the circumstances dealt with in Articles 20–25.[70] On the other hand Article 27 is a without prejudice clause, and does not specify the circumstances in which such compensation may be payable. It can be argued that it thereby usefully qualifies the 'circumstances precluding wrongfulness' in Articles 20–25 – although whether it is equally applicable to each of those circumstances is an open question.

2.2.5.2 'Obligations *erga omnes*' and related concepts

ARSIWA Article 48 makes provision for the invocation of responsibility in the absence of any direct form of injury. Where the obligation breached is one 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. The existence of these 'communitarian norms' – also known as obligations *erga omnes* – was confirmed by the International Court in the *Barcelona Traction* case, when it noted that with respect to obligations owed to the international community as a whole, 'all States can be held to have a legal interest' in the fulfilment of those rights.[71]

Comments of governments on obligations *erga omnes* varied considerably during the second reading. France, for example, was generally critical of the notion, while not denying that in special circumstances a state could suffer legal injury merely by reason of the breach of a commitment. However, it asserted that 'in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule.'[72] This apparently denied the possibility of obligations *erga omnes*, whose very effect, presumably, is to establish a legal interest of all states in compliance with certain norms. Germany, by contrast, saw in the clarification and elaboration of the concepts of obligations *erga omnes* and peremptory norms,

[70] Formerly Draft Articles, Art. 35: see ILC Ybk 1998/II(1), 135 (comments by France).

[71] *Barcelona Traction, Light & Power Company, Limited (Spain v. Belgium)*, Second Phase, ICJ Rep. 1970 p. 3, 32. See further Chapter 11.

[72] ILC Ybk 1998/II(1), 138–9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:33 Page Number: 67

in the field of state responsibility, a solution to the vexed problems presented by Draft Article 19.[73]

The United States took an intermediate position, supporting the clarification and in some respects the narrowing of the categories of 'injured State' in Draft Article 40, especially in relation to breaches of multilateral treaties, while accepting the notion of a general or community interest in relation to defined categories of treaty (e.g. human rights treaties). But it denied that injured states acting in the context of obligations *erga omnes* (or of an *actio popularis*) should have the right to claim reparation as distinct from cessation.[74] The United Kingdom likewise raised issues of the definition of 'injured state' in the context of multilateral treaty obligations. In particular it questioned the consistency of Draft Article 40(2) with VCLT Article 60(2)(c), which allows the parties to multilateral treaties to suspend the operation of the treaty in relation to a defaulting state only if the treaty is 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 under the treaty'.[75]

These views proved influential in developing a consensus model that is reflected in the terms of ARSIWA Article 48. Under the terms of paragraph (1), a non-injured state is permitted to invoke responsibility where the breach complained of concerns (a) an obligation owed to a group of states that includes the non-injured state, which is established for the protection of a collective interest of the group; or (b) an obligation owed to the international community as a whole (a communitarian norm or obligation *erga omnes*). Under paragraph (2), however, the remedies available in such a situation are limited. The non-injured state may only claim from the responsible state cessation of the internationally wrongful act and assurances of non-repetition. It may not claim reparation, save in the interest of an injured state or the beneficiaries of the obligation breached.

2.3 Invocation and admissibility

2.3.1 Invocation of state responsibility: formal requirements

Although state responsibility in principle arises independent of any claim by another state, if an interested party wishes to claim one of the remedies available to it under Part Two, Chapters II and III of the

[73] Ibid., 165. [74] Ibid., 120–1. [75] Ibid., 141–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:33 Page Number: 68

ARSIWA, it should register its interest. Responses may take a variety of forms, from an unofficial and confidential reminder to fulfil the obligation in question to formal protests, consultations and so forth. An interested state with notice of the breach that does not so act may incur legal consequences, including the eventual loss of the right to invoke state responsibility by reason of waiver or extinctive prescription.[76] But care must be taken not to overly formalize the procedure for complaint, or to imply that the normal consequence of the non-performance of the objection is the lodging of a statement of claim before a relevant court or tribunal. In many cases, quiet diplomacy is the most effective method of ensuring the performance of international obligations and even reparation for breaches thereof.[77] Nonetheless, an injured or otherwise interested state is entitled to respond to the breach, and the first step in this respect should be to call the attention of the responsible state to the situation and request that it take the appropriate steps to cease the breach and provide appropriate redress.

In practice, claims for responsibility are raised at many different levels of government, depending on their seriousness and on the general relations between the states concerned. Moreover, the International Court has on occasion proved itself satisfied with rather more informal methods of invocation.[78] No doubt the precise form the claim takes will depend on the circumstances, but ARSIWA Article 43 sets the basic requirement that a state invoking responsibility must give notice thereof to the responsible state. In so doing, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take. In addition, since the normal mode of interstate communication is writing, it is appropriate that any notification of claim should also be in writing,[79] though this is not expressly required by Article 43.

2.3.2 *Certain questions as to the admissibility of claims*

If a state having protested at a breach is left unsatisfied by the response (or lack of it) on the part of the responsible state, it is entitled to seek

[76] See ARSIWA, Art. 45. See, for analogy, VCLT, Art. 65.

[77] See further Waibel, in Crawford, Pellet and Olleson (2010) 1085.

[78] See e.g. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Rep. 1992 p. 240, 253–5, discussed in Chapter 17.

[79] There are precedents for this: see e.g. VCLT, Arts. 23 (reservations, express acceptances of reservations and objections to reservations 'must be formulated in writing'), 67 (notification of invalidity, termination or withdrawal from a treaty must be in writing).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:34 Page Number: 69

those measures of remedy – that is, cessation, assurance, reparation and so on – provided in Part Two of the ARSIWA. Article 44, however, refers to and preserves the effect of certain procedural barriers that may preclude the claim from being brought. This flows from the need to interact with the wider body of international law, and to display sensitivity to individual circumstances attending each claim. It is important to remember that these are not the only objections to admissibility that might be raised, depending on the precise terms of the claim and the court or tribunal before which the claim is brought. Article 44 states that:

> 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.

Thus two bases of inadmissibility are specifically contemplated: nationality of claims and exhaustion

2.3.2.1 Nationality of claims

Nationality of claims owes much to the law on diplomatic protection. A statement as to the modern position was that of the Permanent Court of International Justice in *Mavrommatis*:

> 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 which they have been unable to obtain satisfaction through the ordinary channels.[80]

Article 44(a) does not attempt a detailed elaboration of the nationality of claims rule. It is content with only identifying the principle as applicable, leaving the detailed rules to the ILC Articles on Diplomatic Protection (considered in more detail in Chapter 18).

2.3.2.2 Exhaustion of local remedies

A similar position obtains in relation to the exhaustion of local remedies rule contained in Article 44(b). The rule was described as 'an important

[80] *Mavrommatis Palestine Concessions*, (1924) PCIJ Ser. A No. 2, 12.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:34 Page Number: 70

principle of customary international law' in the *ELSI* case.[81] The chamber provided a succinct definition of the rule in the following terms:

> [F]or an international claim 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.[82]

Article 44(b) as formulated does not provide that state responsibility is not *incurred* unless local remedies have been exhausted – that would be an unacceptable conflation of primary and secondary rules;[83] what it does provide, however, is that no claim is *admissible* unless local remedies have been so exhausted. Again, the content of the exhaustion of local remedies rule is not elaborated within the terms of Article 44, and questions such as whether the rule applies to injuries inflicted outside the territory of the respondent state or to injuries inflicted in commercial or economic fields (as a consequence of an *acta jure gestionis*), and indeed what amounts to exhaustion, are left to the law of diplomatic protection (see Chapter 18).

2.3.2.3 Waiver[84]

ARSIWA Article 45(a) provides that the responsibility of a state may not be invoked if the injured state has validly waived the claim. A waiver, simply put, is the manifestation by a state of its intention to renounce a right or claim. It is thus an expression of the basal principle of consent that runs throughout international law.[85] It is by no means confined to the field of state responsibility, but extends to all types of rights or claims recognized by international law, for example the right to invalidate, terminate or suspend treaties under VCLT Article 45, the right of territorial sovereignty (*derelictio*),[86] and rights in the field of diplomatic and consular immunity.[87]

[81] *ELSI*, ICJ Rep. 1989 p. 15, 42. See also *Interhandel (Switzerland v. United States)*, Preliminary Objections, ICJ Rep. 1959 p. 6, 27. On the rule generally, see Fawcett, (1954) 31 BYIL 452; Mummery, (1964) 58 AJIL 389; Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983); Amerasinghe, *Local Remedies in International Law* (2nd edn, 2004); Paulsson, *Denial of Justice in International Law* (2005); Crawford and Grant, 'Local remedies, exhaustion of', (2007) MPEPIL.

[82] *ELSI*, ICJ Rep. 1989 p. 15, 46.

[83] E.g. the exhaustion of local remedies to the extent possible in the circumstances is a substantive element of a denial of justice claim in international law and thus an aspect of a primary rule: see further Paulsson (2005), ch. 5.

[84] Generally: Feichtner, 'Waiver', (2006) MPEPIL; Tams, in Crawford, Pellet and Olleson (2010) 1035, 1036–42.

[85] ARSIWA Commentary, Art. 45, §2.

[86] Tams (2010), 1036–7.

[87] Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, Art. 32; Vienna Convention on Consular Relations, 24 April 1963, 586 UNTS 262, Art. 45.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:34 Page Number: 71

Although the early authorities were clear in stipulating that a waiver to be effective must be express,[88] the concept has evolved such that it is now possible for a waiver to be identified via implication.[89] For such an implication to be drawn the actions of the injured state must, however, be unequivocal.[90] A rare example of an implied waiver occurred in the *Russian Indemnity* case. There, the Russian embassy 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 amount requested, the tribunal held that Russian conduct amounted to the abandonment of any other claim arising from the loan,[91] thereby also demonstrating that a right may be waived *in part*.

International law has no requirements of form with respect to waiver: the actors are 'free to choose whatever form they please provided their intention clearly results from it'.[92] The doctrine is not, however, entirely without restraint. In the first place (and self-evidently) a state is not entitled to waive a right which it does not hold: *nemo plus dare potest quam ipse habet*.[93] By extension, even if an injured state elects to waive its right to invoke state responsibility with respect to a breach of an obligation *erga omnes*, it cannot thereby prevent other states from bringing claims under ARSIWA Article 48.[94] Second, a waiver will only bind a state if the conduct constituting the waiver is performed by a person who or institution which is entitled to represent it. VCLT Article 7(2) provides some guidance in this respect, listing as it does those persons who possess 'full powers' and are thus capable of entering into a treaty on behalf of a state.[95] A state may also ratify the acts of a person or entity after their commission, thereby 'adopting' the acts in question as the state's own.[96]

[88] *Certain Norwegian Loans (France v. Norway)*, Preliminary Objections, ICJ Rep. 1957 p. 9, 26 ('abandonment . . . must be declared expressly').
[89] *Phosphate Lands in Nauru*, Preliminary Objections, ICJ Rep. 1992 p. 240, 248–59.
[90] *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 266 ('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').
[91] *Russian Indemnity (Russia v. Turkey)*, (1912) 11 RIAA 421, 446.
[92] *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, ICJ Rep. 1961 p. 17, 31.
[93] Tams (2010), 1039–41. [94] ARSIWA Commentary, Art. 45, §4.
[95] E.g. heads of state, heads of government, ministers of foreign affairs, heads of diplomatic missions and other appropriately accredited representatives: Tams (2010), 1038–9.
[96] VCLT, Art. 8; *United States Diplomatic and Consular Staff in Iran (US v. Iran)*, ICJ Rep. 1980 p. 3, 74.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:35 Page Number: 72

Waiver is very often considered to be a unilateral act of state, and is treated as such in the literature.[97] This view is, however, inadequate, particularly when considering the phenomenon of implied waiver.[98] Very often a waiver can only be understood in terms of the interaction between two parties within a factual matrix. In this, implied waiver bears a close relationship to doctrines such as acquiescence and estoppel, where the conduct of one party is received, processed and reinforced by another until the intention of one party to waive a particular right – affirmed incrementally through continued interaction – becomes undeniable.

2.3.2.4 Acquiescence[99]

ARSIWA Article 45(b) provides that the responsibility of a state may not be invoked where 'the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim'. Acquiescence or delay, like waiver, is a principle of international law likewise based on the principle of consent. In essence, it reflects the notion that inaction on the part of a state where some response is called for may lead to the loss of a right or claim. In such a case silence is seen as reflecting an implied consent: *qui tactet consentire videtur si loqui debuisset ac potuisset*.[100] Again, the concept is not limited to the law of state responsibility: the term originally emerged in the context of maritime delimitation,[101] and has been adopted by the Court in the context of territorial disputes as well. In *Pulau Bata Puteh*, it was said that:

> Under certain circumstances, sovereignty over territory might pass as a result of the failure of a State which has sovereignty to respond to conduct *à titre de souverain* of the other State . . . Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of a reaction may well amount to acquiescence . . . That is to say, silence may also speak, but only if the conduct of the other State calls for a response.[102]

As mentioned, silence is generally considered to be characteristic of acquiescence. But a failure to assert claims may also be inferred from

[97] Tams (2010), 1037. [98] Crawford, Third Report, 70–1.
[99] Marques Antunes, 'Acquiescence', (2006) MPEPIL; Tams (2010), 1042–5.
[100] Tams (2010), 1042–3.
[101] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, ICJ Rep. 1984 p. 246, 305.
[102] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Rep. 2008 p. 12, 50–1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:35 Page Number: 73

certain active conduct which may be seen as reflective of passivity in the context in which it occurs.[103]

When considering a situation of possible acquiescence, two further considerations must be borne in mind. The first is that the passivity giving rise to acquiescence must have continued for a certain period of time. International law contains no hard and fast rule for the length of time that must pass before acquiescence is deemed to have occurred: any such conclusion must be driven by context.[104] Thus in *Banks of Grisbadarna*[105] the time period in question was relatively short, while in *LaGrand* Germany was held entitled to bring its claim despite the fact that it had known of the United States' illegal actions for a number of years and failed to act until the last moment.[106]

The second consideration is that, in order to amount to acquiescence, the inaction on the part of the injured state must have come about in circumstances that called for some response. Again, such circumstances are determined on a case-by-case basis, but if *Temple* is any criterion, it would appear that the presentation of materials through intergovernmental channels which are clearly inconsistent with a right that the receiving state wishes to assert will call for a response.[107]

Acquiescence bears a close resemblance to implied waiver: indeed, the ARSIWA Commentary does not differentiate between them, and both are reliant on an interactive paradigm of action and reaction. Likewise, VCLT Article 45, on which ARSIWA Article 45 is itself based, draws no such distinction, treating implied waiver as an aspect of the general concept of

[103] Tams (2010), 1043. And see *Temple*, ICJ Rep. 1962 p. 6, 25, 30–1.

[104] *Phosphate Lands in Nauru*, Preliminary Objections, ICJ Rep. 1992 p. 240, 253–4 ('It is . . . for the Court to determine in light of the circumstances of each case whether the passage of time renders the application inadmissible').

[105] *Banks of Grisbadarna (Norway v. Sweden)*, (1909) 11 RIAA 147, 161–2.

[106] *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466, 486–7. The Court, however, implied that any right of reparation had been affected by delay: ibid., 508.

[107] In the *Temple* case, the position of the boundary between Thailand (Siam) and Cambodia in the area around Preah Vihear on maps prepared by the French Government did not correspond to the watershed boundary established in the 1904 treaty. Thailand failed to challenge this on receipt of the maps, and on several later occasions when it could have been expected to raise an objection. The Court treated its subsequent passive conduct and continued use of the maps without protest as acceptance of Cambodia's sovereignty over the Temple, which was shown clearly on the Cambodian side of the frontier: to that extent at least, Thailand was precluded from relying on the earlier watershed line. See ICJ Rep. 1962 p. 6. For the subsequent dispute over the extent of the Court's finding see *Request for interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear *(Cambodia v. Thailand) (Cambodia v. Thailand)*, ICJ, pending, 2011.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:36 Page Number: 74

acquiescence, leading some commentators to remark that the ARSIWA's division is 'unconvincing'.[108]

Acquiescence also bears some resemblance to the concept of estoppel in international law.[109] Estoppel, which is not mentioned in the ARSIWA, is a mechanism borrowed from the common law. A party who through an actual or implied representation has led another in good faith to rely on that representation to its detriment will not be permitted to depart from its initial representation.[110] Whereas with acquiescence the state concerned is taken to have relinquished a claim or right through inaction, estoppel makes no such presumption: rather, the state is precluded from alleging the contrary to what was represented.[111] In practical terms, the same facts may ground both a claim of estoppel and acquiescence,[112] but they are analytically distinct.

2.4 Diplomatic protection and its analogues

2.4.1 Public and private rights in international law

The ARSIWA are primarily concerned with the protection of public rights and the observance of public obligations, that is, those conferred on states by virtue of the rules of international law. But states may also contract with natural or juridical persons, and thereby enter into the world of private rights and obligations. To what extent, if any, may these be protected under the rules of state responsibility?

Acts which affect private rights are as capable of commission by states as those which affect public rights: the rules of attribution contained in ARSIWA Part One, Chapter II do not function differently depending on the character of the rights in question. Differences, however, arise in relation to the applicable law as well as consequential questions of enforceability. Private rights are not the ordinary subject matter of disputes on the international plane, and cannot be elevated to that level

[108] E.g. Tams (2010), 1044.

[109] E.g. *Gulf of Maine*, ICJ Rep. 1984 p. 246, 304 (Canada, in argument, referring to estoppel as 'the alter ego of acquiescence'). Also *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, ICJ Rep. 1960 p. 192, 206; cf. ibid., 219 (Judge Spender), 221 (Judge ad hoc Urutia Holguin). Generally: Sinclair, in Lowe and Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996) 104; *Brownlie's Principles*, ch. 18.

[110] Generally: Cottier and Müller, 'Estoppel', (2007) MPEPIL.

[111] See *Temple*, ICJ Rep. 1962 p. 6, 62–3 (Judge Fitzmaurice); *Gulf of Maine*, ICJ Rep. 1984 p. 246, 305.

[112] Thirlway, (1989) 60 BYIL 1, 29, 30.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:36 Page Number: 75

absent some special mechanism that either converts a private right to a public right capable of enforcement (as in the case of diplomatic protection) or directs the jurisdiction of some international court or tribunal to the private right in question, usually by way of an applicable law clause (as in the case of investor-state arbitration). In either case, the consent of the state against which enforcement of the private right is sought is to some extent required.

2.4.2 *The institution of diplomatic protection*[113]

As an institution, diplomatic protection has a long and not always happy history. During the late nineteenth and early twentieth centuries, it came to be associated with the imperialist project, being employed by colonial states to protect their nationals engaged in trade or commerce in the developing world. To take two examples, the Boer War (1899–1902) was justified by Britain on the basis that gold mines owned by its nationals in the Witwatersrand required protection;[114] more widely, the history of the Caribbean and Latin America is replete with instances of US intervention in order to protect the interests of corporations such as the United Fruit Company.[115] On other occasions, however, demands by states for compensation for injuries suffered by nationals were settled via conciliation or arbitration. In time, it became accepted that diplomatic protection could only be enforced by peaceful means such as negotiation or arbitration, and not by the use of force.[116]

Diplomatic protection is part of the law of state responsibility, but was dealt with by the ILC as a separate project.[117] Following the work of two Special Rapporteurs, Mohamed Bennouna (Morocco) and John Dugard (South Africa), the ILC adopted the Articles on Diplomatic Protection

[113] See Chapter 18. See further Crawford, (2006) 31 S. Af. YIL 1; Amerasinghe, *Diplomatic Protection* (2008); Dugard, 'Diplomatic protection', (2009) MPEPIL; Dugard, in Crawford, Pellet and Olleson (2010) 1051.

[114] See further Packenham, *The Boer War* (1979).

[115] See further Langley, *The Banana Wars* (2nd edn, 2002). On the wider relevance of the imperialist project to international law, see Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

[116] ADP Commentary, Art. 1, §8: 'the use of force . . . is not a permissible method for the enforcement of the right of diplomatic protection'. This is consistent with the peaceful settlement approach that has prevailed under international law since the conclusion of the First Hague Convention for the Pacific Settlement of International Disputes, 1 Bevans 230, at the First Hague Conference on 29 July 1899; the pacific settlement principle is now embodied in the UN Charter.

[117] ARSIWA Commentary, Art. 44, §§2, 5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:36 Page Number: 76

(ADP) in 2006.[118] As with the ARSIWA, it was decided when diplomatic protection was laid down as a topic in 1997 that the ILC would again focus on the secondary or framework rules of the international law of diplomatic protection and not on the substantive standards.[119]

ADP Article 1 provides:

> [D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Thus, under international law, a state is responsible for an injury to a foreign national caused by that state's wrongful act or omission. Diplomatic protection may provide a remedy to the aggrieved alien in such a case, and represents a procedure by which the state of the nationality of the alien may seek to redress the wrong inflicted by another state on its citizen. Such protection extends to both natural and juridical persons.[120] The right is not unrestricted, however, and is commonly attended by two preconditions: the aggrieved individual must be a national of the state bringing the claim[121] and must already have exhausted to the extent possible the local remedies available for redress of the wrong in the responsible state.[122] Both are included in ARSIWA Article 44, but the ADP provide further elaboration of both.

A protecting state may claim by way of reparation the remedies of restitution, compensation or satisfaction. A state may have recourse to non-forcible countermeasures in order to enforce the terms of any remedy. The ILC has affirmed that forcible countermeasures cannot be employed by way of enforcement.[123]

A central question surrounding diplomatic protection is exactly *whose* rights are being upheld in the making of a claim. The traditional view derives from Vattel:

> Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not attain the grand end of the civil association, which is safety.[124]

[118] ILC Report 2006, UN Doc. A/61/10, §34ff. [119] ILC Ybk 1997/I, 273.
[120] See e.g. *Nottebohm (Liechtenstein v. Guatemala),* Second Phase, ICJ Rep. 1955 p. 4; *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3; *Elettronica Sicula SpA (ELSI) (US v. Italy)*, ICJ Rep. 1989 p. 15; *Ahmadou Sadio Diallo (Guinea v. DRC)*, ICJ, Judgment of 30 November 2010.
[121] Further Dugard (2010), 1053–61. [122] Ibid., 1061–7. [123] ILC Ybk 2000/II(2), 74–6.
[124] Vattel (1758), Bk II, Ch. VI, §71 ((2008), 298).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:37 Page Number: 77

This position – that the state in making a claim for diplomatic protection is acting on its own behalf – was confirmed by the Permanent Court in *Mavrommatis*:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.[125]

In practice, when states bring proceedings on behalf of their nationals, they seldom claim that they assert their own right but refer to the injured individual as 'the claimant'. In effect, by bringing a claim for bringing diplomatic protection, a state is enforcing the rights of the individual at one remove. As noted by Dugard, logical inconsistencies in the traditional doctrine, such as the requirement of continuous nationality, the exhaustion of local remedies rule and the practice of fixing the quantum of damage to loss suffered by the aggrieved national lend support to this view.[126] However, although it may bring a claim in support of one of its nationals, a state is under no obligation to do so, a point affirmed by the International Court in the *Barcelona Traction* case.[127] The ILC rejected the proposal *de lege ferenda* that such a duty to act be included in the ADP as going beyond the permissible limits of the progressive development, although it did include a recommendation in ADP Article 19 that a state entitled to diplomatic protection should 'give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.[128]

2.4.3 Functional and other protection (by international organizations or third states)[129]

2.4.3.1 International organizations

An analogue of diplomatic protection is functional protection, whereby an international organization protects its agent in a manner resembling

[125] (1924) PCIJ Ser. A No. 2, 12. [126] Dugard (2010), 1052. [127] ICJ Rep. 1970 p. 3, 44.

[128] Even if the state is unwilling to act on behalf of its national in an ad hoc instance, an investor may still seek compensation for injury via investor-state arbitration if the necessary investment treaty superstructure is in place. On the relationship between diplomatic protection and investment arbitration, see Amerasinghe (2008), ch. 17; Douglas, *The International Law of Investment Claims* (2009); Douglas, in Crawford, Pellet and Olleson (2010) 815.

[129] Benlolo Carabot and Ubéda-Saillard, in Crawford, Pellet and Olleson (2010) 1073, 1083, and see further Chapter 18.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:37 Page Number: 78

diplomatic protection.[130] The basis for this in international law was recognized by the International Court in *Reparation for Injuries Suffered in the Service of the United Nations*,[131] an opinion requested by the General Assembly in the wake of the assassination of an UN envoy, Count Folke Bernadotte, by Zionist extremists. The court found that the United Nations possessed international personality as an international organization, and that agents should be able to count on the protection of the organization in order to perform their duties properly.[132] If an agent was to suffer injury in the performance of his or her duties as a result of an internationally wrongful act, the organization had standing to claim against the responsible state.[133]

The doctrine as identified in *Reparation for Injuries* separates functional protection from diplomatic protection. Functional protection is derived *intuitu personae*: by virtue of its functions, an international organization must be enabled to carry out its mission as set down in its constitutive instrument.[134] This may include the capacity to make claims on behalf of their agents.[135]

2.4.3.2 Nationals of third states

During discussion of the ADP by the ILC, the point was made by Giorgio Gaja (Italy) that states could also be concerned with functional protection, and employ non-nationals in a variety of fields, for example the armed forces.[136] Similar considerations apply to the crew of merchant ships flying the flag of the claimant state.[137] Although various mechanisms exist in international law whereby a state may protect a non-national against the internationally wrongful act of *another* state,[138] the

[130] This was not excluded by the ADP, which provide in Art. 16 that:
> The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

[131] ICJ Rep. 1949 p. 174. See also *Applicability of Article VI, Section 22, of the Convention of the Privileges and Immunities of the United Nations*, ICJ Rep. 1989 p. 177; *Difference Related to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, ICJ Rep. 1999 p. 62.

[132] *Reparation for Injuries*, ICJ Rep. 1949 p. 174, 183. [133] Ibid., 187.

[134] See generally *Brownlie's Principles*, ch. 7.

[135] E.g. Pescatore, (1961) 103 Hague *Recueil* 1, 219–21 (European Communities).

[136] ILC Ybk 2002/I, 226. Non-nationals may also be found in the diplomatic corps of various states.

[137] ADP Commentary, Art. 18. [138] Ibid., §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:37 Page Number: 79

general position is that where those mechanisms or exceptions do not apply, a state does not have the right to bring a claim for a violation of state responsibility with respect to a non-national.[139]

2.5 Responsibility of non-state actors

2.5.1 Individual criminal responsibility

In principle, international law operates horizontally, that is, between those entities recognized to possess personality on the international plane, such as states and international organizations. But certain offences (e.g. genocide, war crime, crimes against humanity, torture) when committed by an individual will be considered as in direct violation of international law, and there are now international tribunals capable of trying those who breach these norms.[140]

The starting point of this development is the trial at Nuremberg of senior figures of the Nazi regime for heinous acts committed or directed to be committed during the Second World War.[141] Immediately after judgment was handed down by the Nuremberg Tribunal, the UN General Assembly passed a resolution[142] affirming 'the general principles of international law recognized by ... the judgment of the Tribunal'. The ILC was subsequently asked to formulate these principles, completing the task in 1950.[143] Principle I stated that '[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.' The ILC was to return to this principle in 1996 when commenting on its Draft Code of Crimes against the Peace and Security of Mankind, stating:

> The principle of individual responsibility and punishment of crimes under international law recognized at Nürnberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Charter and Judgment of the Nürnberg Tribunal which gives meaning to the prohibition of crimes under

[139] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, ICJ Rep. 1966 p. 6, 47.

[140] Most notably the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. For a survey see *Brownlie's Principles*, ch. 30.

[141] A second, lesser known trial was also undertaken for more junior members of the regime: Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011).

[142] GA Res. 95(I), 11 December 1946.

[143] See the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, with commentaries, ILC Ybk 1950/II, 374ff.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:38 Page Number: 80

international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment.[144]

The principle of individual criminal responsibility under international law was implemented in various treaties following the Nuremberg and Tokyo war crimes tribunals. A key example of this is the Convention on the Prevention and Punishment of the Crime of Genocide.[145] Article IV provides:

> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Similarly, with respect to war crimes, the Geneva Conventions 1949[146] provide for effective penal sanctions 'for persons committing or ordering to be committed, any of the grave breaches of the present Convention' defined by the relative provisions.[147] Additional Protocol II – which applies to situations of internal armed conflict – similarly contemplates individual criminal responsibility.[148] With respect to torture, reference may be made to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[149] which defines torture in Article 1 as 'inflicted by or at the instigation of or with the acquiescence of a public official acting in an official capacity'.

2.5.2 *Corporate criminal responsibility*

The development of a law of individual criminal responsibility in international law has not – or not yet – been paralleled by a regime of corporate criminal responsibility.[150] As indicated above, the various international criminal law treaties deal exclusively with the criminal responsibility of the individual. They make no attempt to solve the range

[144] ILC Ybk 1996/II(2), 19. [145] 9 December 1948, 78 UNTS 277.

[146] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

[147] E.g. Geneva Convention I, Art. 49.

[148] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, esp. Art. 6(2)(b): 'no one shall be convicted of an offence except on the basis of individual penal responsibility'.

[149] 10 December 1084, 1465 UNTS 85. [150] Cf. Clapham, (2008) 6 JICJ 899.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:38 Page Number: 81

of legal issues that arise regarding attributing specific intent to corporations in the case of international crimes, let alone questions of the applicable sanctions for corporations.[151]

In terms of state practice, no corporation has yet been prosecuted by any municipal or international court or tribunal for any international crime. In addition, none of the five major international criminal tribunals established to date – the Tokyo and Nuremberg tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) – contemplate corporations as defendants. The Charter of the Nuremberg Tribunal provided for the trial of persons who 'whether as individuals or as members of organizations' committed specific crimes.[152] The Statutes of the ICTY[153] and the ICTR[154] similarly provide only for jurisdiction over natural persons. As for the International Criminal Court, the issue of corporate responsibility was considered by the drafters of the Rome Statute but ultimately abandoned due to a divergence in state practice, as well as for want of time. As the central international criminal instrument of the modern era, this omission is significant, demonstrating the absence so far of any accepted rules or standards for corporate criminal responsibility under international law.[155]

2.5.3 International law claims against individuals and groups

A more recent addition to the discourse on international responsibility is the possibility of civil claims against non-state actors. No manifestation of this concept yet exists on the international plane. Rather, states incorporate international law norms into their own legal systems, thereby enabling the making of civil claims as an exercise of domestic jurisdiction.

[151] See e.g. Weigend, (2008) 6 JICJ 927, arguing that to impose corporate criminal liability in the international sphere too hastily would be to change the specific character of criminal law.

[152] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Art. 6.

[153] SC Res. 827 (1993), Annex, Arts. 2–6. [154] SC Res. 955 (1984), Annex, Arts. 2–5.

[155] Saland, in Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 189, 199; Ambos, (1999) 10 CLF 1, 7; Clapham, in Kamminga and Zia-Ziarifi (eds.), *Liability of Multinational Corporations under International Law* (2001) 139, 195; Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006), 139–40. Cf. Kyriakakis, (2009) 56 NILR 333.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:39 Page Number: 82

An apparent exception is the Alien Tort Claims Act – also known as the Alien Tort Statute (ATS) – of the United States.[156] The ATS gives US federal courts jurisdiction over cases where the applicable law is customary international law where (a) the plaintiff is an alien, (b) the defendant is responsible for a tort, and (c) the tort in question violates international law, including customary international law.[157] Since its 'rediscovery' in the 1980s, the ATS has been extensively litigated, with some sizeable settlements. To date, the claims pursued have related largely to human rights abuses; courts have found that such norms include the prohibitions on genocide and war crimes,[158] torture[159] and cruel, inhuman or degrading treatment,[160] summary execution,[161] disappearances,[162] non-consensual medical experimentation on children,[163] and forced labour.[164] The Supreme Court in *Sosa* v. *Alvarez-Machain*,[165] however, narrowed the scope of those customary international law rules the breach of which could found an action under the ATS to 'norm[s] of an international character accepted by the civilized world' that are 'defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized',[166] being those norms with a definite content and similar international acceptance to the rules extant at the time the Act was passed (e.g. offences against ambassadors, violations of safe conduct and piracy). In *Sosa*, the applicant failed in a claim based on 'the clear and universally recognized norm prohibiting arbitrary arrest and detention'.[167] The principles enunciated in *Sosa* were applied in *Sarei* v. *Rio Tinto*, with the majority holding that the plaintiffs' claims of genocide and war crimes fell within the ATS, whereas claims alleging crimes against humanity arising from a blockade and racial discrimination did not.[168]

[156] 28 USC §1350. Further: Seibert-Fohr, 'Alien Tort Statute', (2008) MPEPIL.
[157] E.g. *Sosa* v. *Alvarez-Machain*, 542 US 692, 720 (2004) ('[the ATS] furnished jurisdiction for a relatively modest set of actions alleging violations of the law of nations').
[158] *Kadić* v. *Karadžić*, 70 F.3d 232, 240 (2nd Cir., 1995).
[159] *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 847 (11th Cir., 1996).
[160] *Xuncax* v. *Gramajo*, 886 F.Supp. 162, 179 (D Mass, 1995).
[161] *In Re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1472 (9th Cir., 1994); *Xuncax* v. *Gramajo*, 886 F.Supp. 162, 179 (D Mass, 1995).
[162] *Forti* v. *Suarez-Mason*, 694 F.Supp. 707, 720 (ND Cal, 1988).
[163] *Abdullahi* v. *Pfizer Inc*., 562 F.3d 163, 176–77 (2nd Cir., 2009).
[164] *Doe* v. *Unocal*, 395 F.3d 932, 957 (9th Cir., 2002).
[165] 542 US 692 (2004). [166] Ibid., 725.
[167] Alvarez had previously succeeded in making out this cause of action before the 9th Circuit sitting *en banc*: 331 F.3d 604, 620 (9th Cir., 2003). For the Supreme Court reasoning dismissing the identified norm as a cause of action: 542 US 692, 731–8 (2004).
[168] (9th Cir., Docket No. 02-56256/02-56390/09-56381, 25 October 2011) slip op 19332–3, 19358–80.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:39 Page Number: 83

Although only foreign nationals may be ATS claimants, there is no nationality requirement imposed on the defendant, and US nationals and non-nationals alike may be sued under its provisions. High-profile cases have been brought against high-ranking serving or former government officials such as Ferdinand Marcos,[169] Radovan Karadžić[170] and Robert Mugabe.[171]

A more vexed question is its applicability to corporations. US companies are named as defendants in most ATS cases, converting the statute into a corporate social responsibility tool.[172] But a determination by the Supreme Court as to whether corporations can be held liable under the ATS has not yet been made,[173] and the question remains unsettled and contentious.[174]

2.6 Responsibility and accountability

The definition of responsibility for the purpose of the ARSIWA is the 'legal relations which arise under international law by reason of an internationally wrongful act'.[175] By contrast, the notion of accountability is less clear. Indeed, there is no exact equivalent in other European languages.[176] Italian, Spanish and French 'all need to borrow the English word if they wish to indicate "*la responsabilité des gouvernants devant le peuple, au double sens de lui rendre compte et de tenir compte de lui*"'.[177] This

[169] *In Re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir., 1994).
[170] *Kadic* v. *Karadžíc*, 70 F.3d 232 (2nd Cir., 1995).
[171] *Tachiona et al.* v. *Mugabe and ZANU-PF*, 234 F.Supp. 2d 401 (SDNY, 2002).
[172] E.g. *Doe* v. *Unocal*, 395 F.3d 932 (9th Cir., 2002)
[173] Cf. *Presbyterian Church of Sudan* v. *Talisman Energy Inc.*, 582 F.3d 244 (2nd Cir., 2009); *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111 (2nd Cir., 2010) (*cert* granted); *Sarei* v. *Rio Tinto* (9th Cir., Docket No. 02-56256/02-56390/09-56381, 25 October 2011) slip op.; cf. CPUSIL, (2010) 104 AJIL 119. On 5 March 2012 the parties in the *Kiobel* proceedings were directed to file supplemental briefs addressing the question whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States; see 132 S Ct 1738 (2012); CPUSIL, (2012) 106 AJIL 382.
[174] *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111, 148–9 (2nd Cir., 2010); cf. Paust, (2010–11) 51 Va JIL 977.
[175] See ARSIWA Commentary, Art. 1.
[176] Mulgan, (2000) 78 *Public Administration* 555, 555, citing Dubnick, in Sampford and Preston (eds.), *Public Sector Ethics* (1998) 69.
[177] Harlow, *Accountability in the European Union* (2002), 14, citing Avril, in Wahl and Quermonne (eds.), *La France presidentielle* (1995) 65. Harlow makes the point that this may explain the apparent lack of interest in the concept in institutional studies of the EU (ibid., 14ff.); she concludes that the term 'accountability' 'is not in use everywhere and, when it is found, [it] is often an English import' (ibid., 15).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:39 Page Number: 84

has not prevented the increasing use of the term in political and legal discourse.[178] It is increasingly used in international law, for example to call for the accountability of international organizations or non-state actors.[179]

In this wider sense it was addressed by an International Law Association (ILA)'s Committee on Accountability of International Organizations: the committee's terms of reference included consideration of 'what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organizations to their members and to third parties, and of members and third parties to such organizations'.[180] In its Final Report, the committee noted that that, as a matter of principle, accountability is linked to power and authority – it is the duty to account for the exercise of power.[181] It stated that accountability is a 'multifaceted phenomenon', and the form under which it eventually arises will be determined by the circumstances surrounding the relevant act or omission. The committee concluded that the accountability of international organizations consists of three interrelated and mutually supportive levels:

> [First level] the extent to which international Organizations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;
>
> [Second level] tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);
>
> [Third level] responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires or violate the law of employment relations).[182]

The notion of accountability is distinguishable from the notion of responsibility in three ways. First, it is not limited to responsibility

[178] Mulgan (2000), 555; Harlow (2002), 1. [179] See Hafner, (2003) 97 ASIL Proc. 236, 236.
[180] ILA, Committee on Accountability of International Organizations, First Report, *Taipei Conference* (1998) 586.
[181] ILA, Committee on Accountability of International Organizations, Final Report, *Berlin Conference* (2004) 5.
[182] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:40 Page Number: 85

towards other states under international law, but includes responsibility towards an international organization's staff as well as individual persons, irrespective of the applicable law. Second, it embraces a more extensive political understanding, that it is the duty to account, by whatever means, for the exercise of power. Third, it includes primary norms that can be termed norms of good governance, and incorporates the concept of transparency in both the decision-making process and the implementation of decisions.[183]

Although there has been a tendency to use the terms 'accountability' and 'responsibility' interchangeably, it is clear that responsibility is a narrower concept, properly confined to the legal relations arising by reason of an internationally wrongful act. Accountability, on the other hand, includes wider forms of answerability (financial, political and administrative).

2.7 The modern synthesis and its future

2.7.1 Governmental criticisms

Although the ARSIWA have been generally welcomed and widely invoked, they have not escaped criticism. In the first place, certain governments remain broadly opposed to the concept of multilateral responsibility and as a consequence take issue with, *inter alia*, ARSIWA Articles 40, 41, 48 and 53. This opposition previously manifested itself with respect to the language of 'international crimes of states'; some governments consider the language of peremptory and communitarian norms that emerged in 2001 to be little better: notably, Japan referred to Article 41 as being 'haunted by the ghost of "international crime"' and that the concept of 'serious breaches of essential obligations to the international community' inserted in its place was 'the equivalent of "international crime" barely disguised'.[184] A number of governments called for the deletion of Articles 40 and 41 outright.[185] Other states were more accepting of the ILC's change in direction, but expressed

[183] There have been some steps towards greater accountability of international organizations. For example, the World Bank Inspection Panel was set up to provide a body competent to review, and if appropriate investigate, complaints against the Bank: see IBRD Resolution No. 93-10 and IDA Resolution No. 93-6, The World Bank Inspection Panel, 22 September 1993, 34 ILM 520; Further: Gowlland-Gualtieri, (2001) 72 BYIL 213.

[184] ILC Ybk 2001/II(1), 67–8.

[185] Namely France, Japan and the United States: ibid., 64–72.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:40 Page Number: 86

concern over the ambiguity of the new terminology.[186] China's complaint is illustrative:

> The revised text reflects major changes to the former article 19. The new text replaces 'State crimes' with 'serious breaches of essential obligations to the international community', thus circumventing the controversial concept of State crimes. It also differentiates between varying degrees of gravity of an internationally wrongful act. China appreciates this effort. However, some fundamental questions still remain in the current text. For example, what is 'an obligation owed to the international community as a whole and essential for the protection of its fundamental interests'? To talk about the consequences without a clear definition of the concept would very easily lead to controversy in practice.[187]

However, the system had its share of supporters as well, notably among the Nordic countries, which noted that, although the concept of a state crime might be considered inappropriate, some division should be recognized between an 'ordinary' breach of international law, and the breach of those norms the violation of which is considered an affront to the international community as a whole, that is, aggression and genocide.[188]

In a related complaint, some states were alarmed by the content of what would become ARSIWA Article 48. China raised the concern that it

> would allow any State other than the injured state to invoke the responsibility of another State, while [draft] article 54 would further allow such states to take countermeasures at the request and on behalf of the injured State. These provisions would obviously introduce elements akin to 'collective sanctions' or 'collective intervention' into the regime of State responsibility, broadening the category of States entitled to take countermeasures, and establishing so-called 'collective countermeasures'. This would run counter to the basic principle that countermeasures should and can only be taken by States injured by an internationally wrongful act. More seriously, 'collective countermeasures' could become only one more pretext for power politics in international relations, for only powerful States or blocs of States are in a position to take countermeasures against weaker States. Furthermore, 'collective countermeasures' are inconsistent with the principle of proportionality enunciated in article 52. The same countermeasures would become tougher when non-injured States join in, leading to undesirable consequences greatly exceeding the injury.[189]

[186] Namely Austria, China, Mexico, the Netherlands, Slovakia, South Korea and the United Kingdom: ibid.
[187] Ibid., 67. [188] Ibid., 64. [189] ILC Ybk 2001/II(1), 79.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:40 Page Number: 87

Similarly, France remarked:

> On several occasions, France has defended the idea that what should distinguish the injured State from the State having a legal interest is the fulfilment of the obligation of reparation. The State which has only a legal interest can only demand the cessation of the breach committed by another State. It cannot seek reparation for the damage caused by the internationally wrongful act which has not directly affected it, nor is there any reason for it to substitute itself for the injured State in demanding the reparations owed to that State. Unlike the injured State which can, by invoking the responsibility of the State which has committed the wrongful act, seek reparation for the damage it has suffered, a State which has a legal interest, can only demand the cessation of the internationally wrongful act when invoking the responsibility of the State which has violated the obligation.[190]

2.7.2 *Scholarly criticisms*

In an early but perceptive response, Caron[191] criticized the ILC's decision to present its conclusions in the form of a treaty-like text – or more particularly, a treatise written as though it were a treaty.[192] Such an approach (characteristic of most ILC work) 'finesses the question of whether – at any given moment – the ILC is codifying the law or progressively developing it'.[193] It provides the finished product with a false sense of solidarity, while at the same time masking division and debate within the Commission, which in the case of the ARSIWA played out over four decades. Such an approach can create the mistaken impression that the work of the ILC is a source of law within the meaning of Article 38(1) of the Statute of the International Court.[194]

Within the hierarchy of Article 38(1) of the Statute, the ARSIWA represent a 'subsidiary means for the determination of rules of law'. It is *evidence* of the law and not a source. Thus the bare article must be read in the light of the accompanying commentary, and preferably alongside the preparatory work of the ILC such that the history of each provision may be traced with precision: 'indeed, what is required is to analyze, perhaps even rewrite, the work of the ILC as though it were a narrative study'.[195] Caron concluded that the codification of the law of state responsibility as a set of articles carried with it unavoidable risks; in its

[190] Ibid., 80 n. 1. [191] Caron (2002). [192] Ibid., 868.
[193] Ibid., 862. Also Ramcharan, *The International Law Commission* (1977), 104–5; Goswami, *Politics in Law Making* (1986), 162.
[194] Caron (2002), 867. [195] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:41 Page Number: 88

place he suggested an authoritative scholarly statement of the law that could better reflect the topography of the field.[196]

Further scholarly complaints arose from those who supported the earlier inclusion of 'state crimes' in the Draft Articles and therefore opposed the amendment of Draft Article 19. Cassese levelled two objections at the regime which emerged in 2001,[197] arguing that, notwithstanding the language of ARSIWA Article 41, the Articles failed to provide for a truly collective response to serious breaches of communitarian norms, on which the individual response by each state was made contingent. Second, he complained that the interplay of Articles 41 and 48

> boils down to granting to all other States, in the case of very serious breaches of obligations flowing from *jus cogens*, the normal rights accruing to any injured State toward the responsible state . . . *plus* the [obligations contained in Article 41] but *minus* the right to resort to countermeasures proper. The crucial point of what measures other States could lawfully take to react to the gross breaches and induce compliance with international law has been substantially left in abeyance.[198]

More recently, criticism of the Draft Articles as such has tended to abate, and attention has turned to the formulation of particular articles and whether they reflect general international law.[199] A significant episode in that regard was the decision of the Appellate Body of the World Trade Organization (WTO) in *US – Antidumping and Countervailing Duties* in 2011. One question there was the interpretation of the phrase 'public body' as it appeared in Article 1.1(a)(i) of the Subsidies and Countervailing Measures Agreement.[200] At first instance, the Panel, in line with certain submissions made by the United States, cast doubt on the reliability of the ARSIWA. It said:

> China significantly overstates the status that has been accorded to the Draft Articles where they have been referred to by panels and the Appellate Body. Indeed, in not a single instance of such citations identified by China has a panel or the Appellate Body identified the Draft Articles as 'relevant rules of

[196] Caron (2002), 873:

> To apply them correctly, decision makers must . . . consult the commentaries and reports for each article, which illuminate the practice underlying the rule, the discussions of the ILC, and the comments of various governments. Together these sources bring life to the articles and reveal the degree of consensus.

[197] Cassese, *International Law* (2nd edn, 2005), 269–71. [198] Ibid., 271.

[199] E.g. ARSIWA, Art. 16 (as to which see Chapter 12); Art. 25 (as to which see Chapter 9).

[200] Agreement on Subsidies and Countervailing Measures, 14 April 1994, 1869 UNTS 14.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:41 Page Number: 89

international law applicable in the relations between the parties' in the sense of Article 31(3)(c) of the Vienna Convention, such that they should be 'taken into account together with the context' when interpreting the treaty. Rather, in our view, the various citations to the Draft Articles 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.[201]

In this, as in certain other respects, the Appellate Body disagreed with the Panel. It said:

> We 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'. The Panel elaborated that, while in some WTO disputes the ILC Articles 'have been cited as containing similar provisions to those in certain areas of the WTO Agreement, in others they have been cited by way of contrast with the provisions of the WTO Agreement, as a way to better understand the possible meaning of the provisions of the WTO Agreement'. The Panel considered this to indicate that panels and the Appellate Body have not considered the ILC Articles to constitute rules of international law in the sense of Article 31(3)(c). To us, this demonstrates the opposite. If, as the Panel states, certain ILC Articles have been 'cited as containing similar provisions to those in certain areas of the WTO Agreement' or 'cited by way of contrast with the provisions of the WTO Agreement', this evinces that these ILC Articles have been 'taken into account' in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases.[202]

The Appellate Body declined, however, to settle definitively 'the question of to what extent ... the ILC Articles [reflect] customary international law'.[203] But such questioning of the customary and/or principled content of the ARSIWA is perfectly normal, and not at all to be construed as an attack on their theoretical underpinnings. Although the customary character of the ARSIWA is perhaps *a priori* heightened by their origins in the work of the ILC, when all is said and done it is state practice and *opinio juris* that will confirm their continued relevance – and to a large extent the ILC's control over the future of the ARSIWA ended with their adoption. The testing process undertaken by the Panel and Appellate Body in *US – Antidumping and Countervailing Duties* is to be

[201] *US – Antidumping and Countervailing Duties*, WT/DS379/R, 22 October 2010, §§8.87ff.
[202] *US – Antidumping and Countervailing Duties*, WT/DS379/AB/R, 11 March 2011, §313.
[203] Ibid., §311.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:42 Page Number: 90

welcomed – and, it should be said, to date this process has produced far more victories than defeats for the customary character of the ARSIWA.

2.7.3 A convention on state responsibility?

The ILC's practice in respect of other topics has been to make some recommendation to the General Assembly on questions of form, although these recommendations are not always accepted. In the case of the ARSIWA, two alternative options were considered: a convention on state responsibility and some form of endorsement or taking note of the Articles by the General Assembly.

The advantage of a convention is that states would have full input into the eventual text. The adoption of the Articles in the form of a multilateral treaty would give them durability and authority. The ILC's work on the law of treaties, adopted as the Vienna Convention of 1969, has had a stabilizing effect and exerts a strong continuing influence on customary international law, irrespective of whether particular states are parties to the Convention. Many members of the ILC, and a number of governments, considered that the lengthy and careful work of the ILC on state responsibility merited reflection in a law-making treaty.

On the other hand, adoption of the Articles by the General Assembly offers greater flexibility and would allow for a continued process of legal development. States might well not see it as in their interests to ratify an eventual treaty rather than relying on particular aspects of it as the occasion arose. An unsuccessful convention might even have a 'decodifying' effect. A more realistic and potentially more effective option would be to rely on international courts and tribunals, on state practice and doctrine to adopt and apply the rules in the text. Even before their adoption in 2001, the International Court had already referred to the Draft Articles on a number of occasions; so had other tribunals. Since 2001, the ARSIWA have been referred to more than 150 times by international and national courts and tribunals. This experience suggests that the Articles will have long-term influence even if they do not take the form of a convention.[204]

A more important issue than that of form, in the view of many governments, was whether and how the substance of the text would be reviewed and considered. A preparatory commission, as adopted for

[204] This general view was expressed, for example, by Austria, China, Japan, the Netherlands, the United Kingdom, the United States: A/CN.4/515. The Netherlands affirmed that the result should not be expressed in any weaker form than a General Assembly declaration: ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:42 Page Number: 91

example for the Draft Statute for an International Criminal Court, can be extremely time-consuming. It is also less appropriate for a statement of secondary rules of international law, abstracted from any specific field of primary legal obligations but with wide-ranging and diffuse implications. A diplomatic conference, and the preparatory commission which would necessarily precede it, might result in the repetition or renewal of the discussion of complex issues and could endanger the balance of the text found by the ILC.[205] A less divisive approach would be for the General Assembly simply to take note of the text and to commend it to states and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law.[206]

Although this 'modest' approach attracted a considerable measure of support, probably the dominant view was to prefer the process and form of a law-making convention. Members taking this view stressed the importance of the subject, the balance of the text, the very substantial measure of support for it in the ILC and among governments, and the need for dispute settlement in the field of state responsibility.[207]

Faced with this division of opinion, the ILC endorsed a two-stage approach. In the first instance it recommended that the General Assembly take note of and annex the Articles in a resolution, with appropriate language emphasizing the importance of the subject. The second phase could involve the further consideration of the question at a later session of the General Assembly, after a suitable period for reflection, with a view to the possible conversion of the Articles into a convention, if this is thought appropriate and feasible. At this second stage the General Assembly could consider whether and what provisions for dispute settlement should be included in an eventual convention.[208]

The matter has since been debated in the General Assembly on four occasions, in 2001, 2004, 2007 and 2010.[209] Resolutions were adopted on all four occasions, as follows:

- GA resolution 56/83, 12 December 2001. The General Assembly took note of the ARSIWA, the text of which it annexed to the resolution, and 'commend[ed] them to the attention of Governments without

[205] See the comments by the Austrian Government, ibid.
[206] Crawford, Fourth Report, 7. [207] ILC Ybk 2001/II(2), 24–5.
[208] ILC Ybk 2001/I, 67.
[209] J. Crawford and S. Olleson, 'The continuing debate on a UN convention on state responsibility', (2005) 54 ICLQ 959.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 2 Title Name: CRAWFORD
Date:18/3/13 Time:12:06:44 Page Number: 92

prejudice to the question of their future adoption or other appropriate action'.[210]

- GA resolution 59/35, 2 December 2004. The General Assembly requested governments to submit written comments on any future action.[211] It also commissioned a compilation of decisions of international courts, tribunals and other bodies referring to the ARSIWA.[212]
- GA resolution 62/61 of 6 December 2007. The General Assembly specified that it would in 2010 'further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles'.[213]
- GA resolution 65/19 of 6 December 2010. The General Assembly acknowledged the importance of the ARSIWA,[214] and decided that it will, in 2013, 'further examine, within the framework of a working group of the Sixth Committee and *with a view to taking a decision*, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles'.[215]

On balance, the better course of action remains either final adoption by the General Assembly as a non-binding text,[216] or the continued postponement of any decision on the final form of the Articles until a later date. At present the Articles are performing a constructive role in articulating the secondary rules of responsibility. It may seem paradoxical that this role can only be preserved by keeping the possibility of a convention open while perpetually postponing a decision on the conclusion of such a convention. But given the alternatives and the danger of the Sixth Committee's replicating the ILC's forty years of work on the subject, perhaps to lesser effect, this seems to be the only way forward. In the meantime, the position of the Articles as part of the fabric of general international law will continue to be consolidated and refined through their application by international courts and tribunals.

[210] GA res 56/83, 12 December 2001, §3.
[211] GA Res. 59/35, 2 December 2004, §2.
[212] GA Res. 59/35, 2 December 2004, §3.
[213] GA Res. 62/61, 6 December 2007, §4.
[214] GA Res. 65/19, 6 December 2010, §1.
[215] GA Res. 65/19, 6 December 2010, §4 (emphasis added).
[216] As in the case of the ILC Articles on Nationality of Natural Persons in relation to the Succession of States of 1999: see GA Res. 66/489, 9 December 2011.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:56 Page Number: 93

3 Corollaries of breach of an international obligation

3.1 Introduction

ARSIWA Article 1 provides that international responsibility arises in respect of internationally wrongful acts. Article 2 defines an internationally wrongful act as occurring when conduct attributable to a state under international law constitutes a breach of an international obligation of the state. Article 12 provides that a breach of an international obligation exists when an act of the state in question is not in conformity with what is required of it by the obligation, regardless of its origin or character. Thus the international law of obligations is central to the regime of state responsibility – but the ARSIWA do not define 'international obligation' beyond the general terms of Article 12.[1] Nor do the Articles attempt to set out the content and scope of the international obligations breach of which gives rise to responsibility: this is the function of primary rules, whose codification would involve restating most of substantive customary and conventional international law.

The Articles thus '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'.[2] Moreover, they apply to the whole field of international obligations of states,[3] whether the obligation is owed to one or several states, to

[1] Note, however, that ARSIWA Commentary, Art. 2(b) is careful to specify that what matters in considering a breach of an international obligation is not simply the existence of a rule or norm of international law, but its application in the specific case to the responsible state: ARSIWA Commentary, Art. 2, §13.

[2] ARSIWA Commentary, General Commentary, §4.

[3] It has long been established that international obligations could in principle be assumed by states on any subject: see *SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 25.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:56 Page Number: 94

an individual or group, or to the international community as a whole; and regardless of whether the obligation is set out in a treaty, arises under general international law, applies only locally or regionally, or is the result of a unilateral commitment.

3.2 Breach of obligation and its corollaries

3.2.1 The components of a breach

ARSIWA Article 2, entitled 'Elements of an internationally wrongful act of a State', provides:

> 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.

This is a basic, even axiomatic statement of the conditions of state responsibility: it defines the general prerequisites for the responsibility which Article 1 proclaims. Article 2 has the further role of structuring the articles that follow. Chapter II deals with the requirement of attribution of conduct to the state under international law (see below, Chapters 5–7). Chapters III and V deal, so far as the secondary rules can do so, with the breach of an international obligation, including general defences and excuses (under the rubric of 'circumstances precluding responsibility') (see below, Chapters 7–9). But responsibility can also arise for states other than the primary actor, whether because the conduct is in some sense collective or implicates others by way of complicity or, possibly, state succession. Certain of these issues are dealt with in ARSIWA Part One, Chapter IV; others, notably succession to responsibility, were not covered by the ILC but are dealt with here for the sake of completeness (see below, Chapters 10–13).

3.2.2 The substantive corollary: reparation

In accordance with the classical understanding of responsibility, as articulated by Anzilotti and others (see above, Chapter 1), the automatic substantive corollaries of responsibility are cessation (if the breach is continuing) and reparation (see below, Chapters 14–16). Indeed, the Draft Articles on first reading were largely confined to these issues: although there was a substantial treatment of countermeasures, these were not considered as part of any more general scheme of invocation and were therefore seen as more 'automatic' than in truth they are, or should be.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:57 Page Number: 95

3.2.3 *The procedural corollary: claim and countermeasure*

For if these secondary rights and obligations arise by operation of law, their implementation in practice is far from being automatic. In particular, implementation of responsibility requires invocation by way of a claim made, whether by the injured state or possibly by other states – or in the case of injury to individuals, by the victims themselves (if a forum is available). Furthermore, in certain circumstances an injured state may respond to a continuing or unremedied breach by taking countermeasures. These general questions of implementation are dealt with in ARSIWA Part Three (much of it introduced on second reading), and in Chapters 17–21 below.

3.2.4 *Dispute settlement in claims of responsibility*

In this context something more should be said about dispute settlement in matters of responsibility. Part Three of the Articles on first reading included an elaborate system for the settlement of disputes. This was unusual for an ILC text, such matters normally being left to the Sixth Committee of the General Assembly or a diplomatic conference. Part Three established a hierarchical dispute settlement procedure referring disputing states first to negotiation, then to conciliation, and finally to arbitration if the parties agreed. Two annexes to the part set out the procedure for constituting a Conciliation Commission and an Arbitral Tribunal. However, the intermediate steps of negotiation and conciliation could be bypassed where the dispute arose between states parties, one of which had taken countermeasures against the other. In such circumstances, the state which was the target of the countermeasures was entitled at any time unilaterally to submit the dispute to an arbitral tribunal. In this respect only was arbitration compulsory.

Thus Part Three on first reading had two distinct functions. The first was to provide for compulsory conciliation of disputes 'regarding the interpretation or application of the present articles', followed by voluntary arbitration if the dispute was not thereby resolved. This was a 'soft' and supplemental form of dispute settlement, which, like interstate conciliation generally, might be supposed in theory to work well but in practice, in situations of deep conflict such as that generated by many state responsibility disputes, was unlikely to work at all.[4]

[4] Perhaps the two best examples of successful conciliation in the modern period are the *Iceland-Norway Jan Mayen Continental Shelf Delimitation* case (for the Conciliation Commission's Report see (1981) 62 ILR 108, 27 RIAA 1, and the resulting Agreement

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:57 Page Number: 96

The first reading commentary, while referring to Part Three as 'the general dispute settlement system',[5] failed to address the question whether a dispute concerning the interpretation or application of the primary obligations was covered by Part Three. Although it has happened, for example in the *LaGrand* case,[6] that the parties to a dispute agree that there has been a breach of the primary obligation and disagree only on the consequences, this is unusual. Disputes rarely concern only remedies for a breach; they almost always include disputes about whether there has been a breach in the first place, and what are the elements of the breach. In that respect, for example, the *Rainbow Warrior* arbitration[7] or the *Gabčíkovo-Nagymaros* case[8] are more typical than *LaGrand*: in these cases the question of remedies, that is, of secondary obligations in the field of responsibility, was central to the dispute but there was also a prior question, by no means trivial, whether there had been a breach at all.

Thus, quite apart from the debatable value of compulsory conciliation in practice, there was a key uncertainty with Part Three. Was a dispute as to whether there had been a breach of a primary obligation not itself focusing for example on attribution or on the existence of a circumstance precluding wrongfulness, one 'regarding the interpretation or application of the present articles'?[9] If not, how could the conciliators perform their function? For example, how could they propose the form and amount of reparation due without determining whether there had

between Norway and Iceland on the Continental Shelf between Iceland and Jan Mayen, 22 October 1981, 2124 UNTS 247, incorporating the Commission's recommendations), which was in all but form a maritime boundary arbitration, and the Papal Mediation in the *Beagle Channel* case (see the Proposal of the Mediator, Suggestions and Advice, (1980) 21 RIAA 243; the original award is at (1977) 21 RIAA 57), which occurred after an arbitral award was rejected by one party. Neither concerned responsibility.

[5] See Draft Articles Commentary, Art. 54, §1.

[6] *LaGrand (Germany v. US)*, Provisional Measures, ICJ Rep. 1999 p. 9; Merits, ICJ Rep. 2001 p. 466.

[7] *Rainbow Warrior (New Zealand/France)*, (1990) 20 RIAA 217.

[8] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7.

[9] The phrase 'dispute concerning the interpretation or application' of a treaty has been given a broad interpretation. See, e.g., *Mavrommatis Palestine Concessions*, PCIJ Ser. A No. 2, (1924) 16, 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 427–8; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Rep. 1996 p. 595, 615–17; *Oil Platforms (Iran v. US)*, Preliminary Objection, ICJ Rep. p. 803, 820); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK)*, Preliminary Objections, ICJ Rep. 1998 p. 9, 18.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:57 Page Number: 97

been a breach, and in what respect? Even if the fundamental question between the parties concerns, for example, whether a treaty has been validly concluded or how it is to be interpreted – neither issue covered by the ARSIWA – it would be necessary to answer those questions in order to determine whether there had been conduct inconsistent with an international obligation in force for the state concerned. The innocent formula 'dispute regarding the interpretation or application of the present articles' covered every dispute as to the existence of an internationally wrongful act of a state or its consequences within the field of responsibility, broadly conceived so as to cover cessation as well as reparation. The aim of conciliation may have been modest; the scope of the obligation to conciliate was not.

This became even more important having regard to the second function of Part Three, concerning the settlement of disputes. Draft Article 58 (2) provided that:

> In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

The essential difficulty with this provision was that it privileged the responsible state over the injured state. Compulsory arbitration was only available where a 'dispute arises between States Parties to the present articles, one of which *has taken* countermeasures against the other' (emphasis added). By definition countermeasures are measures taken by an injured state against the state responsible for an internationally wrongful act. Only the responsible state could trigger the arbitration, and then only if the measures taken against it really did constitute countermeasures. In other words, the effect was to give a unilateral right to arbitrate not to the injured but to the responsible state. Such inequality as between the two states concerned could not be justified in principle. It could even give an injured state an incentive to take countermeasures, in order to induce the responsible state to resort to arbitration.[10]

Initial consideration of the linkage between dispute settlement and countermeasures by the ILC in 1999 led to two conclusions: first, that the specific form of unilateral arbitration proposed in the Draft Articles

[10] See Crawford, Second Report, 95.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:58 Page Number: 98

presented serious difficulties and, second, that the desirability of compulsory dispute settlement had to be considered both for the injured state and for the allegedly responsible state.[11]

In the end the central question was whether, assuming the Articles would be adopted in the form of a convention, provision should be made for compulsory dispute settlement, open to both (or all) states concerned. Optional arbitration and non-binding forms of dispute settlement could be discounted. It was unnecessary for the Articles to provide yet another optional mechanism for the judicial settlement of disputes,[12] and, as for other forms of dispute settlement such as conciliation and inquiry, the fact remains that, outside the context of maritime incidents, there has been little recourse to these methods in resolving disputes over state responsibility.[13] Indeed, in the light of the development of compulsory third-party dispute settlement in such major standard-setting treaties as the United Nations Convention on the Law of the Sea and its associated implementation agreements, the Marrakesh Agreement of the World Trade Organization (WTO), and Protocol 11 to the European Convention on Human Rights, providing only a 'soft' form of dispute settlement in the Articles would have seemed a regressive step.

So far as government comments were concerned, while the importance of peaceful settlement of disputes was stressed, few governments sought to go further. Most took the view that general provisions for compulsory dispute settlement could not realistically be included. Most members of the ILC concurred in this view, and it was agreed that there would be no provision in the Articles for dispute settlement machinery.[14] However, in its report to the General Assembly, the ILC drew attention to the desirability of peaceful settlement in disputes concerning state responsibility, leaving it to the General Assembly to consider

[11] ILC Ybk 1999/II(2), 87–8. For government comments (largely hostile to compulsory dispute settlement) see e.g. UN Doc. A/CN.4/488, 142–6; UN Doc. A/CN.4/513, §§19–21; UN Doc. A/CN.4/515.

[12] Apart from the Optional Clause and multilateral treaties providing for general recourse to judicial settlement (e.g. American Treaty on Pacific Settlement, Bogotá, 30 April 1948, 30 UNTS 55; European Convention for the Peaceful Settlement of Disputes, 29 April 1957, 320 UNTS 243), reference may be made to the Permanent Court of Arbitration's Optional Rules for Arbitrating Disputes between Two States. No state lacks access to one or more means of optional judicial settlement of disputes.

[13] For commissions of inquiry into issues of responsibility for maritime incidents see the *Dogger Bank Report*, 26 February 1905, (1908) 2 AJIL 931, and the *Red Crusader Report*, (1962) 35 ILR 485.

[14] ILC Ybk 2001/I, 67.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:58 Page Number: 99

whether dispute settlement provisions could be included in any eventual convention on state responsibility.[15]

3.3 The applicable law in claims of responsibility

3.3.1 Overview

By its terms, the category 'state responsibility' covers the field of the responsibility of states for internationally wrongful conduct, part of the international law of obligations. But what is considered to be a breach of international law by a state depends on the actual *content* of the obligations in question, which may vary markedly from one state to the next, especially where treaties are concerned. Even under customary international law, obligations may vary, due to the operation of factors such as bilateral[16] or regional[17] custom and (though rarely) the persistent objector rule.[18] But once the *existence* of an obligation is established, the principles of state responsibility are generally applicable, absent a *lex specialis* as envisaged in ARSIWA Article 55.[19]

State responsibility may only be engaged for breaches of international law, that is, for conduct which is internationally wrongful because it involves some violation of an international obligation applicable to and binding on the state in question. Thus a dispute between two states

[15] ILC Ybk 2001/II(2), 25. For the ultimate form of the ARSIWA, see Chapter 2.

[16] E.g. *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Rep. 1960 p. 6, 39–43; cf. 62–3 (Judge Wellington Koo); 82–4 (Judge Armand-Ugon, diss.); 110 (Judge Spender, diss.). Also: *Jurisdiction of the European Commission of the Danube,* (1927) PCIJ Ser. B No. 14 p. 6, 114 (Deputy-Judge Negulesco, diss.); *Nottebohm (Liechtenstein* v. *Guatemala),* Second Phase, ICJ Rep. 1955 p. 4, 30 (Judge Klaestead, diss.).

[17] E.g. the alleged regional custom of diplomatic asylum as practised in Latin America, concerning the right of the embassies of other states to give asylum to political refugees: *Asylum (Columbia/Peru)*, ICJ Rep. 1950 p. 266, 276–8. Attempts to establish regional custom have generally failed: e.g. *Rights of Nationals of the United States of America in Morocco (France v. US)*, ICJ Rep. 1952 p. 176, 199–200, citing *Asylum*, ICJ Rep. 1950 p. 266, 276–7; Crawford, *International Law as an Open System: Selected Essays* (2002), 575.

[18] The principle was recognized by both parties, and by the Court, in *Fisheries (UK v. Norway)*, ICJ Rep. 1951 p. 116, 131. Also: *North Sea Continental Shelf (Federal Republic of Germany/ Netherlands; Federal Republic of Germany/Denmark)*, ICJ Rep. 1969 p. 3, 26–7, 131 (Judge Ammoun); 235, 238 (Judge Lachs, diss.); 247 (Judge ad hoc Sørensen, diss.); *Asylum*, ICJ Rep. 1950 p. 266, 277–8; and cf. the central finding of non-opposability of exclusive fisheries zone claims in *Fisheries Jurisdiction (UK v. Iceland)*, ICJ Rep. 1974 p. 3, 29–31.

[19] E.g. those provisions of the WTO covered agreements excluding compensation for breach and focusing on cession. Also (perhaps) Art. 41 (ex Art. 50) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:58 Page Number: 100

arising from an alleged breach of international law – whether based in treaty or custom – will concern state responsibility. This will be true irrespective of whether the remedy sought is the cessation of continuing unlawful conduct or reparation for a breach, or a mere declaration of wrongdoing. On the other hand, not every claim made against a state which touches on international law will invoke the rules of state responsibility. For example, if litigation is commenced against a state in a municipal court on the basis of a purely commercial transaction, international law will govern or at least be relevant to the state's immunity (if any) before the court and from ensuing measures of enforcement, but the substantive claim will derive from the applicable law of the contract.[20]

Claims of responsibility were traditionally brought between states through diplomatic channels or other direct communications, or before an international court or tribunal. However, there is now the possibility in some cases for individuals or corporations to access international tribunals and bring state responsibility claims in their own right. The two most prominent examples are claims for breach of regional human rights treaties (such as the European Convention on Human Rights) and claims for breach of an international investment agreement before an arbitral tribunal established under that agreement.[21] Subsequent enforcement of these claims before municipal courts will depend on the approach to international law of the domestic legal system in question. It may, in certain circumstances, be possible to 'domesticate' claims of responsibility. But complexities may arise when considering the rules of jurisdiction and immunity, as well as the interface between international and municipal law.[22]

3.3.2 International law as the governing law

Some cases of responsibility are obviously international from their inception – for example cases involving the use of force between states, the diversion of a river in alleged breach of an international watercourse treaty, or infringements of diplomatic immunity. But many cases, especially in fields such as human rights and investment protection, involve the concurrent application of international and national (i.e. internal) law. This was in part the point of the exhaustion of local remedies rule, intended *inter alia* to

[20] ARSIWA, Arts. 1, 3, 27. See also *Elettronica Sicula SpA (ELSI) (US v. Italy)*, ICJ Rep. 1989 p. 15, 51; *Vivendi Universal v. Argentina*, First Annulment, (2002) 6 ICSID Reports 340, 365–8.

[21] E.g. under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

[22] See the overview of these subjects in *Brownlie's Principles*, chs. 3, 22.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:59 Page Number: 101

clarify the applicable local law and to give the courts of the state concerned the opportunity to remedy any injury cognizable under that law.

On the other hand, once the case is raised to the international plane (whether by the exhaustion or, as in most bilateral investment treaties, the waiver of the local remedies rule), international law is and obviously must be the governing law. It was established as long ago as the *Alabama* arbitration that a state may not rely on its own law as an excuse for failure to comply with its international obligations.[23] This rule, codified in Article 27 of the Vienna Convention on the Law of Treaties,[24] is rendered in ARSIWA Article 3 as follows:

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.

The characterization of conduct as lawful or not is an autonomous function of international law. The long line of authorities supporting this proposition is surveyed in the commentary: they include *Wimbledon*,[25] the *Reparations for Injuries* opinion[26] and the *ELSI* case.[27] No government expressed any doubt as to the correctness of Article 3 as a matter of international law.[28]

But this does not mean that issues of 'internal' law are irrelevant to responsibility. National law will often be relevant, whether because it is incorporated by reference in the relevant international law rule, or because it is part of the factual matrix of the dispute,[29] or in rare cases because a finding of a breach of national law is a prerequisite to a determination of international responsibility.[30]

[23] *Alabama Arbitration (Great Britain v. US)*, (1872), in Moore, 1 *Int. Arb*. 495, 656.

[24] Art. 27 reads:

> 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.

23 May 1969, 1155 UNTS 331. Art. 46 concerns the validity of treaties concluded in manifest breach of an internal rule of law 'of fundamental importance'.

[25] *SS Wimbledon,* (1923) PCIJ Ser. A No. 1, 29–30.

[26] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, p. 174, 180.

[27] *ELSI*, ICJ Rep. 1989, p. 15, 51, 74.

[28] See UN Doc. A/CN.4/488, 35.

[29] E.g. *ELSI*, ICJ Rep. 1989 p. 15, where Italian law was highly relevant in determining whether the requisition of a factory was 'arbitrary'.

[30] This is the case in claims alleging breach of an 'umbrella clause' in investment treaty. An umbrella clause contains a commitment by the host state to the effect that it will comply with obligations entered into relating to covered investments, including contractual obligations. See *SGS Société Générale de Surveillance SA* v. *Philippines*, Jurisdiction, (2004) 8

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:59 Page Number: 102

These points have particular relevance for investment arbitration, given that the applicable law clauses of many investment treaties refer to both national and international law. Notably, Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[31] provides that:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Both of these systems of law must be applied by investment tribunals, giving investment arbitration its so-called 'hybrid' character.[32] This task is made possible in that each system of law plays a distinct role. The law of the host state governs the transaction arrived at between the investor and the host state (and, for example, determines whether the rights that allegedly constitute the investment exist), whereas the function of international law is to act as a review mechanism for the impugned transaction. The conduct of the host state is assessed by reference to the standards set out in the investment treaty.[33]

These issues were at the heart of the lengthy *Vivendi* dispute. The first tribunal there incorrectly concluded that it did not have jurisdiction to determine the legality of Argentina's conduct under the investment treaty, on the basis that the underlying contract had conferred exclusive jurisdiction on Tucumán's administrative tribunals concerning its 'interpretation and application'.[34] As the Annulment Tribunal stated in partially annulling the award,

> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract ... [W]here 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract

ICSID Reports 515, 549–62; *CMS Gas Transmission Company* v. *Argentina*, Annulment, (2007) 14 ICSID Reports 251, 268; Crawford, (2008) 24 *Int. Arb.* 351, 366–70.

[31] 18 March 1965, 575 UNTS 159.

[32] See, generally, Douglas, (2003) 74 BYIL 151. See further Douglas (2009), ch. 2.

[33] Douglas (2003), 211–3.

[34] For the Tribunal's decision see *Vivendi Universal* v. *Argentina*, First Award, (2000) 5 ICSID Reports 299.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:42:59 Page Number: 103

between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard ... [I]t is one thing to exercise contractual jurisdiction ... and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.[35]

The claim was restated and a second award granting Vivendi damages of US$105 million was ultimately upheld in a second decision on annulment.[36]

3.3.3 *The* lex specialis *principle and 'self-contained regimes'*

But if international law is the applicable law in matters of responsibility, the question is *which* rules of international law – those articulated in the ARSIWA or those expressed or to be implied in the treaty or other instrument which is the source of the substantive obligation said to have been breached? The ARSIWA are not, generally speaking, peremptory, and treaties can and sometimes do provide for the conditions and consequences of non-compliance in a way which overlaps with the potential application of the ARSIWA. The question in such cases is whether the specific provisions of the treaty were intended to be cumulative with or exclusive of the ARSIWA.

These issues are dealt with by referring to the *lex specialis* principle, articulated in ARSIWA Article 55 in the following terms:

> 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.

[35] *Vivendi Universal* v. *Argentina*, First Annulment, (2002) 6 ICSID Reports 340, 366–8. See also *Waste Management* v. *Mexico (No. 2)*, (2004) 11 ICSID Reports 362, 378–9:

> NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an 'umbrella clause' committing the host State to comply with its contractual commitments. This does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117. Furthermore, while conduct (e.g. an expropriation) may at the same time involve a breach of NAFTA standards and a breach of contract, the two categories are distinct.

[36] *Vivendi Universal* v. *Argentina*, ICSID Case ARB/97/3, Second Award, 20 August 2007; *Vivendi Universal* v. *Argentina*, ICSID Case ARB/97/3, Second Annulment, 10 August 2010.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:00 Page Number: 104

The first reading equivalent had applied only to Part 2 of the Draft Articles,[37] whereas Article 55 applies to the whole text; the phrase 'the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State' is a succinct summary of the content of the ARSIWA as a whole.

Government comments on the *lex specialis* principle were uniformly supportive,[38] not only in relation to Part Two of the Articles but generally.[39] Switzerland raised the question of the relation between *lex specialis* and Article 60 of the Vienna Convention on the Law of Treaties, dealing with termination of a treaty for material breach: Article 60 was not *lex specialis* in relation to issues of responsibility.[40]

As noted, treaties often make specific provision for the legal consequences of breaches of particular provisions. The question whether those consequences are exclusive – in other words, whether the consequences which would otherwise apply under general international law are thereby excluded – is a question of interpretation in each case, which no generic provision such as Article 55 can prejudge. In some cases it will be clear from the language that only the consequences specified flow. 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 Dispute Settlement Understanding as it relates to remedies.[41] An example of the

[37] Draft Art. 37 on first reading read:

> The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

[38] See the discussion held in the Sixth Committee in which 'the remark was made that the draft should continue to respect *lex specialis*' (UN Doc. A/CN.4/496, 20). The Sixth Committee has noted that specific treaty regimes providing their own framework for the responsibility of states would ordinarily prevail over the provisions of the draft articles (regardless of their eventual form) (ibid.). Likewise, at its fifty-fourth session it was noted that the draft articles 'would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade, which had been developed in recent years' (UN Doc. A/CN.4/504, 9).

[39] See comments by Germany (UN Doc. A/CN.4/488, 33), the United States (ibid., 84), the United Kingdom (ibid., 28) and Japan (UN Doc. A/CN.4/492, 12). See also the observation made in the Sixth Committee that 'the Commission should draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle' (ibid., 20).

[40] The discussion in the Sixth Committee also stressed the importance of respecting the 'parallelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention' (UN Doc. A/CN.4/496, 20).

[41] Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Annex 2: Understanding on the Rules and Procedures Governing the Settlement of Disputes, Art. 3(7); Gomula, in Crawford, Pellet and Olleson (2010) 791, 797.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:00 Page Number: 105

latter is Article 41 (formerly 50) of the European Convention on Human Rights.[42] Both concern matters dealt with in Part Two of ARSIWA, but the same considerations apply, in principle, to Parts One and Three. Thus a particular treaty might impose obligations on a state but define the 'state' for that purpose in a way which produced different consequences than would otherwise flow from the rules of attribution in Chapter II of Part One.[43]

There are always issues on which treaty regimes remain silent. For example, often the existence of any right to take countermeasures is not explicitly addressed.[44] Are such lacunae to be interpreted as intentional deviations from the general regime of state responsibility or as gaps that need to be filled by that general regime? Treaties rarely answer this question in an unequivocal fashion. Simma and Pulkowski, citing the work of the ILC on fragmentation,[45] suggest that the answer is reached by asking whether 'a fallback on general international law is expedient to serve the purposes of the special regime'.[46] This seems uncontroversial. Such an approach is dictated by the requirement that a treaty be interpreted in the light of its object and purpose.[47] It also recognizes that the issue cannot be avoided merely by labelling a treaty regime as 'self-contained'.[48]

[42] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

[43] Cf. 'federal' clauses in treaties, allowing certain component units of the state to be excluded from the scope of the treaty (e.g. the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, 575 UNTS 159, Arts. 70, 72), or limiting obligations with respect to such units (e.g. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151, Art. 34).

[44] See Simma and Pulkowski (2010), 149–62, for a discussion of the circumstances in which a resort to countermeasures could be considered permissible under diplomatic law, the European Community legal system, the WTO system and human rights treaties. See also ILC Study Group on Fragmentation of International Law, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, UN Doc. A/CN.4/L.682, §190. On countermeasures generally, see Chapter 21.

[45] '[I]f instead of enhancing the effectiveness of the relevant obligations the regime serves to dilute existing standards . . . then the need of a residual application, or a "fall-back" onto the general law of State responsibility may seem called for': 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, UN Doc. A/CN.4/L.682, §137.

[46] Simma and Pulkowski (2010), 148.

[47] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(1).

[48] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, UN Doc. A/CN.4/L.682, §172: 'None of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded'. See also, Crawford, Third

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:00 Page Number: 106

3.3.4 *Claims of responsibility arising under peremptory norms*

The Czech Republic raised the relationship between the *lex specialis* principle and 'crimes' as dealt with in Draft Article 19, suggesting that 'the provisions of part two, when they deal with the regime applicable to "crimes", are no longer simply residual in character'.[49] In its view, if the primary obligation breached arises under a peremptory norm, the applicable secondary rules 'must also be peremptory in nature, with no possibility of derogating from them by means of an agreement *inter partes*'.[50]

The observation raises the broader question of claims of responsibility for breach of peremptory norms. This is dealt with in Chapter 11. To summarize the discussion there, Article 41 of the ARSIWA specifies three consequences which flow in the event of a 'serious' breach of a peremptory norm, defined as a breach involving 'a gross or systematic failure by the responsible state to fulfil the obligation'.[51] In such a situation, states are obliged: to co-operate to bring the breach to an end, not to recognize the situation created as lawful, and to render no aid or assistance to maintain that situation.

3.3.5 *State responsibility and the United Nations Charter*

The UN Charter is the primary world order treaty of the modern international system. Unlike the League of Nations Covenant, its relation to general international law is indirect.[52] Whereas the preamble of the League Covenant referred to the establishment of international peace and security by means of 'the firm establishment of the understandings of international law as the actual rule of conduct among Governments' and by 'a scrupulous respect for all treaty obligations', the preamble to the Charter records a determination 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Whereas the Covenant emphasized in its central Articles 12, 13 and 15 the imperative of arbitration or inquiry in the settlement of disputes and the primacy of

Report, 50: 'there is a presumption against the creation of wholly self-contained regimes in the field of reparation'.

[49] UN Doc. A/CN.4/488, 92. [50] Ibid. [51] ARSIWA, Art. 40(2).

[52] On the relationship between the Security Council and international law see, for example, Frowein and Krisch, in Simma (ed.), 1 *The Charter of the United Nations: A Commentary* (2nd edn, 2002) 701, 710–2; Gowlland-Debbas, in Crawford, Pellet and Olleson (2010) 115, 126–38; Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951), 293–5, 729–30, 735–6; Crawford (2002), *International Law*, 123–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:01 Page Number: 107

international law in determining the domestic jurisdiction of states (Article 15(8)), the Charter disjoins domestic jurisdiction from international law (Article 2(7), first sentence), allows the Security Council to take enforcement action in matters of domestic jurisdiction (Article 2(7), second sentence), and generally treats international law merely as a *desideratum*, not a 'rule of conduct'(Articles 24(2), 25, 36(3), 103).

This contrast notwithstanding, the Security Council has quite often made findings of responsibility, and has sometimes taken Chapter VII action on the basis of such findings. A notable instance of this was the finding of Iraq's responsibility for the invasion of Kuwait in 1991, on the basis of which the United Nations Compensation Commission was established.[53]

It was accordingly seen as necessary to regulate in the Draft Articles adopted on first reading the relations between the Charter and the general regime of state responsibility. Draft Article 39 provided:

Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

This provision, adopted under Special Rapporteur Riphagen,[54] was the subject of much criticism by his successor, Arangio-Ruiz,[55] as well as, from differing points of view, within the ILC itself.[56] Government comments on Draft Article 39 were likewise somewhat mixed. A number of states seemed to view as unproblematic the precedence given by the draft article to the Charter mechanism for the maintenance of international peace and security over the provisions of Part Two.[57] The United States, for instance, agreed with 'the objective of the draft article in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an

[53] See SC Res. 687 (1991), and see further Chapter 19. [54] ILC Ybk 1983/II(2), 43.

[55] Arangio-Ruiz, (1998) 81 RDI 110; Arangio-Ruiz, (2000) 83 RDI 1. See also ILC Ybk 1996/I, 137–9.

[56] For the debate see ILC Ybk 1996/I, 139–42.

[57] See comments of the Czech Republic (discussing responses to 'international crimes' and noting that 'in the field of the maintenance of international peace and security . . . there is in fact already a specific mechanism, which is appropriately covered by draft article 39' (UN Doc. A/CN.4/488, 94)), Mongolia (emphasizing that the text 'should take into full account the current situation concerning the measures which the United Nations is taking under Chapter VII of its Charter (ibid.)) and Japan ('It is evident that under such provisions as Article 103 of the Charter of the United Nations and article 39 of the draft articles, the Charter of the United Nations has precedence over the draft articles' (UN Doc. A/CN.4/492, 13).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:01 Page Number: 108

act of a State, properly undertaken pursuant to a Chapter VII decision of the Security Council cannot be characterized as an internationally wrongful act'.[58] In its view, Article 103 'not only establishes the pre-eminence of the Charter, but makes it clear that subsequent agreements may not impose contradictory obligations on States'. Thus, 'the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security'.[59] France, on the other hand, was concerned that Draft Article 39 'appears to run counter to Article 103 of the Charter of the United Nations, which makes no distinction between the provisions of the Charter' and suggested that it would 'have the effect of restricting the prerogatives of the Security Council'. It would be preferable to state that the provisions of the Draft Articles do not impair the provisions and procedures of the Charter of the United Nations, in accordance with Article 103.[60] The United Kingdom, though supporting the principle of pre-eminence of the Charter reflected in Article 103, opposed addressing the question in the Draft Articles. In its view, this question 'raises complex issues, which concern not only the United Nations but also other international and regional organizations which may be acting in conjunction with the United Nations or in roles assigned to them under the Charter'.[61]

The ILC decided to retain the provision, redrafted, in ARSIWA Part Four. It dropped the suggestive phrase 'where appropriate' and the express reference to Chapter VII. Since Article 103 of the Charter is comprehensive and categorical, it concluded that its effect, whatever it might be, could be reserved in a simple provision.[62] Accordingly ARSIWA Article 59 provides as follows:

Charter of the United Nations

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

3.3.6 *Other legal consequences of internationally wrongful acts*

ARSIWA Article 56 provides:

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.

[58] UN Doc. A/CN.4/488, 95.

[59] Ibid. The United States further noted that 'State responsibility provisions may inform the Security Council's decision-making, but the draft articles would not govern its decisions'.

[60] Ibid., 94. [61] Ibid., 95. [62] Crawford, Third Report, 110–11; ILC Ybk 2000/II(2), 64.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:02 Page Number: 109

This implies that there may be other – unspecified – legal consequences of an internationally wrongful act (apart from those provided for in any applicable *lex specialis*): the question is what they might be. Of course, one consequence of an internationally wrongful act might be the termination of the obligation violated, for example, in case of a 'material breach' of a bilateral treaty pursuant to Article 60(1) of the Vienna Convention on the Law of Treaties. But this has nothing to do with responsibility.

Another possibility is that the principle of law expressed in the maxim *ex iniuria jus non oritur* may generate new legal consequences in a given case of responsibility, consequences which would not be specific or explicit enough to be covered by the *lex specialis* exception. A possible candidate is the so-called principle of 'approximate application', formulated by Judge Sir Hersch Lauterpacht in the Advisory Opinion concerning *Hearing of Petitioners*. He said:

> It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument – not to change it.[63]

In the *Gabćíkovo-Nagymaros Project* case, Slovakia relied on this dictum to justify its diversion of the Danube ('Variant C'). The Court held it was not necessary

> to determine whether there is a principle of international law or a general principle of law of 'approximate application' because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question.[64]

That 'cardinal condition' was not met, in the Court's view, in the circumstances of that case. Moreover, its treatment of the question suggests that this is less an autonomous principle of law than a conclusion generated, within the field of the performance of treaties, by the general principle of law that a state may not rely on the consequences of its own unlawful conduct. As such, there was no need to include it in the ARSIWA. But it is an illustration of the potential of general principles of

[63] *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, separate opinion of Sir Hersch Lauterpacht, ICJ Rep. 1956 p. 23, 46. For discussion see Rosenne, *Breach of Treaty* (1985), 96–101.

[64] ICJ Rep. 1997 p. 7, 53.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 3 Title Name: CRAWFORD
Date:18/3/13 Time:12:43:02 Page Number: 110

international law to generate novel consequences in the field of the performance of legal obligations.

Within the field of state responsibility, there seem to be no *general* legal consequences of the commission of an internationally wrongful act other than those referred to in ARSIWA Parts Two and Three – namely, cessation, restitution, compensation, satisfaction and the possible liability to countermeasures in the event that a state fails to comply with these secondary obligations. Nonetheless, the ILC decided to include a saving clause in terms of Article 56.[65]

[65] For the Special Rapporteur's scepticism as to the need for such a provision see Crawford, Third Report 24–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-II Title Name: CRAWFORD
Date:19/3/13 Time:17:58:09 Page Number: 111

Part II

Attribution to the state

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-II Title Name: CRAWFORD
Date:19/3/13 Time:17:58:09 Page Number: 112

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:32 Page Number: 113

4 Organs and entities exercising governmental authority

4.1 General principles of attribution

A state is a corporate entity and as such cannot carry out its functions and activities without the intermediate involvement of others.[1] 'Attribution'[2] is the process by which international law establishes whether the conduct of a natural person or other such intermediary can be considered an 'act of state', and thus be capable of giving rise to state responsibility.[3] Attribution is thus a basal concept of the law of state responsibility and an essential condition for its operation.

4.4.1 The process of attribution and its discontents

The process of attribution as stated in ARSIWA Article 2 reflects a conception of attribution that is essentially normative.[4] As the commentary notes,

[1] See e.g. Kelsen, *The Pure Theory of Law* (2nd edn, 1960; Knight trans. 1967), 290–312. Also *German Settlers in Poland*, (1923) PCIJ Ser. B No. 6, 22: 'States can only act by and through their agents and representatives'.

[2] Earlier writers (notably Special Rapporteur Ago, following Anzilotti) tended to prefer the term 'imputation' or 'imputability' in expressing this concept: e.g. Starke, (1938) 19 BYIL 104; ILC Ybk 1970/II, 187–9. The International Court in some later decisions (with then-Judge Ago forming part of the majority) also adopted the term: *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 51. The ILC, however, preferred the term 'attribution' to avoid any suggestion that the legal process of connecting conduct to the state was a 'fiction': ILC Ybk 1971/II(1), 214; Brownlie (1983), 36–7. Accordingly, 'attribution' was the preferred term in the Draft Articles on first reading, and was retained during the second: Crawford, First Report, 33. It has since been consistently adopted by the International Court: see e.g. *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 223, 226, 232, 242; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 202–11.

[3] ARSIWA Commentary, Pt I, Ch. II, §2. Also Starke (1938), 105; Brownlie (1983), 132–3; Condorelli and Kreß, in Crawford, Pellet and Olleson (2010) 221, 220–3.

[4] Condorelli and Kreß (2010), 225–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:32 Page Number: 114

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 causality.[5]

This characterization was a point of contention within the ILC, with the normative thesis being subjected to an extensive critique based on a 'factual' approach to attribution – the notion that attribution is a simple empirical statement by an adjudicator based on an underlying factual matrix.[6] As the state is the principal subject of international law and effectively precedes it, so the argument runs, the structure of the state and the identification of its acts cannot be determined by rules forming part of the international legal order.

This statist position, however, fails to grasp the need for legal standards in the regulation of inter-state relations.[7] In addition, its proponents concede that any process of 'factual' attribution must be conducted according to 'criteria, standards and principles, including, in addition to common sense, national and international rules',[8] adopting in the end a normative frame of analysis.[9] Of course, normative processes must demonstrate sensitivity to the facts of each case, but that is true in any event.[10]

One consequence of the normative approach is the possibility that the general rules of attribution set out in ARSIWA Part One, Chapter II can be displaced by a *lex specialis* within the meaning of ARSIWA Article 55.[11] This may occur in one of two ways. In the first place, the *lex specialis* may comprise an entirely new set of secondary rules of attribution introduced by treaty and applicable as between the parties – a special rule of attribution *ratione personae*.[12] One example arises in the context of Article 139 of the United Nations Convention on the Law of the Sea,[13] which provides that a state may act as 'sponsor' of a private entity undertaking sea-bed mining: in so doing, the state assumes responsibility for certain acts of the private operator.[14] In the second, a *lex specialis* with respect to

[5] ARSIWA Commentary, Pt I, Ch. II, §4.
[6] This was particularly evident in the writings of Special Rapporteur Arangio-Ruiz: e.g. ILC Ybk 1989/II(1), 48–53.
[7] Condorelli and Kreß (2010), 225. Also Kelsen (1960), Ch. VII.
[8] ILC Ybk 1989/II(1), 52. [9] Condorelli and Kreß (2010), 225.
[10] Crawford, (1999) 10 EJIL 435, 439; Condorelli and Kreß (2010), 227. Cf. Jinks, (2003) 4 Chicago JIL 83, 88–90, arguing that the scope of ARSIWA, Art. 8 has been relaxed in the light of the 9/11 terrorist attacks.
[11] Kees, 'Responsibility of states for private actors', (2011) MPEPIL, §2.
[12] Crawford, First Report, 33–4. [13] 10 December 1982, 1833 UNTS 3.
[14] Further: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, (2011) 150 ILR 244; Freestone, (2011) 105 AJIL 755.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:33 Page Number: 115

mechanisms of attribution may be inherent in the primary rule to which the secondary rules of state responsibility apply – a special rule of attribution *ratione materiae*.[15] Such a rule was suggested by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case for determining whether armed forces engaged in an internal conflict are in fact fighting on behalf of a foreign state, even where they do not meet the formal requirements to be considered an organ of that state;[16] the existence of such a special rule was denied by the International Court in the *Bosnian Genocide* case.[17]

4.1.2 *Bases of attribution in the ARSIWA*

Chapter II of Part One of the ARSIWA consists of eight articles, which may themselves be divided into three categories.[18] The first – comprising Articles 4 to 7 – forms the hard core of the doctrine of attribution, dealing with organs and agencies of state exercising sovereign authority. It operates largely though not exclusively by *renvoi* to the internal constitutional and legal arrangements of the state in question.[19] It is the subject of this chapter.

The second category comprises Article 8 and is dealt with in Chapter 5. In short, it considers those situations where a state, through the direction and control of another entity, creates a *de facto* organ or agent for the purposes of attribution. Recently, this area has achieved considerable prominence in terms of responsibility with respect to non-state actors such as paramilitary organizations, private military and security companies and terrorist groups.[20] Given that such entities are not co-opted into the legal apparatus of the state, municipal law plays a considerably lesser role. Despite this, as Condorelli and Kreß have noted,[21] the second

[15] Condorelli and Kreß (2010), 227.

[16] *Tadić*, Appeal against Conviction, (1999) 124 ILR 63, 98. Further: de Hoogh, (2001) 72 BYIL 255.

[17] *Bosnian Genocide*, ICJ 2007 p. 43, 210–11. Further: Griebel and Plücken, (2008) 21 LJIL 601; Milanović, (2009) 22 LJIL 307.

[18] On first reading there were no fewer than eleven, including a number of 'negative attribution' articles. These were essentially circular and were deleted on second reading: Crawford, First Report, 48–50, 53–4; ILC Ybk 1998/II(2), 84–7.

[19] Crawford, First Report, 34.

[20] Generally: Lehnardt, in Chesterman and Lehnardt (eds.), *From Mercenaries to Market* (2008) 139; Becker, *Terrorism and the State* (2006); Trapp, *State Responsibility for International Terrorism* (2011); Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (2011); Beaucillon, Fernandez and Raspail, in Francioni and Ronzitti (eds.), *War by Contract* (2011) 396.

[21] Condorelli and Kreß (2010), 227.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:33 Page Number: 116

category of attribution remains closely aligned with the first, as both stem from the state's capacity to determine its own organization on an internal level. The difference lies in the realization that the first category is established largely through the operation of internal law, while the second is created de facto and externally through the instruction, direction or control by state organs of other entities and persons for particular purposes.

Articles 9, 10 and 11 concern certain exceptional categories of attribution in which the actions of non-state actors may be considered attributable to a state without any prior intervention, delegation or instruction from an Article 4 organ.[22] Article 9 covers the very special case where private persons step in to fulfil state functions in the absence of the official authorities – a form of agency of necessity. Article 10 deals with responsibility arising from the conduct of an insurrectional movement which succeeds in replacing the government or in creating a new state by separation or secession. Article 11 is a residual category (added on second reading): it addresses the situation, well known in domestic agency law, of ratification: in international law terms, where a state by its conduct adopts another's actions as its own *ex post facto*.[23] There is also the further situation, external to the ARSIWA, of the attribution to states of acts done under the supervision of international organizations, notably in the context of peacekeeping and other forms of UN intervention.[24] These rather heterogeneous cases are dealt with in Chapter 6.

4.2 Organs of the state

4.2.1 Responsibility for the acts of state organs

The principle that a state is responsible for the actions of its organs[25] is of long standing, and was recognized as such by early ad hoc tribunals such

[22] Generally: Dumberry, (2006) 17 EJIL 605.

[23] ARSIWA, Art. 11 was first introduced in 1998: Crawford, First Report, 55–6.

[24] See e.g. *Behrami* v. *France; Saramati* v. *France, Germany and Norway*, (2007) 133 ILR 1; *R (Al-Jedda)* v. *Secretary of State for Defence*, [2008] 1 AC 332; *Al-Jedda* v. *United Kingdom*, (2011) 147 ILR 107; *Mukeshimana-Ngulinzira* v. *Belgium*, ILDC 1604 (BE 2010); *Nuhanović* v. *Netherlands*, LJN: BR5388, 5 July 2011; *Mustafić* v. *Netherlands*, LJN: BR5386, 5 July 2011.

[25] The term 'organ' in this context appeared for the first time in the work of the Hague Conference on the Codification of International Law in 1930. It was adopted by the ILC through the work of Special Rapporteur Ago, who took the view that an organ was nothing more than an individual acting alone or in concert on behalf of the state: ILC Ybk 1973/I, 56. Some members of the Commission were concerned that a definition of 'organ' that contained references to individuals could prove confusing, however, and so

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:34 Page Number: 117

as the Mexican–American Claims Commission.[26] In the *Moses* case, for example, Umpire Liebler remarked that '[a]n 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.'[27] Similarly, in the *Salvador Commercial Company* case, it was 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'.[28] The rule has been confirmed as customary in categorical terms by the International Court in the *Special Rapporteur* Advisory Opinion.[29]

The ARSIWA codify this basic proposition in Article 4, subtitled 'Conduct of the 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.

The commentary to Article 4 makes it clear that responsibility for the acts of state organs is unlimited, insofar as the act of the organ in question is performed in an official capacity.[30]

In addition, there is no need for the organ to be, so to speak, the direct proprietor of the unlawful act, depending on the primary obligation in question. In the early case of the *Alabama*, Great Britain was held liable

Ago deleted all references to persons from Draft Art. 5 as adopted on first reading, in order to 'avoid entering into theoretic problems concerning the definition of the notion of an organ itself'': Draft Articles Commentary, Art. 5, §12. Further: Momtaz, in Crawford, Pellet and Olleson (2010) 237, 238.

[26] On the contribution of the various Mexican Claims Commissions to international responsibility as a whole, see Feller, *The Mexican Claims Commissions 1923–1934* (1935; repr. 1971), ch. 7.

[27] Moore, 3 *Int. Arb.* 3127, 3129. Also: *Claims of Italian Nationals Resident in Peru,* (1901) 15 RIAA 395, 399 (*Chiessa* claim), 401 (*Sessarego* claim), 404 (*Sanguinetti* claim), 407 (*Vercelli* claim), 408 (*Queirolo* claim), 409 (*Roggero* claim), 411 (*Miglia* claim); *Finnish Shipowners (UK/Finland)*, (1934) 3 RIAA 1479, 1501.

[28] *Salvador Commercial Company (El Salvador/US)*, (1902) 15 RIAA 455, 477.

[29] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Rep. 1999 p. 62, 87: 'According to a well-established rule of international law, the conduct of any organ of State must be regarded as an act of that State. This rule . . . is of a customary character.'

[30] ARSIWA Commentary, Art. 4, §5. See further ARSIWA, Art. 7, as discussed below.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:34 Page Number: 118

for permitting the construction in Liverpool of the CSS *Alabama*, a Confederate commerce raider that caused considerable damage to Union interests.[31] In the *Corfu Channel* case, Albania was held responsible for the laying of mines in its territory by an unnamed third party (most likely Yugoslavia[32]) on the basis of its officials' knowledge of the activity and their corresponding failure to warn shipping in the area.

In the modern era, the Panels and Appellate Body of the WTO's Dispute Settlement Body have considered similar cases of indirect liability in cases where state organs have failed to properly supervise the actions of private actors such that the international obligations of the relevant state are met. In *Canada – Dairy (Art 21.5 II)*, the Appellate Body noted that

> irrespective of the role of private parties . . . the obligations . . . remain obligations imposed on Canada . . . The question is not whether one or more individual milk producers, efficient or not, are selling CEM at a price above or below their individual costs of production. The issue is whether Canada, on a national basis, has respected its WTO obligations.[33]

4.2.2 *Defining an 'organ'*

Under ARSIWA Article 4(1), the actions of any state organ will be attributable to that state as a matter of international law, 'whether the organ exercises legislative, executive, judicial or any other functions'. This wording reflects the idea that the separation of powers, although widely adopted in theory, has been subject to local variation and elaboration,[34] as well as uneven practical execution, rendering the caveat 'any other functions' necessary. Mere ownership of an entity by a state, however, will not automatically convert that entity into an organ of the state.[35]

[31] The tribunal in that case also considered British liability for the activities of the CSS *Florida*, also built in Liverpool: *Alabama Arbitration (Great Britain v. US)* (1872), in Moore, 1 *Int. Arb*. 495. Further: Bingham (2005); Bingham, 'Alabama arbitration', (2006) MPEPIL.

[32] Chinkin, *Third Parties in International Law* (1993), 319.

[33] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Article 21.5, II)*, WT/DS103/AB/RW2, 17 January 2003, §§95–6.

[34] See e.g. the Constitution of the Republic of China (Taiwan), which makes reference to five branches (or '*yuan*') of government: executive, legislative, judicial, examination (responsible for validating the qualifications of civil servants) and control (responsible for auditing): Constitution of Taiwan (2005, as amended), chs. V–IX. This structure arose from the blending of Montesquieu's ideas with Confucian notions of government: Sun, *Three Principles of the People* (1927; trans. Price 1938), Pt II, lecture 6. Analogues for the latter two branches exist in other states, but are considered constitutionally subsidiary to other branches: e.g. the US Office of Personnel Management (part of the executive branch) and the US Government Accountability Office (part of the legislative branch).

[35] *EDF (Services) Limited* v. *Romania*, ICSID Case No. ARB/05/13, 8 October 2009, §190, holding that two state-owned corporations 'both possessing legal personality under Romanian

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:34 Page Number: 119

4.2.2.1 The executive

Despite such variations, most acts giving rise to implications of responsibility will emerge from the executive government, which provides the most direct manifestation of state power. The most obvious executive manifestations are actions of the armed forces, which in the context of armed conflict are in all cases attributable to and engage the international responsibility of the state in question.[36] As was noted by Commissioner Nielsen in the *Kling* case,

> The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, 'the conduct of any organ of a State must be regarded as an act of that State'... In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol 1 additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.[37]

It has been suggested that the automatic attribution of acts of armed forces to the state represents a special rule of attribution *ratione materiae*,[38] on the basis that their acts remain attributable even where the forces in question are no longer under the control of the state, as where soldiers have become lost and decide to shoot their way out of trouble.

law separate and distinct from that of the State, may [not] be considered as a State organ'. Cf. ILC Ybk 1998/I, 243 (Hafner). Further: Chapter 5.

[36] Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277, Art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Art. 91. Further, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), 4; Henckaerts and Doswald-Beck, 1 *Customary International Humanitarian Law* (2005; repr. 2009), 530–50; Condorelli and Kreß (2010), 227–8.

[37] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 242.

[38] Condorelli, (1984) 189 Hague *Recueil* 9, 145ff; Condorelli and Kreß (2010) 222, 227–8; Tonkin (2011), 96–7. See also the remarks of Reuter and Ago during the deliberations of the ILC: ILC Ybk 1975/I, 7 (Reuter), 16 (Ago). Further: *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 101 n. 117, describing the view as 'forcefully advocated in legal literature'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:35 Page Number: 120

But it is hard to see how this position differs from the rule of automatic attribution already in operation under ARSIWA Article 4, especially in the light of ARSIWA Article 7, which confirms that acts *ultra vires* remain attributable to a state where committed by one of its organs. The mere fact of a soldier losing his way does not deprive him of the status of a state organ, and *prima facie* any acts of soldiery he performs while astray remain those of the state, even if they involve pillage for private gain.[39] By contrast, private acts of naval personnel involved in a brawl while on shore leave would not of themselves give rise to state responsibility.[40]

The dividing line between the two is perhaps best demonstrated by the early case of *Youmans*, in which Mexican troops brought in by the government to forestall an attack on three American nationals not only failed to disperse the attacking crowd, but participated in the riot. On the basis that the soldiers were on duty and under the command of a superior officer at the time, Mexico was held responsible for the deaths of the Americans.[41] Had the troops been wearing civilian clothing and participating in the riot as effectively private citizens, Mexico would presumably not have been held responsible.

4.2.2.2 The legislature

Similarly, the legislature, through the passage of laws, regulations and other ordinances, is also capable of manifesting state power, a point noted by the Permanent Court in *Certain German Interests in Polish Upper Silesia*:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of the State, in the same manner as do legal decisions or administrative measures.[42]

Internal legal doctrines such as parliamentary sovereignty do not diminish the force of this conclusion, although in many cases some executive act giving effect to the legislation will be required to give rise to responsibility.[43] Some classes of treaty obligation will, however, give

[39] See e.g. *Eis (US/Soviet Union)*, (1959) 30 ILR 116, 117.
[40] *The Zafiro (Great Britain/US)*, (1925) 6 RIAA 160, 164.
[41] *Youmans (US/Mexico)*, (1926) 3 ILR 223, 223–4.
[42] (1926) PCIJ Ser. A No. 7, 19.
[43] See e.g. *Tippets, Abbet, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, (1984) 6 Iran–US CTR 219, 225–6; *Phelps Dodge Corp* v. *Iran*, (1986) 10 Iran–US CTR 121, 130; *Tecnicas Medioambientales Tecmed SA* v. *Mexico*, (2006) 10 ICSID Reports 130, 175; *Telenor Mobile Communications AS* v. *Hungary*, ICSID Case No. ARB/04/15, 13 September 2006, §§64–70. Also Dolzer and Schreuer, *Principles of International Investment Law* (2008), 101–4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:35 Page Number: 121

rise to responsibility in the absence of legislation, for example where an agreement requires that it be made effective through the adoption of certain municipal law standards.[44] In addition, as stated in ARSIWA Article 3, a state cannot plead the provisions of its internal law in order to justify an internationally unlawful act. As the International Court stated in the *Avena Interpretation* case,

> [T]he Court observes that considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.[45]

4.2.2.3 The judiciary

Judicial acts are, of course, capable of giving rise to state responsibility,[46] and at least one 'nominate delict', denial of justice, is specifically concerned with judicial acts. In this regard, the doctrine of judicial independence – like that of parliamentary sovereignty – has internal effect only: that the judiciary has erred from the perspective of international law may attract state responsibility no matter how independent of the executive the judicial act may have been. Thus in the *Special Rapporteur* Advisory Opinion, the International Court considered the acts of the Malaysian judiciary as those of a state organ in the sense of ARSIWA Article 4.[47] More explicitly, the WTO Appellate in *US – Shrimp* remarked that '[t]he United States, like all other members of the WTO and of the general community of states, bears responsibility for acts of all of its departments of government, including the judiciary.'[48]

One characteristic way in which judicial actions engage the international responsibility of the state is through denial of justice with

[44] As in the case of the so-called 'sectoral' agreements on terrorism: e.g. International Convention on the Suppression of the Financing of Terrorism, 9 December 1999, 2178 UNTS 197, Art. 4. Also UN Charter, Art. 103 and SC Res. 1373 (2001).

[45] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. US)*, ICJ Rep. 2009 p. 3, 18.

[46] Anzilotti, *Cours de droit international* (1929; repr. 1999), 479: '[It is] undoubtedly a mistake to deny that a State can be held responsible for judgments of its courts by reason of the independence of the judiciary, which does not permit that the executive interferes with the administration of justice'. Also Momtaz (2010), 239–40.

[47] ICJ Rep. 1999 p. 62, 87–8.

[48] *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, §173.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:35 Page Number: 122

respect to aliens;[49] another is through the misinterpretation or misapplication of treaties.[50] Thus, in *LaGrand*[51] and *Avena*,[52] foreign citizens in the United States had been tried and sentenced to death without regard for their rights under the Vienna Convention on Consular Relations.[53] The International Court ordered a stay of execution, noting that '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'.[54] Following the rejection of the injunction by the US Supreme Court on constitutional grounds,[55] the state of Arizona carried out the executions. The International Court subsequently held that 'the United States, by applying rules of its domestic law ... violated its international obligations'.[56] Similar conclusions were reached by the Court in *Avena*, where it was considered that

> [T]he rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with ... the legal consequences of [a] breach have to be examined and taken into account in the course of review and reconsideration ... the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.[57]

Similar considerations apply to the interpretation of domestic legislation in ways contrary to international law. In most legal systems there is at least a presumption that legislation is to be interpreted as conforming with rather than violating international law, but the legislation may be

[49] Generally: Paulsson (2005).

[50] McNair, *Law of Treaties* (1961), 346:

> [A] State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task, or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty.

[51] *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466, 508.

[52] *Avena and Other Mexican Nationals (Mexico v. US)*, ICJ Rep. 2004 p. 12, 66.

[53] 24 April 1963, 596 UNTS 261. Also *Vienna Convention on Consular Relations (Paraguay v. US)*, Provisional Measures, ICJ Rep. 1998 p. 248 (removed from list prior to merits).

[54] *LaGrand*, Provisional Measures, ICJ Rep. 1999 p. 9, 16.

[55] See *Federal Republic of Germany* v. *US*, 526 US 111, 112 (1999), rejecting Germany's attempt to enforce the injunction on the basis that (a) the US had not waived sovereign immunity, (b) Art. III, §2, cl. 2 of the US Constitution did not apply to prevent the execution of a foreign national who was not an ambassador or consul, and (c) the Eleventh Amendment of the US Constitution did not permit federal judicial power to be exercised with respect to a foreign state's suit against the US or any of its constituent states.

[56] ICJ Rep. 2001 p. 466, 472–3. [57] ICJ Rep. 2004 p. 12, 65–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:36 Page Number: 123

clearly violative while remaining constitutionally valid.[58] For example, in *Mortensen* v. *Peters*[59] the Scottish Court of Sessions interpreted fisheries legislation as extending four miles out to sea, at a time when the predominant view (certainly the British view) was that only a three-mile territorial sea was permitted. In the event the executive decided not to enforce the limit as against foreign vessels beyond three miles, thereby avoiding international claims if not international responsibility.[60]

4.2.2.4 Federal and other internal subdivisions

In keeping with the notion that the constitutional arrangements of the state are of limited or no relevance when considering international responsibility, it is no excuse for a state to deny liability by virtue of the fact that the wrongful act was performed by an internal political subdivision, such as a state, province or territory.[61] This is provided for expressly in ARSIWA Article 4(1). The rule is of a long-standing and customary character, as acknowledged by the Mexican–French Claims Commission in the *Pellat* arbitration with respect to the Mexican state of Sonara:

> [T]he argument [that Mexico was not responsible for the acts of Sonara] ignores the principle of international responsibility ... of a federal state for all State actions which give rise to claims of foreign states. This vicarious liability cannot be denied, not even if the Federal Constitution to the Central Government would deny the right of control over individual states, or the right to require them to comply [with] the requirements of international law.[62]

A similar principle was expressed in the 1929 Harvard Draft on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, Article III of which provided:

[58] On the presumption of consistency with international law see *Brownlie's Principles*, 66–7 (UK), 79–80 (US), 93–103 (treaties in the civil law tradition).

[59] (1906) 14 SLT 227.

[60] O'Connell, 1 *The International Law of the Sea* (1982), 364–7; Churchill and Lowe, *The Law of the Sea* (3rd edn, 1999), 447–8.

[61] ARSIWA Commentary, Art. 4, §§8–10; Momtaz (2010), 241–3.

[62] *Estate of Hyacinth Pellat (France/Mexico)*, (1929) 5 RIAA 534, 536. Also *Youmans* v. *Mexico (US/Mexico)*, (1926) 4 RIAA 110, 116; *Mallén* v. *US (Mexico/US)*, (1927) 4 RIAA 173, 178, 181; *Heirs of the Duc de Guise*, (1953) 13 RIAA 150, 156; *Metalclad Corporation* v. *Mexico*, (2000) 119 ILR 615, 634; *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux (Vivendi)* v. *Argentina*, (2000) 5 ICSID Reports 296, 313; *Mytilineos* v. *Serbia and Montenegro*, (2006) 16 ICSID Reports 567, 602–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:36 Page Number: 124

A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under a mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.[63]

The principle was confirmed in the modern era by the International Court in *LaGrand*. In its decision on provisional measures, the Court noted that under US domestic law Arizona had the capacity to comply with the Court's interim orders: '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 … the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States'.[64] A similar view has been taken by WTO panels, one of which in *Australia – Salmon (Art 21.5)* held Australia liable for the actions of Tasmania.[65] Rather more controversially, the Inter-American Court of Human Rights has construed the so-called 'federal clause' (Article 28) of the American Convention on Human Rights[66] to imply state responsibility for the acts of federated units:[67] the ordinary intent of such a clause is to limit responsibility through constraint of the primary norm.[68]

4.2.3 *De facto organs*

Although ARSIWA Article 4(2) is phrased in terms of 'the internal law of the State', the use of the term 'includes' indicates that internal law is not the end of the matter, a change made, after vigorous debate, on second reading.[69] As is made clear in the commentary,[70] in some legal systems the status of state organ may be bestowed not only by internal law but also by internal practice, creating a category of de facto organ. A state cannot evade responsibility for the conduct of a body which as a matter

[63] (1929) 23 AJIL Spec. Supp. 133, 133.
[64] ICJ Rep. 1999 p. 9, 16. Also *Avena*, Provisional Measures, ICJ Rep. 2003 p. 77, 80; *Avena Interpretation*, Provisional Measures, ICJ Rep. 2009 p. 311, 329.
[65] *Australia – Measures Affecting the Importation of Salmon (Article 21.5)*, WT/DS18/RW, 20 March 2000, §7.12.
[66] 22 November 1969, 1144 UNTS 123.
[67] *Garrido and Baigorria* v. *Argentina*, IACtHR C/39, 27 August 1998, §38.
[68] Momtaz (2010), 243. [69] ILC Ybk 1998/I, 241–6; ILC Ybk 1998/II(2), 82.
[70] ARSIWA Commentary, Art. 4, §11. Also Milanović, (2006) 17 EJIL 553, 582; Momtaz (2010), 243–4; Tonkin (2011) 86–90.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:36 Page Number: 125

of practice is considered to be or acts as an organ merely by denying it status as such under internal law.

Such an equation may only take place, however, in exceptional circumstances, since ultimately international law looks to substance rather than form. That point was made clearly by the International Court in *Bosnian Genocide*, although using the term 'agent' rather than 'organ'. There – using language used earlier in the *Nicaragua* case – the Court drew a threshold at the point at which 'the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument'.[71] It continued:

> In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.[72]

The exceptional status of a de facto agent was emphasized by the Court in requiring 'proof of a particularly great degree of State control' over the entity in question. Some indication as to factors which could help establish such dependence or control were identified by the Court in *Nicaragua*,[73] which made particular reference to: (a) whether the non-state entity was *created* by the state; (b) whether state involvement exceeded the provision of training and financial assistance; (c) whether complete (as opposed to a degree of or potential for) control was exercised *in fact*; and (d) whether the state selected, installed or paid the political leaders of the group.[74] The Court noted that

[71] ICJ 2007 p. 43, 205, citing *Nicaragua*, ICJ Rep. 1986 p. 14, 62–3. This represents an expansion on the wording of ARSIWA, Art. 4, which does not consider explicitly the standard of control required: Milanović (2006), 582–3. For criticism, see Griebel and Plücken, (2008) 21 LJIL 601; contra Milanović (2009).

[72] ICJ 2007 p. 43, 205

[73] It is common to speak of *Nicaragua* as developing a single test for the attribution of the conduct of private actors to the state: see e.g. Meron, (1998) 92 AJIL 236, 237 (referring to 'the *Nicaragua* test'); Chase, (2004–5) 45 Va JIL 41, 107 (describing the ICJ as having arrived at 'the effective control standard'); Dinstein, *War, Aggression and Self-Defence* (5th edn, 2011), 224. In truth it created two tests: one of 'complete control' in the context of what would become ARSIWA, Art. 4, and one of 'effective control' for entities under the direction and control of a state in the context of what would become ARSIWA, Art. 8: *Tadić*, ICTY Case No. IT-94-1-T, Trial Chamber, 7 May 1997, 295–6 (Judge McDonald, diss.); cf. the later decision of the Appeals Chamber in *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 106–7. On the use of ARSIWA, Art. 8, see further Chapter 5.

[74] ICJ Rep. 1986 p. 14, 62–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:37 Page Number: 126

according to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces under the latter's command.[75]

Once such a relationship is proved, however, a de facto organ functions just like any other, and all acts it performs in the exercise of state authority are attributable to the state.[76] It is for this reason that the present work will use the term only in the context of ARSIWA Article 4, even though it was introduced by Special Rapporteur Ago with reference to the predecessor of ARSIWA Article 8.[77] Within the law of state responsibility, an organ is an entity whose conduct gives rise to per se responsibility on the part of the state. As will be seen in Chapter 5, the same cannot be said of the entities contemplated under ARSIWA Article 8, rendering the use of the word 'organ' there inapposite.

4.3 Entities exercising governmental authority

4.3.1 Attribution of acts of private parties

Even where an entity is not an organ of the state, the latter may still be held responsible for its conduct in certain circumstances. It is tempting, especially for a common lawyer, to use the municipally well-known term 'agency' compendiously to cover such cases, but the ARSIWA avoids the term entirely.[78] Instead, it analyses separately the case where sovereign or governmental authority is delegated to a entity which is not an organ,

[75] Ibid., 64. Also Milanović (2006), 577:
> The type and degree of control must qualitatively be the same as the control a state exercises over its own organs, forces or territory, and the state would accordingly be responsible for any acts committed by such a group, even if a specific act was committed *ultra vires* or against explicit instructions.

[76] *Bosnian Genocide*, ICJ 2007 p. 43, 207. Further: Momtaz (2010), 243.

[77] ILC Ybk 1971/II(1), 264.

[78] ARSIWA Commentary, Art. 5, §§1–7. The DARIO, by contrast, make frequent use of the term: see e.g. DARIO, Arts. 6, 7, 9, 53(2)(b). The term 'agent of an international organization' is defined in DARIO, Art. 2(d) as 'an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'. On agency at common law see e.g. Watts (gen. ed.), *Bowstead and Reynolds on Agency* (19th edn, 2012). For a comparative overview of domestic agency laws, see Verhagen, in Smits (ed.), *Elgar Encyclopedia of Comparative Law* (2006) 33.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:37 Page Number: 127

and cases where, without formal delegation, such an entity acts on state instruction, direction or control. The latter case is covered by Article 8, discussed in Chapter 5; the former case is dealt with in Article 5.

ARSIWA Article 5 provides:

> 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.

ARSIWA Article 5 represents a concept known previously within international law and which represents a functional test of attribution, as opposed to the structural test of ARSIWA Article 4. Within the Draft Articles, it was contained within Draft Article 7(2), the commentary to which explained:

> The fact that an entity can be classified as public or private ... the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or it is subject to State control to a greater or lesser extent ... do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs ... [T]he most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specific functions which are akin to those normally exercised by the organs of the State ...[79]

Article 5 has increased in relevance as the modern state has outsourced increasing numbers of what would classically have been considered 'government' functions, resulting in the creation of parastatal entities.[80] The commentary places in this category, *inter alia*, 'public corporations, semi-public entities, public agencies of various kinds, and even, in special cases, private companies',[81] provided that in each case the entity is empowered by domestic law to exercise some species of governmental authority. In most recent times, concern has been focused on the activities of what are presently termed 'private military corporations', and the use by the United States of entities such as Academi (previously known as Blackwater and Xe Services) and DynCorp in Afghanistan and Iraq.[82] This

[79] Draft Articles Commentary, Art. 7, §18.
[80] ARSIWA Commentary, Art. 7, §1.
[81] Ibid., §2.
[82] Generally: Wolfrum, in Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 423; Lehnardt (2008); Hoppe, (2008) 19 EJIL 989; Beaucillon, Fernandez and Raspail (2011).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:37 Page Number: 128

is not the only modern example, however; governments employ corporate entities *inter alia* to control immigration and to run prisons, things that can only be done through the exercise of public powers of detention, arrest and so on. Further examples are central banks and stock exchanges which in many cases are separate from governments and their economic policies, but which may exercise regulatory authority.[83]

Not all corporate entities with ties to the government are to be considered agents of the state for the purpose of ARSIWA Article 5. This distinction is evidenced in the jurisprudence of the Iran–US Claims Tribunal, which, due to the character and course of the Iranian Revolution of 1979, was required to determine on numerous occasions whether the acts of *prima facie* private individuals could be attributed to Iran.[84] In *Hyatt International Corporation* v. *Iran*, the Tribunal held Iran liable for acts of expropriation carried out by a non-state charity, the Foundation of the Oppressed. It said:

> In view of the circumstances of its establishment and mode of governance, and in view of the functions it fulfils, the Tribunal concludes that the . . . Foundation for the Oppressed, has been and continues to be instrumentally controlled by the Government of the Islamic Republic of Iran.[85]

By contrast, the Tribunal in *Schering Corporation* v. *Iran* did not consider the actions of a 'workers' council' at the claimant company to be attributable to the Iranian state:

> The constitution and regulatory framework of the creation of Workers' Councils do not indicate that the Councils were to have other duties than basically representing the workers' interest *vis-à-vis* the management of companies and institutions and to cooperate with the management. That the formation of the Councils was initiated by the State does not in itself imply that the Councils were to function as part of the State machinery.[86]

A similar picture often emerges in the context of investor-state arbitration. A useful example is *EDF (Services) Limited* v. *Romania*, where the claimant drew on multiple provisions of the ARSIWA in an attempt to

[83] Momtaz (2010), 244. Whether a central bank is considered to be a state organ within the meaning of ARSIWA, Art. 4 or an entity exercising governmental authority within the meaning of Art. 5 depends on its precise relationship with the government: ILC Ybk 1998/I, 243 (Crawford).

[84] Indeed, the Tribunal's jurisprudence made a signal contribution to the development of attribution as a whole: Caron, in Lillich and Magraw (eds.), *The Iran–United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 109.

[85] (1985) 9 Iran–US CTR 72, 94. [86] (1984) 5 Iran–US CTR 361, 370.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:38 Page Number: 129

prove that the conduct of two state-owned corporations, CN Bucarest Aeroporti Otopeni (AIBO) and Compania de Transportationuri Aeriene Romane Tarom SA (TAROM), by virtue of certain wholly commercial activities was attributable to Romania. With respect to attribution under Article 5, the Tribunal held:

> AIBO's and TAROM's contractual relations with EDF under the [two joint venture agreements] were not exercises of delegated government authority. Rather, these relations were entered into and performed in pursuit of the corporate objectives of a commercial company with a view to making profits, as any other commercial company operating in Romania ... Accordingly, neither AIBO nor TAROM were agents of Romania or exercised governmental functions when they performed the specific acts and conduct alleged by Claimant to be in breach of the BIT.[87]

4.3.2 Defining 'governmental authority'

By its terms, ARSIWA Article 5 requires that the entity is 'empowered by the law of that State to exercise elements of the governmental authority'. There is no consensus as to precisely what constitutes 'governmental authority' – the concept tends to depend 'on the particular society in question, its history and traditions'.[88] However, certain central cases of governmental authority which may be exercised by private entities may be identified. As specified in the commentary, these include powers of detention and discipline pursuant to a judicial sentence, powers in relation to immigration control and quarantine, and the identification of property for seizure.[89] It may be thought unsatisfactory in defining governmental authority to rely simply on the functions governments have historically performed: such an 'intuitive' appreciation may become increasingly difficult to justify as more and more functions are privatized or outsourced.[90] But the consequence of such a development – to the extent it occurs – will simply be that Article 5 will narrow in scope, by comparison with Article 8.

The commentary does not, however, limit itself to historical precedent in determining what is governmental authority for this purpose. It offers a further set of criteria,[91] positing that such a designation will depend on (a) the content of the powers, (b) the manner in which they are conferred on the entity, (c) the purposes for which the powers are to be exercised, and (d) the extent to which the entity is publicly accountable for their exercise.

[87] ICSID Case No. ARB/05/13, 8 October 2009, §§197–8.
[88] ARSIWA Commentary, Art. 5, §6. Also: ILC Ybk 1998/I, 229, 232 (Crawford).
[89] Ibid., §2. [90] Tonkin (2011), 101. [91] ARSIWA Commentary, Art. 5, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:38 Page Number: 130

Insofar as criterion (a) is concerned, one method by which an act may be described as having governmental content is if the state ordinarily reserves such conduct for itself. Put another way, if a private person can perform the function without the government's permission, it is not to be considered governmental.[92] According to the restrictive theory of state immunity, this manifests as the well-known distinction between *acta jure imperii*, which attract immunity, and *acta jure gestionis*, which do not.[93] Application of these concepts to attribution under ARSIWA Article 5 is useful, and achieves consistency between these different areas of international law.[94] Thus private persons may not lawfully engage in combat operations without government mandate, but they can enter into contracts for the supply of military goods and services.[95] As Tonkin points out, however, the mere fact that a private entity can perform an act without governmental authorization does not necessarily mean that governmental authority in the context of ARSIWA Article 5 is excluded – the provision of convoy security for a military operation or high-ranking civilian dignitary is not *acta jure imperii* but is still redolent of governmental authority.[96] In such cases, it may be that no abstract rule can adequately capture the complexity of the situation, leaving the question of attribution under Article 5 to the appreciation of the tribunal.

Criterion (b) as identified in the commentary – the manner of conferral – is likewise relevant. In most cases, governmental authority will be conferred by statute or by executive order,[97] and no particular problem will arise. But governments have increasingly begun to use contractual arrangements with private entities in order to avoid scrutiny of their operations – particularly in the case of private prisons and the use of private military corporations in combat zones.[98] The phrase in Article 5 – 'empowered by the law of that State' – would seem to require specific delegation rather than legality under the general law. But it is

[92] Tonkin (2011), 101–8.
[93] Generally: Sornarajah, (1982) 31 ICLQ 661; Crawford, (1983) 54 BYIL 75; Trooboff, (1986) 200 Hague *Recueil* 235; Schreuer, *Sovereign Immunity: Some Recent Developments* (1988); Fox, *The Law of State Immunity* (2nd edn, 2008), 502–30.
[94] ILC Ybk 1998/I, 243 (Crawford).
[95] Cf. *Sandline International Inc*. v. *Papua New Guinea*, (1998) 117 ILR 552, where an arbitral tribunal felt able to hold a mercenary contract enforceable despite its unconstitutionality under the law of the host state.
[96] Lehnardt (2008), 145; Tonkin (2011), 101.
[97] This was true of the Foundation for the Oppressed: *Hyatt International Corporation* v. *Iran*, (1985) 9 Iran–US CTR 72, 88–91.
[98] Tonkin (2011), 103.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:39 Page Number: 131

necessary to disaggregate the functions involved, for example in the running of a private prison. Catering, cleaning and running educational courses do not involve as such the exercise of governmental authority; the exercise of powers of arrest, detention and internal discipline do. If such functions are lawfully conferred by public contract, then the empowering law would qualify for the purposes of an Article 5 delegation.[99]

Criterion (c) is the purpose for which the power is conferred.[100] Put another way, it may be asked, has the power been bestowed in order to advance classically sovereign objectives? An example of a situation in which purpose was highly relevant was *Hyatt International Corporation* v. *Iran*, in which the Articles of Association of the Foundation for the Oppressed provided in Article 2 that:

> [The purposes of the Foundation include] [c]entralization in the Foundation with the purpose of management and utilization, of all liquid funds, shares, securities, moveable and immovable assets of the Pahlavi family and the wealth of all natural and legal persons who through affiliation with the above family have illegally accumulated fortunes, whether in Iran or abroad, [as to which] the Revolutionary Court has issued or will issue orders for their restitution or temporary management, and the acquisition thereof by the oppressed ... [The Foundation] can proceed with the use of [various Revolutionary tribunals] for the discovery, seizure, removal, maintenance, inventory taking, assessment, change for the better, operation and every other action required for the management of the properties.[101]

On this basis, the Tribunal held that '[i]n its establishment, governance, and objectives, the Foundation thus appears to be an instrumentality of the Government of Iran'.[102]

Criterion (d) refers to accountability, and the extent to which the government is entitled to supervise those on whom it has bestowed governmental authority. *Hyatt Corporation International* v. *Iran* again provides a clear-cut example: the Foundation for the Oppressed was subject to considerable oversight by the Iranian government; its officers were appointed, dismissed and directed by an officer appointed by the Ayatollah Khomeini, its financial and business affairs were supervised by the

[99] In the United Kingdom, private prisons have been established under the Private Finance Initiative, in which the right to establish a private prison is established by contract. By contrast, the right of the captain of a commercial aircraft to give directions to passengers is established by statutory order: Air Navigation Order 2009 (UK), Art. 141.

[100] Lehnardt (2008), 145–6; Tonkin (2011), 103–8.

[101] (1985) 9 Iran–US CTR 72, 89. [102] Ibid., 91.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:39 Page Number: 132

office of the Iranian prime minister and its accounts were subject to government audit.[103]

4.3.3 'Empowered by the law' of the state

ARSIWA Article 5 does not look simply at the question of 'governmental authority'; it also requires that the capacity to exercise authority be derived from the law of the state. This requirement is of a formal character and requires only that the entity in question must have been empowered pursuant to some legal provision of the state.[104] This is clearly contemplated in the commentary, which makes reference to 'private security firms *contracted* to act as prison guards'.[105] It is not necessary that the empowering law should define the roles and responsibilities of the entity exhaustively.[106]

4.4 Organs placed at the disposal of another state

ARSIWA Article 6 deals with an extremely narrow – but in practice not uncommon – situation where the organ of one state is placed at the disposal of another such that it effectively acts for the latter's benefit and under its authority. Article 6 reads:

> 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 6 is concerned with the capacity of an organ of state A to exercise the governmental authority of state B, in which case its acts will be attributed to the latter but not the former.[107] This implies that the organ of state A is acting with the consent, under the authority of and for the purposes of state B. A simple example may be seen in the *Chevreau* case,[108] which concerned the British consul in Persia, who while acting as the temporary *chargé d'affaires* of the French consulate in Tehran, received and then lost documents entrusted to him. On a claim brought by France, Arbitrator Beichmann held that 'the British Government

[103] Ibid., 89–92, and see Lehnardt (2008), 145; Tonkin (2011), 103.
[104] Tonkin (2011), 111; cf. Beaucillon, Fernandez and Raspail (2011), 404–5.
[105] ARSIWA Commentary, Art. 5, §2. [106] Ibid., §7.
[107] Ibid., Art. 6, §1. This is distinct from a situation in which a state organ is placed at the disposal of an international organization, as discussed in Chapter 6.
[108] *Chevreau (France/Great Britain)*, (1931) 2 RIAA 1113.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:39 Page Number: 133

cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another power'.[109] The implication was that the agreed terms on which the British consul was acting contained no provision for allocating responsibility for his act to the United Kingdom.

4.4.1 *Defining 'disposal'*

The specialized character of ARSIWA Article 6 is evident from the definition given to the crucial phrase 'placed at the disposal'. In the commentary, it is said that the term

> does not mean only that the organ must be appointed to perform functions appertaining to the State at whose disposal it is placed. It also requires that, in performing the functions entrusted to it by the beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State.[110]

One example of a 'loaned' organ for the purposes of Article 6 – even though it never moves from London – is the Judicial Committee of the Privy Council, which acts as a court of final appeal for a number of states within the Commonwealth.[111] Its role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[112] Another, *sui generis*, example arose in the context of the Auditor-General of New Zealand, who for a time acted as the auditor of the Cook Islands by virtue of an agreement between the two and pursuant to the Constitution of the Cook Islands.[113] In the *Winebox* case, the question arose whether the Auditor-General could be required by a New Zealand court to produce documents acquired in the exercise of this function. The Court of Appeal rightly approached the case on the basis that the Auditor-General was performing an official function on behalf of the Cook Islands and was

[109] Ibid., 1141.

[110] Draft Articles Commentary, Art. 9, §5. See also the comment of the ARSIWA Commentary, Art. 6, §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 another State'. Also ibid., §2.

[111] Draft Articles Commentary, Art. 9, §10.

[112] See e.g. Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru, 6 September 1976, 1216 UNTS 151.

[113] Constitution of the Cook Islands, Art. 71. After 1991, the constitution was amended to reflect the inauguration of the Cook Islands' own audit office.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:39 Page Number: 134

not responsible to any New Zealand authority as a consequence, although it eventually denied immunity on other grounds.[114]

The European Commission of Human Rights had to consider the question in two cases relating to the exercise by Swiss police officers in Liechtenstein of 'delegated' powers.[115] At the time of the decision, Liechtenstein was not a party to the European Convention on Human Rights (ECHR),[116] so if the conduct in question was attributable only to Liechtenstein, no breach of the Convention could have occurred. The Commission held the case admissible on the basis that pursuant to a treaty governing relations between Switzerland and Liechtenstein of 1923,[117] Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers were thus operating in accordance with Swiss law and considered to be exercising the governmental authority of Switzerland. Consequently, they were not considered to be at the 'disposal' of Liechtenstein.[118]

A similar suite of issues arose in the case of *Drozd and Janousek*.[119] The case concerned Andorra, a microstate whose joint heads of state, the 'co-princes', are the president of France and the bishop of Urgel in Spain.[120] As with Liechtenstein in *X and Y*, Andorra was not then a party to the ECHR. The claimants were each sentenced to lengthy sentences by the

[114] *KPMG Peat Marwick* v. *Davison*, (1996) 104 ILR 526, 536–7 (Cooke P), 569, 574–6 (Richardson J). Further: Hastings, Angelo and Sage, (1996) 26 VUWLR 459. An appeal to the Privy Council on other grounds was dismissed: *Brannigan* v. *Davison*, [1996] 3 WLR 859.

[115] *X and Y* v. *Switzerland*, (1977) 20 ECommHR Ybk 402, 402–6.

[116] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

[117] Swiss Confederation–Liechtenstein Customs Union Treaty, 29 March 1923, 21 LNTS 232. Further: Duursma, *Fragmentation and the International Relations of Micro-states* (1996), 160–70.

[118] Similarly, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara* v. *Italy and Albania*, [2001] ECtHR 39473/98. But cf. *Turkey – Restrictions on the Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, §§9.33–9.44.

[119] *Drozd and Janousek* v. *France and Spain*, [1992] ECtHR 12747/87.

[120] Prior to the constitutional reforms of 1993, Andorra was considered to be a condominium ruled jointly by France and Spain through the persons of two 'co-princes', the president of the French Republic (as successor to the Count of Foix) and the bishop of Urgel. The events in *Drozd and Janousek* occurred under this regime. Generally: Crawford, (1977) 55 RDISDP 259; Duursma (1996), Ch. 7. As a result of the 1993 reforms, both 'in their personal and exclusive right' are still considered to be the joint heads of the Andorran state with constitutional powers and functions: Constitution of Andorra, Arts. 1, 43–9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:40 Page Number: 135

Tribunal de Corts of Andorra. They elected to serve their sentence in France and then brought proceedings against France and Spain, alleging that they were responsible for deficiencies in the organization of the Andorran courts, and that France was also responsible for their arbitrary detention, which no French court had authorized.

The European Court of Human Rights drew a distinction between the judicial process carried out in Andorra and the subsequent detention in France. The former did not involve the exercise of governmental authority either of France or of Spain. True, French and Spanish judges served on the Andorran courts, but for that purpose they were formally seconded and in their Andorran capacity they could not be considered organs of France or Spain.[121] The latter was defended by France on the grounds that 'an adequate legal basis was provided by international custom and by the French and Andorran domestic law which implemented that custom'. A narrow majority of the Court accepted that view and dismissed the complaint. To impose on France responsibility for ensuring that the original judgment complied with the ECHR 'would . . . thwart the current trend towards strengthening international co-operation in the administration of justice'; the only obligation of France was not to participate in a 'flagrant denial of justice', of which there was no sufficient evidence before the Court. Thus the majority drew a distinction between the acts of French and Spanish officials (including the co-princes) in their capacity as Andorran organs, and the actions of France in giving effect to Andorran judgments: French responsibility was only attracted by the latter, and only to a limited extent.[122]

4.4.2 Additional requirements

There are two further requirements on the operation of ARSIWA Article 6.[123] In the first place, it requires that the entity placed at the disposal of another state be a state organ within the meaning of Article 4. Thus Article 6 does not deal with experts from another state or an international organization merely advising a government.[124] It also excludes the case of state organs sent to state B for the purposes of state A, or even for shared purposes, but which maintain their own autonomy and status, for example foreign military liaison or cultural missions,[125] and foreign relief or aid organizations.

[121] [1992] ECtHR 12747/87, §96. [122] Ibid., §§106, 110.
[123] ARSIWA Commentary, Art. 6, §5.
[124] Draft Articles Commentary, Art. 9, §2; ARSIWA Commentary, Art. 6, §§4–5.
[125] Draft Articles Commentary, Art. 9, §7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:40 Page Number: 136

In the second place, Article 6 requires that the organ in question be exercising the governmental authority of the receiving state. Thus if the armed forces of state A were sent to state B and placed under the control of state B to suppress an insurrection, the units in question would be acting *jure imperii* on behalf of state B and their actions would be attributable to it. If, on the other hand, the armed forces were required to distribute food supplies provided by non-governmental organizations to various rural communities in state B, their conduct could not be attributed (at least on that basis alone) to state B.

4.5 Ultra vires and personal acts

ARSIWA Article 7 deals with the subject of acts performed by organs within the meaning of ARSIWA Article 4, or agents within the meaning of ARSIWA Article 5, which exceed the brief given to the entity in question by the state. By extension, the provision also applies to ARSIWA Article 6 and organs placed at the disposal of another state. Article 7 provides:

> 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 State under international law if the organ, person or entity acts in that capacity, even if the organ or entity acted in excess of authority or contrary to instructions.

Where an organ is created by the law of the state, it will necessarily be given a range of powers. The same may be said of a private entity empowered by law to exercise governmental authority. Within the municipal sphere, a failure to act within authorized boundaries – that is, an act *ultra vires* – does not *prima facie* excuse the state, and the validity of the act may be challenged as a consequence: thus, the common law doctrine of judicial review of executive and legislative acts. Similarly, the mere fact that an organ or entity has exceeded its powers does not exclude the responsibility of the state on the international plane. What matters is the exercise of *state authority*, not its propriety. Thus, in the *Union Bridge Company* case, a British officer appropriated American property during the Boer War, mistakenly believing it to belong to a belligerent. The British American Claims Tribunal held that the fact that the officer – who was authorized only to seize property belonging to belligerents – was mistaken and his confiscation *ultra vires* was irrelevant to the question of British responsibility.[126]

[126] (1924) 2 ILR 170, 171.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:41 Page Number: 137

However, a state is not responsible for every act done by an individual in its service, but only when the individual purports to act on behalf of the state. Where an individual does something in his or her capacity as a private citizen, state responsibility will not arise. In the context of ARSIWA Article 7, the difficulty lies in distinguishing an official, though *ultra vires*, act from a purely private one. The *locus classicus* is the decision of the French–Mexican Claims Commission in *Caire*.[127] Caire, a French national, kept a boarding house in Mexico City. One of his boarders was a major attached to the Northern Division of the Conventionist forces which at that time occupied the city. On 11 December 1914, the major and two soldiers attempted to extort money from Caire under threat of death. Caire refused. The major later reappeared with a captain of the same brigade. They took Caire to their barracks where he was stripped; from there he was driven to another village and shot. Notwithstanding the private motivations of the perpetrators, 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.[128]

Apparently the difference between an *ultra vires* act that invokes state responsibility and a strictly private act that does not is that the former is performed using and cloaked by the authority provided to the entity by the state. Thus, in *Caire*, the fact that the officers appeared at Caire's boarding house in uniform, and took him to an army barracks was sufficient to render the act, although *ultra vires*, not merely private. As the Draft Articles Commentary put it, '[i]n international law, the State must recognize that it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity appear to be acting effectively in its name.'[129]

A further demonstration of the distinction is provided by the decision of the Iran–US Claims Tribunal in *Yeager* v. *Iran*.[130] There, the claimant brought two complaints against the Iranian government, the first on the basis of having unlawfully been required to pay extra money to an Iran Air agent to get a prepaid air ticket issued, the second on the basis of a

[127] *Estate of Jean-Baptiste Caire* v. *Mexico (France/Mexico)* (1929) 5 RIAA 516. The decision was described as a 'precise, detailed and virtually definitive formulation of the principles applicable': Draft Articles Commentary, Art. 10, §14. Also Crawford, First Report, 47.
[128] (1929) 5 RIAA 516, 529. [129] Draft Articles Commentary, Art. 10, §17.
[130] (1987) 17 Iran–US CTR 92.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:41 Page Number: 138

shakedown performed by two uniformed officers of the Revolutionary Guard performing the functions of customs, immigration and security officers. Iran Air at the time was wholly state-owned, and the enterprising Iran Air agent was thus indirectly a state employee. In contrast, the Revolutionary Guard had not yet been formally incorporated into the Iranian state. The Tribunal held Iran liable for the actions of the latter, but not the former. In its view, there was insufficient evidence to indicate that the agent's request for a bribe was made in anything other than his capacity as a private individual:

> 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 ... The critical question here, then, is whether the Iran Air agent was acting in his official capacity as an organ of Iran Air when he demanded the extra payment. There is no indication in this case that the Iran Air agent was acting for any other reason than personal profit, or that he had passed on the payment to Iran Air. He evidently did not act on behalf or in the interests of Iran Air. The Tribunal finds, therefore, that this agent acted in a private capacity and not in his official capacity as an organ for Iran Air.[131]

In contrast, the Tribunal held Iran responsible for the acts of the Revolutionary Guards, who, unlike the Iran Air agent, did not solicit a bribe, but simply seized the money, invoking the immigration and customs powers entrusted to them by the Iranian state. The Tribunal said:

> [The Revolutionary Guards] were, thus, obviously acting in their capacity as 'organs' of the new government, or at least acting on its behalf. Again, under such circumstances the Respondent must show that it did not and could not control the 'Revolutionary Guards' operating at the Airport. In the absence of evidence that it made at least an attempt to enjoin their activity or to hinder such seizure of cash, these acts are considered as attributable to the new Government.[132]

The difference between the situation in *Caire* and the actions of the Revolutionary Guards in *Yeager* on the one hand, and the Iran Air agent in *Yeager* on the other is that the latter, although he was able to extract a bribe by virtue of his position, did not hold himself out as acting on behalf of the state. The soldiers in *Caire* were able to arrest their victim through the exercise of state authority; the Revolutionary Guards invoked their state power as customs officials. As was made clear in another case of the Iran–US Claims Tribunal, *Petrolane Inc*. v. *Iran*,[133]

[131] Ibid., 111. [132] Ibid., 110. [133] (1991) 27 Iran–US CTR 64, 92.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:41 Page Number: 139

the Article 7 'extension' of liability for acts done *ultra vires* is predicated on the actions in question being done by 'persons cloaked with governmental authority'. It is this that differentiates the factual scenario in *Caire* from a hypothetical alternative in which the major merely shot Caire with his service pistol. As the commentary puts it,

> 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, this 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. The 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 carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority.[134]

Notwithstanding the relative clarity of the position, practical difficulties remain, a point demonstrated by the *Rainbow Warrior* incident.[135] The MV *Rainbow Warrior* was a former UK government trawler purchased by the environmental activist organization Greenpeace. In 1985, while it was moored in Auckland harbour in preparation for protests against French nuclear testing on Mururoa Atoll, two agents of the French intelligence service, the Direction Générale de la Sécurité Extérieure (DGSE), attached explosive devices to the ship and detonated them, destroying the vessel and killing a photographer on board. The agents – Alain Mafart and Dominique Prieur – were carrying Swiss passports and posing as tourists; they were arrested following interview by the New Zealand police. France initially denied any connection with Mafart and Prieur,[136] but then reversed its position and admitted that the two were DGSE agents. It continued to deny responsibility, however, on the basis that neither the DGSE nor the French government at large had ordered the attack.[137]

[134] ARSIWA Commentary, Art. 7, §8.
[135] Generally: Wexler, (1987) 5 BUILJ 389; Hoss and Morgan-Foster, 'Rainbow Warrior, The', (2010) MPEPIL; Trapp (2011), 36–7.
[136] Letter from the President of France to the Prime Minister of New Zealand, 8 August 1985, 74 ILR 262.
[137] Trapp (2011), 36.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 4 Title Name: CRAWFORD
Date:18/3/13 Time:12:10:42 Page Number: 140

Had this position been maintained, it would have led to a delicate situation in which the French government admitted that Mafart and Prieur were state organs within the meaning of ARSIWA Article 4, while claiming that the bombing was a private act under ARSIWA Article 7. In determining French responsibility, an international court would have had to make the sensitive and practically challenging determination that criminal (or even terrorist) conduct could fall within the official functions of a state organ.[138] Ultimately, the French government merely acknowledged that the agents were acting in their official capacity as DGSE operatives,[139] and agreed with New Zealand to refer the contested questions of their fate[140] and of compensation to the UN Secretary-General.[141]

[138] Ibid.
[139] Communiqué from the Prime Minister of France, 22 September 1985, 74 ILR 261.
[140] Meanwhile they had been convicted of manslaughter by a New Zealand court: *R* v. *Mafart and Prieur*, (1985) 74 ILR 241, 243.
[141] *Rainbow Warrior (New Zealand/France)*, (1986) 74 ILR 241, 256.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:22 Page Number: 141

5 Direction or control by the state

5.1 Development of the law

Under the law of state responsibility, the conduct of private persons and entities is not normally attributed to a state.[1] Although for some purposes the state is equated to its people (e.g. self-determination) or at least its nationals (e.g. diplomatic protection, the Olympic medal tally), for the purposes of responsibility the state is normally limited to the acts of its organs and agents exercising public authority. But international law has long acknowledged that, in certain circumstances, private action may be attributable to a state if the entity in question has acted under the instruction, direction or control of that state.[2] The rationale behind this is clear: by acting on behalf of the state, the private entity becomes 'the extended arm of the instructing State organ and therefore the attribution in the sense that the conduct is to be considered as State action is a matter of consequence'.[3] The international obligations of the state could be easily evaded if this possibility of private delegation was not taken into account.

5.1.1 Early cases

This principle that states could be held responsible for the conduct of non-state actors was uncontested in the early cases,[4] although some of the decisions usually cited as authority actually concerned problems

[1] ARSIWA Commentary, Art. 8, §1. See e.g. *Finnish Shipowners (Finland/UK)*, (1934) 3 RIAA 1479, 1501: 'These acts must be committed by the respondent Government or its officials, since it has no direct responsibility under international law for the acts of private individuals.'

[2] See e.g. the Draft Articles Commentary, Art. 8, §7, referring to the notion as 'practically undisputed'. Also Crawford, First Report, 39–40; ARSIWA Commentary, Art. 8, §2.

[3] Wolfrum (2005), 427.

[4] ILC Ybk 1971/II(1), 264.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:22 Page Number: 142

other than attribution. For example in *The Zafiro*,[5] a British merchantman was requisitioned by the US Navy in Hong Kong. The original crew, comprising British officers and Chinese sailors, shipped in the US merchant service under the command of an American naval officer so as to allow the *Zafiro* to access neutral ports in the furtherance of US naval objectives. At one such port call in Cavite, which had been abandoned by the Spanish, the Chinese crew of the ship obtained shore leave and promptly rioted. The British–American Tribunal held that as the *Zafiro*'s crew were effectively private citizens contracted to serve on board the vessel, responsibility could not attach to the United States directly. Responsibility could, however, be imputed on the basis that the US officer in charge had failed to exercise due diligence:

> [t]he nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body.[6]

Another often-cited case is *Stephens*,[7] which concerned an American national shot by Lorenzo Valenzuela, an auxiliary of the Mexican state. Valenzuela was arrested by the civilian authorities and handed over to the Mexican army. When the auxiliaries were disbanded, however, Valenzuela was mistakenly released. Although Valenzuela was at most an irregular member of Mexico's armed forces, without a uniform or insignia, he was clearly acting on behalf of the Mexican state. The Mexican–American Claims Commission accordingly ruled that '[t]aking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a [Mexican] soldier',[8] thus giving Valenzuela the status at least of a de facto organ within the meaning of ARSIWA Article 4.

Two other incidents reflecting more directly the position eventually taken by the ILC with respect to responsibility for non-state actors are the cases of *Black Tom* and *Kingsland*,[9] which concerned acts of purported sabotage committed during the First World War, namely two fires which damaged or destroyed the Black Tom railway terminal on New York harbour, and plant of a car and foundry company at Kingsland in

[5] (1925) 6 RIAA 160. [6] Ibid., 164.
[7] *Charles S. Stephens and Bowman Stephens* v. *Mexico (US* v. *Mexico)*, (1927) 4 RIAA 265.
[8] Ibid., 267.
[9] *Lehigh Valley RR Co. and Agency of Canadian Car and Foundry Co. Ltd* v. *Germany*, (1930) 8 RIAA 84; (1939) 8 RIAA 225. Also (1931) 25 AJIL 147.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:23 Page Number: 143

New Jersey. At the time the fires occurred, the United States was still neutral. These acts were alleged to have been committed by German saboteurs, but the US–Germany Mixed Claims Commission did not consider these assertions to have been made out on the facts. Had the sabotage been proved, however, there was little doubt that Germany would have been found responsible for the conduct of private citizens it directed to carry out acts of arson on its behalf.

5.1.2 The work of the International Law Commission

On the basis of these early cases – some of them at least relevant to attribution – a provision that would permit states to be held responsible for the acts of private entities was introduced by Special Rapporteur Ago,[10] who noted:

> The underlying principle of international law, which is increasingly becoming clear as our analysis progresses, requires that the criterion [of responsibility] should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed, rather than some formal link between the State organization and the person whose conduct is in question. An act by the person most certainly invested with the legal status [of] an organ of the State is still not an 'act of the State' if the person-organ was acting only in a private capacity. Similarly, it is logical that the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at an international level.[11]

On this basis, Ago proposed the following wording for Draft Article 8:

> The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.[12]

This provision was the subject of mild alteration by the Drafting Committee, but its core notion of a person or group of persons acting 'in fact ... on behalf' of the state found its way into Draft Article 8 on first reading.[13] It seems that Ago himself felt that the words 'in fact' in

[10] ILC Ybk 1971/II(1), 267. [11] Ibid., 264. [12] Ibid., 267.

[13] ILC Ybk 1974/II(1), 283:

> 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; or

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Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:23 Page Number: 144

Draft Article 8 referred only to situations of actual instruction of a private entity by a state.[14] On the basis of the International Court's decision in *Nicaragua*,[15] however, the provision was expanded to include situations in which a private entity was under the 'direction' or 'control' of a state.[16] This formulation was incorporated into ARSIWA Article 8 and has since been confirmed by the International Court as reflecting customary international law.[17] Article 8 reads as follows:

> 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, the State in carrying out the conduct.

ARSIWA Article 8 posits two situations in which a state will be held responsible for the acts of private entities: first, where the private entity has been instructed by a state to perform the acts in question; and, second, where the entity is under the direction or control of the state. With respect to the latter, the failure by the ILC to specify a standard of control vis-à-vis the private entity has led to a series of differing interpretations as to the level of state oversight required, particularly as reflected in the decisions of the International Court in *Nicaragua* and *Bosnian Genocide*,[18] and of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*.[19]

5.2 Persons acting on state instruction

The most clear-cut situation in which state responsibility arises under ARSIWA Article 8 is where a state instructs a private person or entity to do something on its behalf.[20] As the commentary states:

> (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.

Draft Art. 8(b) covered situations in which governmental authority was exercised by private parties in the absence of official authorities. The latter notion was separated out by the Drafting Committee on Second Reading and forms ARSIWA, Art. 9, on which see further Chapter 6.

[14] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 188–9 (Judge Ago). Also Draft Articles Commentary, Art. 8, §8; Crawford, First Report, 43.

[15] *Nicaragua*, ICJ Rep. 1986 p. 14, 62. [16] Crawford, First Report, 43.

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ 2007 p. 43, 207.

[18] Also *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 226.

[19] *Tadić*, Appeal against Conviction, (1999) 124 ILR 61.

[20] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 29–30.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:23 Page Number: 145

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' whilst 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.[21]

A simple example of instruction arises in the context of private military or security corporations hired by the state to engage in certain activities on its behalf:[22] where this occurs, the state may incorporate instructions into the terms of company's contract or issue instructions in the field, or both.

Although the principle is clear enough, difficulties arise in its application. In *Bosnian Genocide*, the International Court made an attempt at further clarification, noting that for a state to incur Article 8 responsibility, its instructions must have been given 'in respect of each operation in which the alleged violations occur, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[23] This, however, gives rise to the question of how the term 'operation(s)' is to be defined. Does the state need to direct the entity to perform the specific act contemplated, or will more general instruction which leaves open (or perhaps implies a preference for) the act as a method of fulfilling the directive suffice?[24] The commentary indicates that the latter position is correct,[25] and that where ambiguous or open-ended instructions are given, acts which are considered incidental to the task in question or conceivably within its expressed ambit may be considered attributable to the state:

> Where a State has authorized an act ... questions can arise as to the State's responsibility for actions going beyond the scope of the authorization ... 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 unlawful way. On the other

[21] ARSIWA Commentary, Art. 8, §2. Also Draft Articles Commentary, Art. 8, §§2–3.
[22] Lehnardt (2008), 148; Tonkin (2011), 114–17; Beaucillon, Fernandez and Raspail (2011), 406.
[23] ICJ 2007 p. 43. 208.
[24] Such as where a private military contractor is instructed to compel a detainee to divulge information 'by any means necessary': Tonkin (2011), 115.
[25] Tonkin (2011), 115; Beaucillon, Fernandez and Raspail (2011), 406.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:24 Page Number: 146

hand, where persons or groups have committed acts under the effective control of a State the condition for attribution will be met even if particular instructions may have been ignored.[26]

This paragraph is intended to draw a contrast between the instruction of a free agent – who is thus not really an agent at all – and effective control, implying a core relationship of subordination between the state and its agent. But these are obviously formulas, and their application will depend on the particular circumstances of the case in question.

5.3 Persons acting under direction or control

5.3.1 'Effective control' versus 'overall control'

In addition to 'instruction', ARSIWA Article 8 makes reference to responsibility arising through the 'direction' or 'control' of a private entity by a state. Although the commentary makes it clear that these terms are intended to function disjunctively,[27] courts and tribunals have tended to interpret the words 'direction or control' as imposing a single standard of attribution.[28]

The ILC had the advantage of a number of decisions concerning direction and control between the first and second readings of the Articles.[29] As a result, it felt sufficiently confident to expand Draft Article 8 beyond attribution through instruction alone.[30] The relationship between ARSIWA Article 8 and these cases has been criticized by some as forming a feedback loop wherein the ILC relied on these decisions in drafting Article 8 and its associated commentary, which were in turn relied

[26] ARSIWA Commentary, Art. 8, §8. The position here appears to have evolved slightly from that of the Draft Articles, the Commentary to which referred to the need for the entity to be appointed 'to discharge a particular function or carry out a particular duty': Draft Articles Commentary, Art. 8, §8.

[27] ARSIWA Commentary, Art. 8, §7.

[28] Cf. Cassese, (2007) 18 EJIL 649, 663, who suggests that although disjunctive, 'instruction' and 'direction' possess a greater affinity than 'direction' and 'control'. 'Direction' implies a continuing period of instruction, or a relationship between the state and a non-state entity such that suggestion or innuendo may give rise to responsibility, e.g. in the case of Henry II of England exclaiming in relation to Archbishop Thomas à Becket, 'What miserable drones and traitors have I nourished and brought up in my household, who let their lord be treated with such shameful contempt by a low-born cleric?' The outcome is well known: Schama, 1 *A History of Britain* (2000), 142.

[29] Principally *Nicaragua* and *Tadić* , but also decisions of the ECtHR such as *Loizidou* v. *Turkey*, (1996) 108 ILR 443, and of the Iran–US Claims Tribunal, such as *Yeager* v. *Iran*, (1987) 17 Iran–US CTR 92. Further: Crawford, First Report, 41–2.

[30] Crawford, First Report, 43.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:24 Page Number: 147

on by the Court in arguing that its earlier position reflects customary international law.[31]

These criticisms reflect part of a wider debate concerning the level of control required in customary international law for attribution to occur. ARSIWA Article 8 itself does not specify this, and the field has subsequently divided between the 'effective control' test devised by the International Court in *Nicaragua* and affirmed tangentially in *Armed Activities* and more forcefully in *Bosnian Genocide*, and the 'overall control' test formulated by the ICTY Appeals Chamber in *Tadić* and reaffirmed in the later case law of that tribunal.

5.3.2 Nicaragua

Nicaragua centrally concerned the question whether violations of international humanitarian law committed by various private individuals (the '*contras*') during the Nicaraguan civil war could be attributed to the United States.[32] For this purpose, the Court identified three forms of 'private' conduct of increasing specificity that could generate US responsibility with respect to the *contras*:[33] the paramilitary campaign in general, specific paramilitary operations, and violations of international humanitarian law committed by the *contras* in the course of specific operations.

The key background finding was that although the United States did not 'create' the *contra* force,[34] it was responsible for financing it[35] and for providing logistical support to the movement.[36] It had further trained the *contras* and provided them with intelligence as to Sandinista troop movements.[37] The Court further found that some *contra* operations had been planned in conjunction with US military advisers,[38] and that the United States had identified suitable targets for *contra* attacks.[39]

[31] These criticisms are particularly heightened with respect to the decisions of the International Court in *Nicaragua* and *Bosnian Genocide*: Cassese (2007), 651; Dinstein (2011), 222–3.

[32] Generally: Maier (ed.), (1987) 81 AJIL 77; Crawford, 'Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States)', (2006) MPEPIL; Crawford, (2012) 25 LJIL 471.

[33] Being the paramilitary groups created out of the remnants of Somoza's National Guard who fled to Honduras in the wake of the Sandinista insurrection and later reorganized as a guerrilla insurgency with the help of the CIA under the Reagan administration: Bulmer-Thomas, in Bethell (ed.), 7 *The Cambridge History of Latin America* (1990) 317, 353–65.

[34] *Nicaragua*, ICJ Rep. 1986 p. 14, 61–2. [35] Ibid., 59, 61.

[36] Via provision of uniforms, ammunition and military equipment: ibid., 59.

[37] Ibid., 59–61. [38] Ibid., 61. [39] Ibid., 62, 64–5.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:24 Page Number: 148

The Court found that the United States could not be held responsible for *contra* actions en bloc, basing this conclusion on the fact that the United States did not exercise a sufficient level of control (i.e. 'complete dependence'[40]) over the *contras* such that any act performed by them could be attributed to the United States without the need for further enquiry. The Court said:

> What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on 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 . . . [T]here 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 having acted on its behalf.[41]

In *Bosnian Genocide* these conclusions were correctly identified as developing the notion of a 'de facto organ' in the context of ARSIWA Article 4.[42] Such an organ is based on the concept of 'complete' control such that the entity in question has 'no real autonomy' but is functionally part of the state. It is thus external to ARSIWA Article 8.[43]

With respect to the specific operations of the *contras* (e.g. the targeting of a particular Sandinista installation), Nicaragua's pleadings failed to identify US support for individual *contra* missions;[44] instead, they defined US involvement in the *contra* movement in general.[45] Accordingly, the Court held that the United States had breached the prohibition on the use of force as contained within customary international law on the basis of its direct support of the *contras*.[46] It did not, however, attempt to establish whether specific *contra* operations could be attributed to the United States.[47]

[40] Ibid., 62. [41] Ibid., 62.

[42] *Bosnian Genocide*, ICJ 2007 p. 43, 205. For criticism of this development, see Griebel and Plücken (2008); contra Milanović (2009). Further: Chapter 4.

[43] Cf. de Frouville, in Crawford, Pellet and Olleson (2010) 257, 268–9, who considers the intermingling of forms of attribution unconvincing.

[44] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, Memorial of Nicaragua (Merits), 30 April 1985, 12–15.

[45] Ibid., 70–1.

[46] *Nicaragua*, ICJ Rep. 1986 p. 14, 118–19. Cf. *Tadić*, (1999) 124 ILR 31, 195–7 (Judge Shahabuddeen).

[47] Cf. the discussion of operations carried out directly by US personnel or 'Unilaterally Controlled Latin Assets', such as, *inter alia*, the destruction of the underwater pipeline and terminal at Puerto Sandino on 13 September 1983, the destruction of oil storage facilities at Benjamin Zeladon on 2 October 1983 and the mining of Nicaraguan harbours: *Nicaragua*, ICJ Rep. 1986 p. 14, 46–51.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:25 Page Number: 149

For present purposes, however, the most relevant part of the Court's analysis concerned US responsibility for breaches of international humanitarian law by the *contras* in the course of particular operations. Here, the Court elaborated what has come to be known as the 'effective control' standard of attribution, holding that the general control that the United States had exercised (i.e. the provision of the training and financial, logistical and intelligence support) over the *contras* did not provide a sufficient basis for state responsibility. It said:

> United States participation, even if preponderant or decisive, in the financing, organising, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.[48]

Rather, the Court said, for responsibility to attach to the United States, it had to be shown that it possessed '*effective control* of the military or paramilitary operations in the course of which the alleged violations were committed'.[49] The Court did not seek to define the standard of control further, but noted that US participation in the activities of the *contras* – although extensive – was insufficient for this purpose.[50] In particular, it placed great reliance on the fact that the forms of participation of the United States did not *prima facie* imply that the United States directed and enforced the perpetration of acts contrary to international law: 'such acts could well have been committed by the members of the *contras* without the control of the United States'.[51] This conclusion was supported vigorously in the Separate Opinion of Judge Ago.[52]

5.3.3 Tadić

5.3.3.1 The Trial Chamber

The decision in *Nicaragua* was subsequently the subject of consideration by the Trial and Appeal Chambers in the *Tadić* case.[53] Duško Tadić was a guard in one of the Bosnian internment camps in and around Prijedor in Bosnia-Herzegovina, and was involved in the massacre of some

[48] Ibid., 64. [49] Ibid., 65 (emphasis added).
[50] Ibid: 'The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State'.
[51] Ibid., 64–5. [52] Ibid., 189. Further: Crawford, First Report, 40.
[53] *Tadić*, ICTY Case No. IT-94-1-T, Trial Chamber, 7 May 1997.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:25 Page Number: 150

14,000 people (including some 5,200 Bosniaks and Croats). He was charged with participation in war crimes and crimes against humanity under the ICTY Statute.[54]

As an international criminal tribunal with jurisdiction limited to individuals, the ICTY would not ordinarily be considered competent to address questions of state responsibility. In *Tadić*, however, the ICTY treated state responsibility as an antecedent question in order to determine a question unequivocally within its jurisdiction, namely the distinction between an international and non-international armed conflict.[55] It mattered on the facts in that the grave breaches regime of the 1949 Geneva Conventions, as applied by Article 2 of the ICTY Statute, extends only to armed conflicts of an international character.

In defining the war in Bosnia-Herzegovina as national or international, the trial chamber assessed the relationship between the three Bosnian parties to the conflict (Bosnian Muslims, Croats and Serbs) and the external influence of Serbia (at the time, with Montenegro, the Federal Republic of Yugoslavia (FRY)) and Croatia. In the event that the FRY or Croatia could be found to be responsible for the activities of private entities operating within Bosnia, the conflict would be considered international in character.[56] In particular, the trial chamber focused on the acts of Republika Srpska, an entity opposed to the independence of Bosnia and Herzegovina.[57]

A majority of the trial chamber turned to *Nicaragua* in determining whether the FRY could be held responsible for the acts of the Republika Srpska, but without clearly distinguishing between the tests of 'complete' and 'effective' control set down by the International Court.[58] The majority found that the Republika Srpska, while an ally of the FRY and dependent on its assistance, could not be considered to be under the direction or control of the latter. In this respect, parallels with the *contras*' relationship with the US were clearly evident:

> In sum, while, as in the *Nicaragua* case, the evidence available to this Trial Chamber clearly shows that the 'various forms of assistance provided' to the

[54] SC Res. 827 (1993), Annex, Arts. 2, 3, 5.

[55] *Tadić*, ICTY Case No. IT-94-1-T, Trial Chamber, 7 May 1997, 199–217. Also Milanović (2006), 578. Further: Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law* (2010).

[56] *Tadić*, ICTY Case No. IT-94-1-T, Trial Chamber, 7 May 1997, 200.

[57] Ibid., 204–8.

[58] Ibid., 206. The trial chamber also failed to note that the Court in *Nicaragua* had not sought to use state responsibility as a device to establish the international character of the conflict: Milanović (2006), 578–9.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:25 Page Number: 151

armed forces of the *Republika Srpska* by the [FRY] was 'crucial to the pursuit of their activities' and, as with the early years of the *contras*' activities, those forces were almost completely dependent on the supplies of the [army of the FRY] to carry out offensive operations, evidence that the [FRY] through [its army] 'made use of the potential for control inherent in that dependence', or was otherwise given effective control over those forces and which it exercised, is similarly insufficient.[59]

In the view of Presiding Judge McDonald, dissentient, the FRY could be held responsible for the acts of the Republika Srpska on the basis that the latter was under the complete control of the former and should be considered a de facto organ of the FRY.[60] In so doing, Judge McDonald drew an effective distinction between the two tests posited by the Court in *Nicaragua*.[61]

5.3.3.2 The Appeals Chamber

On appeal by the prosecution, the Appeals Chamber revisited the trial chamber's consideration of *Nicaragua*.[62] The trial chamber's decision to employ state responsibility to determine the international dimension of the conflict was affirmed,[63] but the Appeals Chamber criticized the lower tribunal's reliance on *Nicaragua*. Rather, the Appeals Chamber argued that the notion of an effective control test was contrary to the 'logic' of the law of state responsibility.[64] It said:

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, State 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

[59] *Tadić*, ICTY Case No. IT-94-1-T, Trial Chamber, 7 May 1997, 216.

[60] Ibid., 299; '[The FRY] established what is essentially a puppet regime in the VRS, which was charged with the responsibility for executing the military operations of the [FRY] in Bosnia and Herzegovina.'

[61] Ibid., 295–6.

[62] *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 98–121.

[63] Ibid., 98–101.

[64] Ibid., 108–11. It was also to argue that the test of effective control was at odds with state and judicial practice relying on its reading of cases such as *Tehran Hostages*, ICJ Rep. 1980 p. 3; *Yeager* v. *Iran*, (1987) 17 Iran–US CTR 92; *Loizidou* v. *Turkey*, (1996) 108 ILR 443; and *Jorgic* v. *Germany*, 26 September 1997, 2 StE 8/96, unpublished typescript provided to the ICTY (on appeal: (2000) 135 ILR 152): *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 111–21. Further: Milanović (2006), 585–7; cf. Cassese (2007), 658 n. 17.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:26 Page Number: 152

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.[65]

On this basis, the Appeals Chamber drew a distinction between the level of state control required with respect to an individual or non-organized group as opposed to an 'organized and hierarchically structured group': in the former case, only specific instructions will cause responsibility to accrue, whereas in the latter, *overall control* would suffice.[66] The Chamber drew an analogy here with Draft Article 10, and the capacity for states to be held responsible for the actions of their organs, even if such acts were performed *ultra vires*.[67] It considered the requisite level of control to be established where a state '*has a role in organising, co-ordinating or planning the military actions* of the military group, in addition to the financing, training and equipping or providing operations support to that group'.[68]

If a state's control over an organized non-state group of actors is complete, there is no need to inquire as to what the group has done. Where that level of control is not present, however, the court or tribunal will need to investigate the particular act in question. In contrast, the Appeals Chamber in *Tadić* substitutes for complete control (and the attendant presumption of automatic attribution) the reduced standard of *overall* control.[69] The effect is to render the distinction between organs of the state and non-organs illusory, at least for purposes of attribution.

The ICTY considered the position taken by the Appeals Chamber to be correct as a matter of law, and applied it systematically in its jurisprudence.[70] But the majority reasoning in the Appeals Chamber was

[65] Ibid., 108–9. This position was based on Ago's version of Draft Art. 8 as adopted on first reading, which concerned a private actor acting in fact on behalf of a state without further elaboration. The Appeals Chamber's reliance on Draft Art. 8 in this context is misplaced, given that under Ago's original conception, it was intended to apply in circumstances of actual instruction only: *Nicaragua*, ICJ Rep. 1986 p. 14, 188–9 (Judge Ago). Also Draft Articles Commentary, Art. 8, §8; Crawford, First Report, 43.

[66] *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 109. The Chamber also identified, but discussed only briefly, a third criterion of responsibility drawn from precedents in criminal law, namely where a non-state actor participates in state activities with the appearance of a state organ: ibid., 118–21. Further: Cassese (2007), 657.

[67] *Tadić*, Appeal against Conviction,(1999) 124 ILR 61, 110.

[68] Ibid., 119 (emphasis in original).

[69] De Hoogh, (2001) 72 BYIL 255, 279–81; Milanović (2006), 581.

[70] See e.g. *Prosecutor* v. *Aleksovski*, ICTY Case IT-95-14/I-T, Trial Chamber, 25 June 1999; *Prosecutor* v. *Aleksovski*, ICTY Case IT-95-14/I-A, Appeals Chamber, 24 March 2000; *Prosecutor* v. *Blaškić*, ICTY Case IT-95-14/T, Trial Chamber, 3 March 2000; *Prosecutor* v. *Naletilić*, ICTY Case IT-98-34-T, Trial Chamber, 31 March 2003; *Prosecutor* v. *Kordić and*

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:26 Page Number: 153

criticized in the Separate Opinion of Judge Shahabuddeen, who noted the different contexts of the decisions: while *Nicaragua* had considered the matter from a pure state responsibility perspective, *Tadić* was dealing with individual criminal responsibility.[71] He further noted that the relevant question – which was distinguishable – was whether the FRY was using force through Republika Srpska's armed forces against Bosnia-Herzegovina, *not* whether it was responsible for any breaches of international law committed by the Republika Srpska or its forces.[72] As Tonkin notes, this view is persuasive:

> There is no compelling reason why the same test must apply to, on the one hand, the question of whether a state is acting through a private individual for the purpose of ascertaining the applicable rules of [humanitarian law] and, on the other, the question of whether a state is acting through a private individual for the purpose of establishing state responsibility. The former is determined by the primary rules of international law, which govern the substantive obligations on states, whereas the latter is determined by the secondary rules of international law, which govern the circumstances in which states will be considered responsible for wrongful conduct and the legal consequences flowing from that responsibility.[73]

Additional questions arise from the Appeals Chamber's development of distinct tests for state responsibility for individuals and non-organized groups on the one hand and organized and hierarchical groups on the other.[74] The Chamber based its less stringent standard with respect to the latter on the argument that 'a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group' and that '[c]onsequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the state'.[75] But if overall control within the meaning of *Tadić* is gained by a state through financing, training, advising a group and planning their activities (while not explicitly instructing them) it is difficult to see how these actions would lead to a different conclusion vis-à-vis

Čerkez, ICTY Case IT-95-14/2-T, Trial Chamber, 26 February 2001; *Prosecutor* v. *Kordić and Čerkez*, ICTY Case IT-95-14/2-A, Appeals Chamber, 17 December 2004; *Prosecutor* v. *Delalić et al*., ICTY Case IT-96-21-A, Appeals Chamber, 20 February 2001. Further: La Haye, *War Crimes in Internal Armed Conflicts* (2008), 15–19.

[71] *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 198.

[72] Ibid. This point was made by the ILC itself: ARSIWA Commentary, Art. 8, §5.

[73] Tonkin (2011), 118–19. Also de Frouville (2010), 270.

[74] De Frouville (2010), 270–1.

[75] *Tadić*, Appeal against Conviction, (1999) 124 ILR 61, 109. Also ibid., 116–18.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:26 Page Number: 154

responsibility in their application to an individual, that is, a single terrorist. It is for this reason that the ARSIWA themselves draw no distinction in the text or Commentary between the control exercised by the state over an individual or over a group.

5.3.4 Bosnian Genocide

The International Court returned to the issue of state responsibility for non-state actors in *Bosnian Genocide*. Meanwhile, the ARSIWA had been adopted. The commentary mentioned the decisions in *Nicaragua* and *Tadić*, but declined to take a firm position, distinguishing the latter on the basis that it did not strictly involve state responsibility (as distinct from the applicable law) and that, 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'.[76]

The first indication that the International Court disagreed with the treatment of Draft Article 8 in *Tadić* came in the *Armed Activities* case. The Court there was called upon to decide whether the conduct of certain auxiliaries operating in the Democratic Republic of the Congo could be attributed to Uganda. It held that the required level of instruction, direction or control within the meaning of the provision had not been made out on the facts, citing *Nicaragua* in support.[77]

In *Bosnian Genocide*, a more concerted effort to engage with these two cases was made, with the Court endorsing *Nicaragua* emphatically and rejecting the criticism of that decision by the ICTY in *Tadić*.[78] The case arose out of the same conflict as *Tadić*:[79] the question was whether the FRY (and, later, Serbia) was responsible for acts of genocide committed by Bosnian Serb militias during the Bosnian War. The Court applied ARSIWA Article 8 and explicitly stated that it was to be understood in the light of its previous decision in *Nicaragua*: moreover the particular characteristics of genocide as an international crime did not justify a departure from the effective control test.[80] The Court again criticized the

[76] ARSIWA Commentary, Art. 8, §5. It is worth pointing out, however, that when 'control' first made its way into the ARSIWA, it was tied to the formulation of the concept in *Nicaragua*: Crawford, First Report, 40–1. Also Dinstein (2011), 222–3; Tonkin (2011), 118.

[77] *Tadić* was not referred to: *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 226.

[78] For criticism: Cassese (2007).

[79] Generally: Schabas, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (Bosnia and Herzegovina v. Serbia and Montenegro)', (2008) MPEPIL.

[80] ICJ 2007 p. 43, 208.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:27 Page Number: 155

decision of the Appeals Chamber in *Tadić*, echoing Judge Shahabuddeen's argument that the question 'was not indispensable in the exercise of [the ICTY's] jurisdiction', and noting that, while the ICTY was to be considered an authority on international criminal law, this expertise did not extend to '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'.[81]

The Court then moved to consider the overall control test directly, conceding that the test may well be appropriate for determining whether an armed conflict ought to be classified as national or international, but stressing that there was no reason why the primary norms of international humanitarian law and the secondary rules of state responsibility need to align in this way.[82] The Court stated that, in any event, the overall control test was unsuitable for application in a state responsibility context on the basis that the responsibility so produced was overly broad. It said:

> [T]he '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 [ARSIWA Article 8]. 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.[83]

Thus the Court determined the application of ARSIWA Article 8 to the FRY 'on the basis of its settled jurisprudence',[84] applying the test in

[81] Ibid., 209. [82] Ibid., 210.
[83] Ibid. Cf. ibid., 257 (Judge Al-Khasawneh), arguing that 'different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution'.
[84] Ibid., 210.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:27 Page Number: 156

Nicaragua to determine that the evidence did not support a finding of FRY instruction, direction or effective control with respect to acts of genocide in Bosnia committed by non-state actors.[85]

So far as the law of state responsibility is concerned, this determination effectively ends the debate as to the correct standard of control to be applied under Article 8. Moreover it does so in a manner that reflects the ILC's thinking on the subject from the time the term 'control' was introduced into then-Draft Article 8.

5.4 State responsibility and terrorism

5.4.1 The alleged inadequacy of the effective control test

After some four decades of drafting and debate, the ARSIWA were approved by the ILC and presented to the UN General Assembly in August 2011. Just over a month later, the attacks by Al-Qaeda on targets in New York and Washington, DC, presented a major new challenge for the law of state responsibility, in the context of terrorist groups 'harboured' within the borders of states.

The suggestion that the law of state responsibility was not sufficiently well equipped to deal with terrorism had arisen prior to 11 September 2001,[86] but the attacks gave the issue special impetus and led to a number of further analyses.[87] These critiques often centre on the proposition that the effective control test posited in *Nicaragua* sets the bar too high, such that attribution of terrorist acts to the state proves well nigh impossible.[88] This is coupled on occasion with the suggestion that the test of overall control advanced by the Appeals Chamber in *Tadić* would better meet the needs of the international community in dealing with the threat of terrorism.[89] As Cassese remarks,

> [A]pplying ... the 'effective control' criterion to such actions would prove very exacting and, in addition, raise serious problems of evidence ... If one relies instead upon the 'overall control' test, it suffices to demonstrate that certain

[85] Ibid., 214.
[86] See e.g. Condorelli, (1989) 19 Is. YBHR 233, 237–40; Reisman (1999), 39.
[87] See e.g. Slaughter and Burke-White (2002), 19–20; Chase (2004–5), 118–25; Trapp (2011), ch. 2. On the adequacy of ARSIWA, Art. 8 in general, see Wolfrum (2005), 427–32. Cf. Becker (2006), ch. 7, who argues that the entire 'agency' model of responsibility in this respect is flawed, and proposes instead a causation-based model of responsibility: ibid., chs. 8, 9.
[88] Slaughter and Burke-White (2002), 19–20; Chase (2004–5), 120.
[89] Cassese (2007), 665–7; Trapp (2011), 44–5.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:27 Page Number: 157

terrorist units or groups are not only armed or financed (or also equipped and trained) by a specific state or benefit from its strong support, but also that such [a] state generally speaking generally organizes or coordinates or at any rate takes a hand in coordinating or planning its terrorist actions (not necessarily each individual terrorist operation). It would then be relatively easy to infer from these links that the state at issue bears responsibility for those terrorist activities. In short, on the strength of the 'overall control' test, it would be less difficult to attribute those actions to the state in question.[90]

Alternatively, some commentators support a reading of ARSIWA Article 8 that permits a more flexible standard of control.[91] This position is shared by some states and jurists:[92] for example, on the adoption of the ARSIWA, the Netherlands welcomed the omission of an explicit standard of control from the words of ARSIWA Article 8 and its commentary, seeing this as permitting both the *Nicaragua* and *Tadić* test to operate simultaneously as appropriate.[93] Moreover, it was thought that '[t]his inbuilt ambiguity is a positive element and offers scope of progressive development of the legal rules on State responsibility'.[94] Another position, described by Jinks, is that the customary law of responsibility has been altered by state practice so as to permit attribution in circumstances where states were merely harbouring terrorists.[95] The insistence by the Court in *Bosnian Genocide* that the effective control test represents the only basis of attribution under ARSIWA Article 8 stands in sharp contrast to these positions.[96]

5.4.2 *Alternate bases of state responsibility with respect to terrorism*

Moreover, such criticisms miss the point. As significant an obstacle as the combined position of *Nicaragua* and *Bosnian Genocide* may be to state responsibility with respect to terrorism, a modification to the effective control test is not required in order for states to be found responsible. Nor is it desirable. As Trapp notes, an artificial attempt to hold states liable for acts of terrorism may do more harm than good:

> While a wrongdoing state's responsibility is not invoked as often as it might be in the terrorism context ... holding states responsible as a matter of law for more

[90] Cassese (2007), 666. [91] Trapp (2011), 42.

[92] See e.g. *Blaškić*, ICTY Case IT-95-14-T, Trial Chamber, 3 March 2000, 271ff. (Judge Shahabuddeen); *Bosnian Genocide*, ICJ 2007 p. 43, 257 (Vice-President Al-Khasawneh, diss.).

[93] ILC Ybk 2001/II(1), 49. [94] Ibid. [95] Jinks (2003), 88–90.

[96] ICJ 2007 p. 43, 208–9. This position does not conclude the development of a special rule of attribution *ratione personae* via treaty: see further Chapter 4.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:28 Page Number: 158

than they are responsible for as a matter of fact will certainly not encourage more reliance on the regime of state responsibility as a mechanism for re-establishing the primary legal relationship between injured and wrongdoing states.[97]

Rather than artificially broadening the scope of ARSIWA Article 8 to solve attribution problems with respect to terrorism, the preferable approach is to rely on primary norms of international law to permit direct attribution to the state. To this end, an array of customary and treaty-based norms exist which render state participation in or co-ordination of terrorist acts an international wrong for which state responsibility may arise under ARSIWA Article 4.[98]

In the first place, states remain under an enduring customary duty of prevention with respect to terrorist acts planned and launched from within their borders, namely an obligation on states not to 'allow knowingly [their] territory to be used for acts contrary to the rights of other States',[99] subject to a due diligence standard of conduct. The obligation extends not only to the territory of the state, but also those situations in which a state exercises exclusive jurisdiction over a territory for example as an occupant[100] or otherwise on a temporary basis.[101] States also have the duty of controlling individual actions on board ships[102] and aircraft[103] of their nationality.

The same obligation of due diligence exists with respect to genocide, and was the basis on which Serbia and Montenegro were eventually found liable in *Bosnian Genocide*, notwithstanding the Court's rejection of direct responsibility under ARSIWA Article 8. The Court indicated that the obligation was one of conduct, not of result, saying:

A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take

[97] Trapp (2011), 61, and, more generally, ibid., 45–61. Also Jinks (2003), 91–4.
[98] Condorelli, (1989) 19 Is. YBHR 233, 240–1; Becker (2006), Ch. 4; Trapp (2011), Ch. 3.
[99] *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4, 22. Also *Spanish Zone of Morocco (Spain/United Kingdom)*, (1925) 2 RIAA 615; *Island of Palmas (Netherlands/US)*, (1928) 2 RIAA 829.
[100] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971 p. 16, 54:
The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.
[101] Condorelli (1989), 241.
[102] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Art. 94.
[103] Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 UNTS 219, Art. 3(1).

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:28 Page Number: 159

all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance.[104]

The question whether the state failed to fulfil its obligations of due diligence is informed by what it knew or ought to have known at the time at which the act took place,[105] and whether it had a genuine capacity to act so as to avert the threat.[106] Since the 9/11 attacks, there has perhaps been a decrease in the margin of appreciation that states had previously enjoyed in setting and meeting their internal priorities with respect to terrorism.[107]

A further ground on which states may be held responsible for the active support of terrorist groups and other non-state actors (as opposed to merely tolerating them within the state's territory) was discussed in *Nicaragua*. Although lack of effective control on the part of the United States meant that it was not held responsible for the acts of the *contras* as such, the support that it provided – and particularly the arming and training of the *contras* – was held to constitute a breach of the prohibition of the use of force.[108]

States may also be subject to treaty obligations with respect to terrorism arising from the various sectoral terrorism conventions, which have been widely ratified. The sectoral conventions place a number of common obligations on states parties. For example, under the International Convention for the Suppression of Terrorist Bombings[109] (TBC), states must, *inter alia*, criminalize terrorist bombing within the meaning of TBC Article 1 and ensure the provision of appropriate penalties (TBC Article 3), ensure that such bombings cannot be legally justified politically, philosophically, ideologically and so on (TBC Article 5), establish jurisdiction over such offences where required (TBC Article 6), take steps to investigate (TBC Article 7) and, where prosecution does not take place, extradite the suspect to a jurisdiction that is willing to do so (TBC Article 8).[110] States are also under an obligation to take all practicable measures to prevent and counter preparations in their respective

[104] ICJ 2007 p. 43, 221. [105] Trapp (2011), 66–70. [106] Ibid., 70–5. [107] Ibid., 77–9.

[108] *Nicaragua*, ICJ Rep. 1986 p. 14, 118–19. The Court added that the mere provision of funds to the *contras* alone was insufficient to qualify as a breach of the use of force, though it was held to be an intervention in Nicaragua's internal affairs: ibid., 119.

[109] 15 December 1997, 2149 UNTS 256.

[110] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, §§71–117. Also Scharf, 'Aut dedere aut iudicare' (2008) MPEPIL; *Brownlie's Principles*, 469–71.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:28 Page Number: 160

territories for the commission of terrorism bombings anywhere (TBC Article 15). Self-evidently, the sponsorship of and/or the granting of safe harbour to a terrorist group either before or after a bombing would constitute a breach of the TBC, resulting in state responsibility under ARSIWA Article 4.

Another legislative technique which has been employed in the fight against terrorism is Chapter VII of the UN Charter. Thus Security Council Resolution 1373 of 28 September 2001 effectively requires compliance by all states with the International Convention for the Suppression of the Financing of Terrorism,[111] whether or not they are parties to the convention.[112] While Resolution 1373 stops short of directly attributing terrorist acts to the state, it does require that states refrain from 'providing any form of support, active or passive, to entities or persons involved in terrorist acts', a formulation considerably broader in scope than even the overall control test of *Tadić*.

An impediment to this approach to state involvement in terrorism is the fact that terrorism itself has still not been fully defined.[113] But the definitional debate surrounding terrorism is of greatly reduced significance given the breadth of the sectoral conventions.[114] The 1998 attacks on US embassies in Dar es Salaam and Nairobi, indeed the 9/11 attacks themselves, were covered by one or more of the conventions. Second, following the recommendation of the Security Council in Resolution 1373,[115] the

[111] 9 December 1999, 2178 UNTS 197.

[112] SC Res. 1373 (2001), op. §§1, 2. Also SC Res. 1540 (2004). On the propriety of this form of Security Council 'legislation' see Lavalle, (2004) 41 NILR 411; Talmon, (2005) 99 AJIL 175; Bianchi, (2006) 17 EJIL 881; Joyner, (2007) 20 LJIL 489; Hinojosa Martínez, (2008) 57 ICLQ 333; Orakhelashvili, *Collective Security* (2011), 220–2.

[113] Generally: Becker (2006), 84–118; Saul, *Defining Terrorism in International Law* (2006); Saul, (2005) 52 NILR 57. But cf. the decision of the Special Tribunal for Lebanon Appeals Chamber in February 2011, which (despite being authorized to apply Lebanese domestic law) set out what it described as the definition of terrorism under customary international law: *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I, 16 February 2011, available at www.stl-tsl.org/en/, §85. For criticism see K. Ambos, 'Judicial creativity at the Special Tribunal for Lebanon: is there a crime of terrorism under international law?', (2011) 24 LJIL 655; B. Saul, 'Legislating from a radical Hague: the United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism', (2011) 24 LJIL 677.

[114] Cf. the bombing of the USS *Cole* in 2000, which did not fit within the definition of terrorism under some elements of US law, e.g. 22 USC §2656F(d)(2): 'the term "terrorism" means premeditated, politically motivated violence perpetrated *against non-combatant targets* by subnational groups or clandestine agents' (emphasis added).

[115] SC Res. 1373 (2001), op. §3(d):

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:29 Page Number: 161

various sectoral conventions are now fairly widely ratified.[116] And in any event the obligation on states not to permit the use of their territory for acts contrary to the rights of other states is a customary norm binding on all states, as is the prohibition on the use of force.

For these reasons it is difficult to see the virtue of selectively expanding ARSIWA Article 8 so as to hold states responsible for the independent acts of terrorist groups. In the light of the range of detailed primary norms already prohibiting the sponsorship and support of terrorist acts, the dilution of the *Nicaragua* and *Bosnian Genocide* test of effective control is unnecessary – even counterproductive.

5.5 Attribution and state-owned corporations

Questions surrounding state instruction arise not infrequently in the case of state-owned corporations, which in one sense are under the instruction, direction and control of the state as a principal (and, in some cases, the sole) shareholder.[117] But the mere fact that a corporation is owned, partially or even entirely, by a state does not automatically permit the piercing of the corporate veil and the attribution of the conduct of the corporation to the state, unless it is exercising elements of governmental authority pursuant to ARSIWA Article 5.[118] In the *Barcelona Traction* case, the International Court acknowledged the general separateness of corporate entities at national level, except in special cases where the 'corporate veil' is a mere device or a vehicle for fraud.[119]

> [The Security Council] *Calls* upon all States to ... Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

[116] See e.g. the TBC, which currently has 164 parties: available at treaties.un.org/.

[117] This arises most commonly where a state-owned corporation is engaged in a joint venture with a foreign investor: e.g. *Foremost Tehran Inc*. v. *Iran*, (1986) 10 Iran–US CTR 228; *American Bell International* v. *Iran*, (1986) 12 Iran–US CTR 170. For an analysis of the law in this respect as developed by the Iran–US Claims Tribunal, see Caron (1998), 163–73.

[118] Crawford, First Report, 42–3. Also Caron (1998), 166. See e.g. *International Technical Products* v. *Iran*, (1985) 9 Iran–US CTR 206, 238–9; *Flexi-Van Leasing* v. *Iran*, (1986) 12 Iran–US CTR 335, 348–51.

[119] *Barcelona Traction, Light & Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Rep. 1970 p. 3, 39:

> In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:29 Page Number: 162

Under international law, therefore, the basic presumption remains that the acts of a state-owned corporation are not, merely by virtue of shareholding, attributable to the state.[120] This position is reflected in the decision of the Privy Council on appeal from the Jersey Court of Appeal in *La Générale des Carrières et des Mines* v. *FG Hemisphere Associates LLC* (*Gécamines*).[121] The case concerned a claim brought by a Delaware vulture fund against a mining company owned by the Democratic Republic of the Congo (DRC). The question for the Privy Council was whether the actions of the company, Gécamines, could be attributed to the DRC. It made reference to ARSIWA Articles 4 and 5,[122] and the preservation of the corporate veil at an international level mandated by *Barcelona Traction*,[123] before stating that the question of attribution turned on whether the entity under consideration was (a) distinct from the organs of state, and (b) possessed separate legal personality.[124] Significantly, it held that, as a general principle,

> [W]here a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities.[125]

Further, the Privy Council remarked, it would 'take quite extreme circumstances to displace this presumption'. For the actions of a state-owned corporation to be attributed to the state would require proof that 'despite its juridical personality [the company has] no effective separate existence', and that 'the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa'. While questions of constitution, control and function are relevant to the question of attribution, 'constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the State'.[126]

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on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

[120] As affirmed in certain decisions of the US–Iran Claims Tribunal: see e.g. *Schering Corporation* v. *Iran*, (1984) 5 Iran–US CTR 361, 368–71; *Otis Elevator Company* v. *Iran*, (1987) 14 Iran–US CTR 283, 293–5; *Eastman Kodak Company* v. *Iran*, (1987) 17 Iran–US CTR 153, 163–8.

[121] [2012] UKPC 27. [122] Ibid., §15. [123] Ibid., §22. [124] Ibid., §§28–9.

[125] Ibid., §29. [126] Ibid.

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:29 Page Number: 163

On this basis, the Privy Council considered that the actions of Gécamines could not be attributed to the DRC. It pointed to the fact that despite governmental interference Gécamines was

> a real and functioning corporate entity, having substantial assets and a substantial business including interests in over thirty joint ventures with outside concerns. It had its own budget and accounting, its own borrowings, its own debts and tax and other liabilities and its own differences with government departments. At least one such department (the Revenue) went from time to time to the lengths of enforcing tax claims by execution against Gécamines' assets.
>
> Further, Gécamines was not in any sense by reason of its functions or activities a core department of, or on that score inseparable from, the State . . . It was an entity clearly distinct from the executive organs of the government of the State.[127]

The position of the board in *Gécamines* undoubtedly reflects the state of international law, as foreshadowed by the International Court in *Barcelona Traction*. Where a company is founded by a state and run as an independent business, the corporate veil may not *prima facie* be lifted so as to attribute its acts to the state. But where the company itself is an empty shell or is run simply as a vehicle by government officials, then the position may be different. In this, the company in *Gécamines* may be contrasted with the National Motorway Company of Morocco (ADM) in *Salini* v. *Morocco*.[128] In that case, the tribunal relied on the fact that the Moroccan government possessed an 89 per cent shareholding in ADM, and staffed its board with a variety of government officials including the Minister of Infrastructure, who acted as president.[129] Moreover, the company had developed a practice whereby the minutes of every board meeting were sent to the prime minister and the secretariat-general of the government. It was further considered significant from a functional standpoint that the company was founded for an overtly governmental purpose, namely 'the construction, the maintenance and the management of large-capacity routes of communication, which are assigned to it by the State'.[130]

A further hybrid case occurs where the state appoints an individual to 'manage' a company, a situation which occurred frequently in the

[127] Ibid., §§70, 71.

[128] *Salini Construttori SpA and Italstrade SpA* v. *Morocco*, (2001) 6 ICSID Reports 398, 406–9. See also: *Wena Hotels Ltd* v. *Egypt*, (2000) 6 ICSID Reports 89, 107–9; *Maffezini* v. *Spain*, (2000) 5 ICSID Reports 387, 415–17.

[129] A position constitutionally reserved for him by ADM's articles of association: (2001) 6 ICSID Reports 398, 406–9.

[130] Ibid., 409.

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Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:30 Page Number: 164

context of the Iranian Revolution and was considered often by the Iran–US Claims Tribunal.[131] Naturally, the mere act of appointing a manager may itself be attributed to the state – and in some case this action alone was sufficient to give rise to state responsibility.[132] But, beyond this, the question devolves into an analysis of the independence of the manager and his or her capacity to control the actions of the company. Where, as a result of the appointment of the manager, the corporation loses its independence so as to become an extension of the government, the protection of the corporate veil may no longer extend to it.[133]

Attribution may also occur where a state actually instructs a corporation to do a certain thing: where this occurs, one need not have reference to anything more than the fact of the directive. This occurred in *EDF (Services) Ltd* v. *Romania*, where the Romanian government had directly instructed two state-owned corporations to exercise their rights as the shareholders of a joint venture vehicle in a particular way. The tribunal held:

> The evidence on record indicates that the Ministry of Transportation issued instructions and directions to AIBO and TAROM [the two state-owned corporations] regarding the conduct these Companies should adopt in the exercise of their rights as shareholders of ASRO [the joint venture vehicle] as to acts and conduct that, according to the Claimant, were in breach of the BIT. There is also evidence on record of instructions or directions given to AIBO by the State, through the Ministry of Transportation, regarding the organization of auctions of AIBO's commercial spaces at the Otopeni Airport in 2002. Further, the evidence before the Tribunal indicates that the Romanian State was using its ownership interest in or control of corporations (AIBO and TAROM) specifically 'in order to achieve a particular result' within the meaning of the [commentary to Article 8]. The particular result in this case was bringing to an end, or not extending, the contractual arrangements with [the Claimant] and ASRO and instituting a series of auctions.[134]

[131] Caron (1998), 171–3.

[132] See e.g. *SEDCO* v. *National Iranian Oil Co.*, (1985) 9 Iran–US CTR 248, 278–9: '[when] on the date of the government appointment of "temporary managers" there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred of that date'. Cf. *Starrett Housing* v. *Iran*, (1983) 4 Iran–US CTR 122, 155: 'assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken'.

[133] Caron (1998), 172–3. See e.g. *Tippetts, Abbett, McCarthy, Stratton* v. *Iran*, (1984) 6 Iran–US CTR 219, 225–30.

[134] *EDF (Services) Ltd* v. *Romania*, ICSID Case No. ARB/05/13, 8 October 2009, §201.

PROOF

Comp. by: KNarayanan Stage: Proof Chapter No.: 5 Title Name: CRAWFORD
Date:19/3/13 Time:07:10:30 Page Number: 165

On this basis, Romania was found responsible for the acts of AIBO and TAROM by operation of ARSIWA Article 8,[135] although it was eventually concluded that these did not breach the relevant investment treaty.[136]

[135] Ibid., §§209–14. [136] Ibid., §330.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:06 Page Number: 166

6 Other cases of attribution

6.1 Introduction

This chapter considers, first, three exceptional (and largely self-contained) situations in which the actions of non-state entities, not acting under the direction or control of state organs, may nonetheless be attributed to the state. Thus the chapter considers attribution in cases where the citizenry assumes governmental authority by default or in the absence of the state (ARSIWA Article 9), in cases of insurgency or civil war (ARSIWA Article 10) and in cases of the positive adoption of the conduct of non-state actors (ARSIWA Article 11).

The fourth part of the chapter concerns an issue of growing importance and controversy, namely the attribution of the acts of international organizations to the state. This situation is pointedly not covered in the ARSIWA, but rather in the ILC's later work on the responsibility of international organizations. It has, almost without exception, arisen in the context of peacekeeping missions, where states contribute forces to a multilateral operation under the putative command and legal authority of an organization such as the United Nations or the North Atlantic Treaty organization (NATO), while retaining a measure of operational control over their national contingents. In such cases, the question arises: to whom should the actions of peacekeepers be attributed – the state, the organization or both? That question is presently clouded in uncertainty and confusion.

6.2 Exercise of governmental authority in the absence of the state

6.2.1 Foundations of ARSIWA Article 9

ARSIWA Article 9 governs situations in which private entities exercise public powers in the absence or default of official authorities. It reads as follows:

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:07 Page Number: 167

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.

Representing as it does another method by which a state may be held responsible for the acts of a non-state entity, Article 9 has an affinity with ARSIWA Article 8, which had been merged following the first reading as Draft Articles 8(b) and 8(a), respectively.[1] At the outset, it must be emphasized that the principle reflected by the provision is truly exceptional, a point made in the commentary:

> 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 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 gradually being restored, e.g. after a foreign occupation.[2]

The principle underlying ARSIWA 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, recognized as legitimate by Article 2 of the Regulations respecting the Laws and Customs of War on Land, as annexed to the 1904 Hague Convention IV,[3] and Article 4A(6) of the Geneva Convention relative to the Treatment of Prisoners of War.[4] But there are occasional instances in the field of state responsibility proper, as in the case of *Yeager* v. *Iran*,[5] which concerned, *inter alia*, the role assumed by the local revolutionary committees – the so-called 'Komitehs' – which served as local security forces in the immediate aftermath of the Iranian Revolution.[6]

[1] The two were eventually separated by the Drafting Committee on second reading, resulting in the current arrangement: ILC Ybk 1998/I, 289; 1998 DC Report, SR.2562, 17.
[2] ARSIWA Commentary, Art. 9, §1. Also Draft Articles Commentary, Art. 8(b), §8.
[3] 18 October 1907, 205 CTS 227. [4] 12 August 1949, 75 UNTS 135.
[5] (1987) 17 US–Iran CTR 91. The case also has application with respect to ARSIWA, Arts. 7, 8, 11.
[6] The Komitehs would later be officially recognized by decree under the name 'Revolutionary Guards', although the name, confusingly, was applied to several distinct post-revolutionary entities: (1987) 17 US–Iran CTR 91, 102 n. 8. Attribution of their actions of the Guards to the state did not prove problematic after their recognition: *William L Pereira Associates, Iran* v. *Iran*, (1984) 5 US–Iran CTR 198, 226.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:07 Page Number: 168

The claimant in that case alleged that prior to their acknowledgement by the new Iranian government, members of the Komitehs removed them from their apartment in Tehran and took them to the Hilton hotel prior to expelling them from the country. The Tribunal had to determine whether these acts could be attributed to the Iranian state, and did so by reference to Draft Articles 8(a) and 8(b),[7] noting:

> The Tribunal finds sufficient evidence on the record to establish a presumption that the revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government [i.e. under operation of Draft Article 8 (a)], or 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 [i.e. under operation of Draft Article 8(b)]. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of showing that members of 'Komitehs' or 'Guards' were in fact *not* acting on its behalf, or were not exercising elements of government authority, or that it could not control them.[8]

It is worth pointing out that ARSIWA Article 9 does not cover situations in which the citizenry have succeeded in forming a new de facto government, that is, a government which has not been the subject of *de jure* recognition, but which nevertheless is securely in control of the territory of a state.[9] In such cases, the de facto government is to be considered to be an apparatus of the state, replacing that which existed previously,[10] a point made by Taft CJ in the *Tinoco Concessions* arbitration.[11] Where this occurs, the officials and agents of the *de facto* government are equated to organs of the state proper, giving rise to responsibility under ARSIWA Article 4. By contrast, if the governmental functions in question are exercised by an insurrectionist movement which has not established secure control of the state or which controls only some of its territory, responsibility will not attach to the state unless the insurrectionist movement succeeds in establishing a new government, a point discussed below in the context of ARSIWA Article 10.

6.2.2 Operation of the provision

Given the exceptional circumstances in which it applies, it is unsurprising that there has been little in the way of state practice or judicial consideration of ARSIWA Article 9 since its adoption by the ILC. The

[7] (1987) 17 US–Iran CTR 91, 103. [8] Ibid., 104.
[9] *Brownlie's Principles*, 152–3. [10] ARSIWA Commentary, Art. 9, §4.
[11] *Aguilar-Amory and Royal Bank of Canada (UK/Costa Rica)*, (1923) 1 RIAA 371, 381–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:07 Page Number: 169

Commentary, however, provides guidance as to its application, positing three conditions.[12] First, the non-state actor in question must be utilizing government functions on their own initiative,[13] with the nature of the activity in question given more weight than the existence of a formal link between the actors and the organization of the state.[14]

The term 'governmental authority' as used in Article 9 is itself linked to the same term as it appears in ARSIWA Article 6, and thereby incorporates the well-known distinction between *acta jure imperii*, which attract immunity, and *acta jure gestionis*, which do not.[15] Put another way, governmental authority in the context of the provision is determined by reference to whether, under ordinary circumstances, the government would reserve the actions or functions in question to itself: if a private person can usually perform the function without the government's authorization or delegation of powers, it is not to be considered governmental. Thus private persons may not lawfully engage in the provision of police or border security services (as in the case of the Komitehs in *Yeager* v. *Iran*) without government mandate, but they can enter into contracts for the supply of military goods and services.

Second, the conduct in question must have been carried out 'in the absence or default of the official authorities'.[16] The assumption of governmental activities by non-state actors will not engage state responsibility in every instance, but only where the state apparatus has suffered total or partial collapse, for example in situations where it has lost control of the territory concerned. The test is largely factual in character, but its inclusion indicates that this provision is based on a kind of agency of necessity – on the actual need for *someone* to fulfil the internal functions of the absent state.[17]

The third element of Article 9 further reinforces the requirement of necessity: the circumstances surrounding the assumption of governmental authority must have been such as to call for its exercise in the circumstances.[18] The phrase 'called for' indicates that it is the exercise of governmental authority in general that is called for, and not the

[12] ARSIWA Commentary, Art. 9, §3.
[13] Were they exercising such functions at the behest of the government, their actions would be attributable under ARSIWA, Art. 5: see Chapter 4.
[14] ARSIWA Commentary, Art. 9, §4.
[15] Generally: Sornarajah (1982); Crawford (1983); Trooboff (1986); Schreuer (1988); Fox (2008), 502–30; Yang, *State Immunity in International Law* (2012). Further: Chapter 4.
[16] ARSIWA Commentary, Art. 9, §5. [17] De Frouville (2010), 272.
[18] ARSIWA Commentary, Art. 9, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:08 Page Number: 170

particular actions that are carried out. But, more broadly, this requirement requires an examination of the situation giving rise to the exercise of authority, and whether its assumption is actually required in the circumstances. This introduces a normative element to the provision that justifies departure from the usual rule that states cannot be held liable for the actions of private persons.

6.3 Responsibility for the acts of insurgents[19]

6.3.1 ARSIWA Article 10 in the International Law Commission

As a general rule, a state is not held responsible for the acts of insurgents.[20] By definition, such a movement cannot be considered to be aligned to the interests of the state against which it is fighting. It is external to the formal structure of the state, exercises no constituted authority and cannot be considered to be under the state's 'instruction, direction or control'. As Vattel observed, in a slightly different context,

> A civil war breaks the bonds of society and government, or at least suspends their force and effect: it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the state and resisting the lawful authority, they are no less divided in fact … They stand therefore in precisely the same predicament as two nations, who engage in a contest, and, being unable to come to an agreement, have recourse to arms.[21]

The presumptive non-attribution of the acts of insurgents to the states they oppose is amply supported in the early arbitral decisions. The tribunal in the *Home Missionaries Society* case, for example, made express reference to the

> well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[22]

[19] Generally: Atlam, in Spinedi and Simma (eds.), *United Nations Codification of State Responsibility* (1987) 35; Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), ch. 5; Dumberry, (2006) 17 EJIL 605; Cahin, in Crawford, Pellet and Olleson (2010) 247.

[20] ARSIWA Commentary, Art. 10, §§2, 3. Also Draft Articles Commentary, Art. 14, §4.

[21] Vattel (1758), Bk III, Ch. XVIII, §293 ((2008) 645).

[22] *Home Frontier and Foreign Missionary Society of the United Brethren in Christ* v. *Great Britain (US/UK)*, (1920) 6 RIAA 42, 44. Also *Williams* v. *Bruffy*, 96 US 176, 191 (1877); *British Claims in the Spanish Zone of Morocco (UK/Spain)*, (1925) 2 RIAA 615, 642; *Several British Subjects* v. *US*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:08 Page Number: 171

But an insurgency movement normally differs from other non-state actors in that it controls territory in a public or governmental capacity, although unlawfully. Indeed, Special Rapporteur Ago went so far as to say that an insurrectional movement which establishes its authority over a state's territory becomes a 'separate subject of international law ... perfectly capable of committing internationally wrongful acts'.[23] In fact, at least outside the context of decolonization, there is strong resistance to admitting even the temporary legal personality of insurrectional movements, and 'recognition of insurgency' as an institution is virtually obsolete.[24] It is doubtful that tying responsibility to the legal personality of the insurgents as such is helpful, since their disappearance is eventually ensured, either because the insurrection fails or because it succeeds.[25] In practice what matters is the attribution of the conduct of the movement to the existing state or any new state, and the answer given by Article 10 is that there is no attribution of such conduct unless the insurgents are successful in their aim of creating a new government or, as the case may be, a new state. Article 10 is in effect a negative attribution clause to which is attached a curious form of secondary, contingent responsibility based on the successful outcome of the insurgency. It is as if the state represented by the successful insurgents is precluded from denying the attribution to it of their conduct in the course of the insurgency.[26]

Thus state responsibility may arise on a limited basis where the insurrection succeeds in creating either a new government or even a new state.[27] ARSIWA Article 10 provides:

(Iloilo Claims) (UK/US), (1925) 6 RIAA 158, 159–60; *G. L. Solis* v. *Mexico (US/Mexico)*, (1928) 4 RIAA 358, 361. Cf. *Sambaggio*, (1903) 10 RIAA 499, 524:

> It is suggested that a decision holding Venezuela not responsible for the acts of revolutionists would tend to encourage them to seize the property of foreigners. This appeal is of a political character and does not address itself to the umpire.

[23] ILC Ybk 1972/II, 129.

[24] Wilson, *International Law and the Use of Force by National Liberation Movements* (1988), 27–8; Crawford, *The Creation of States in International Law* (2nd edn, 2006), 380–2.

[25] Cahin (2010), 248.

[26] Cf. Harington, *Epigrams* (1618), Bk IV Epistle 5:

> Treason doth never prosper: what's the reason?
> Why, if it prosper, none dare call it treason.

[27] See e.g. Art. XIII(b) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, (1929) 23 AJIL Spec. Supp. 131:

> In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolution or insurrectionary group

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:08 Page Number: 172

(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 of 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.

On first reading, the principles now reflected in Article 10 were contained in Draft Articles 14 and 15.[28] During the second reading, these were condensed into a single provision, a decision which effectively deleted Draft Article 14[29] and proved relatively uncontroversial on adoption by the ILC.[30]

Two preliminary points arise. The first is one of terminology. ARSIWA Article 10 treats all insurrections generally and makes no attempt to distinguish between a struggle for national liberation on the one hand and a simple rebellion on the other. The 1996 commentary to Draft Article 14 admitted candidly that:

> In formulating ... the present article, the Commission ... is not required to say anything about the various forms which insurrection may take according to whether there is a relatively limited internal struggle, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movement and so on, or about the questions which may arise in connexion with the problem of the international legitimacy of some of these forms.[31]

Similarly, in its commentary to Draft Article 15 the Commission said:

> The Commission considered that no distinction should be made, for the purposes of this article, between different categories of insurrectional movements on the

is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.

[28] See e.g. the comments of Austria: ILC Ybk 1998/II(2), 109–10.

[29] Draft Art. 14 provided that a state is not responsible for the acts of an insurrection movement. Notwithstanding the security that this provided to states, the rule was removed on second reading as an unnecessary 'negative' rule of attribution: Crawford, First Report, 53.

[30] But cf. the comments of the Netherlands, asserting (erroneously) that the provision, in conjunction with ARSIWA, Art. 7, could permit the attribution of all acts of an insurgency to the state: ILC Ybk 2001/II(1), 50.

[31] Draft Articles Commentary, Art. 14, §7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:09 Page Number: 173

basis of any international 'legitimacy' or any illegality in respect of their establishment of government.[32]

The position taken by the ILC in this respect was the subject of significant criticism by developing countries in the Sixth Committee during its consideration of the Commission's 1975 report, on the basis that it impeded recognition of wars of national liberation as a special category in international law.[33] Such criticisms may be met with Ago's response to those members of the Commission who raised similar concerns: that it was 'not the Commission's business to establish when an insurrectional movement was or was not legitimate, or when, how, or with respect to whom, it acquired international personality'.[34]

The issue of terminology, however, re-emerged in the course of the second reading, with Dugard noting that many liberation movements 'would be unhappy to be treated as mere insurrectional movements', but going on to query whether it was 'really possible to distinguish national liberation movements recognized by the [UN] from those which did not enjoy such recognition'.[35] Other members of the Commission, such as Simma and Hafner,[36] defended the general utility of the term 'insurrection movement', whereas others still reiterated Ago's original concerns, noting that 'the Commission would be headed for serious difficulties if it tackled the problem of the status of insurrectional movements'.[37] The question was referred to the Drafting Committee, which was given the option of utilizing either term or both.[38] It chose to retain the neutrality of Ago's original draft, and the final version of ARSIWA Article 10 refers solely to 'insurrection movements', although Article 10(2) does include the generic addition 'or other'.

The second preliminary question concerns the point at which a movement engages the consequences of state responsibility mentioned in ARSIWA Article 10. In his original draft, Ago used the acquisition of international personality by the movement as a catalyst for responsibility,[39] but this was abandoned by the Commission to avoid taking a position on the legal requirements for international personality.[40] Direction may, however, be found in the Commentary,[41] which makes

[32] Ibid., Art. 15, §20. [33] Atlam (1987), 39, 46–9. [34] ILC Ybk 1975/I, 60.
[35] ILC Ybk 1998/I, 251. Also ibid., 255 (Pellet). [36] Ibid., 251–2.
[37] Ibid., 252 (Bennouna, Kabatsi, Melescanu), 253–4 (Crawford). Dugard also raised this issue: ibid., 251.
[38] Ibid., 269 (Crawford). [39] ILC Ybk 1972/II, 128ff. [40] ILC Ybk 1975/I, 41–6.
[41] ARSIWA Commentary, Art. 10, §9. Also Crawford, First Report, 52.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:09 Page Number: 174

reference to Protocol II to the Geneva Conventions.[42] Article 1(1) of Protocol II refers to 'dissident armed forces or other organized 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'. Article 1(2) of the Protocol in turn 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 character'.[43] Thus the International Criminal Tribunal for Rwanda determined that the Rwandan Patriotic Front possessed sufficient territorial control to fulfil these requirements and engage the terms of Protocol II.[44] Similarly, the UNHCR Special Representative in El Salvador applied Protocol II to the Frente Farabundo Martí para la Liberación Nacional,[45] the UNHCR itself extended its operation to the Sudanese People's Liberation Army in Sudan,[46] and the Inter-American Commission on Human Rights applied it to various armed opposition groups in Colombia.[47]

By its terms, ARSIWA Article 10 posits three hypotheses, two explicit and one implicit. First, the insurgency in question succeeds, and replaces the existing government of the state. Second, the insurgency succeeds, but, rather than forming a new government, creates a new state. Third, the insurgency fails.

6.3.2 Responsibility where the insurgency creates a new government

The first hypothesis is reflected in the terms of ARSIWA Article 10(1), and provides that the conduct of an insurgency which becomes the new government of a state shall be considered an act of that state under international law. This is uncontroversial[48] and reflects what one early

[42] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of the victims of non-international armed conflicts, 8 June 1977, 1125 UNTS 609.

[43] Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971 p. 16, 54: 'physical control of territory and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States'. Further: Zegveld (2002), 144–5, 207–10; Cahin (2010), 251–2.

[44] *Prosecutor* v. *Akayesu*, ICTR Case No. 96-4-T, Appeals Chamber, 2 September 1998, §267.

[45] Final Report of the Special Representative on El Salvador, UN Doc. E.CN.4/1985/19, 1 February 1985, §122; UNCHR Res. 1989/68, 8 March 1989, preamble.

[46] UNHCR Res. 1998/67, 21 April 1998, §6.

[47] IACHR, Third Report on the Situation of Human Rights in Colombia, 26 February 1999, OAS Doc. OEA/Ser. L/V/II.102, Doc. 9, rev. 1 §20.

[48] Brownlie (1983), 177–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:09 Page Number: 175

award of the US–Venezuela Mixed Claims Commission referred to as 'a well-established rule of international law'.[49] In the modern era, the principle was referred to with some regularity by the Iran–US Claims Commission.[50]

The commentary explains the logic underpinning ARSIWA Article 10(1) in the following terms:

> 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 to 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.[51]

This position is reflective of the thesis of 'organic' or 'structural' continuity,[52] under which the factual links connecting a former insurrection movement with a current government are sufficient to generate state responsibility not only for the acts of the insurgency prior to its success, but also for the acts of the former government in attempting to suppress the insurgency. It has largely replaced earlier justifications for the rule, most notably the theory that state responsibility derives in such cases from the fact that the insurgency's success reflects the 'national will' of the people.[53] This thesis is unsatisfactory for a number

[49] *Dix (US/Venezuela)*, (1903) 9 RIAA 119, 120. Cf. *Bolivian Railway (UK/Venezuela)*, (1903) 9 RIAA 445, 453. See also the remarks of Verzijl as president of the French-Mexican Claims Commission in the *Pinson* case: *Pinson* v. *Mexico (France/Mexico)*, (1928) 5 RIAA 327, 353:

> [Where] the injuries originated, for example, in requisitions or forced contributions required by the Government [during its] struggle against the insurgents, or by the revolutionaries before their final success, or whether caused by criminal acts of [the] legitimate government or its military forces, or crimes committed by the victorious revolutionary forces, the responsibility of the State cannot, I think, be denied.

[50] See e.g. *Rankin* v. *Iran*, (1987) 17 US–Iran CTR 135, 143; *Yeager* v. *Iran*, (1987) 17 US–Iran CTR 91, 101.

[51] ARSIWA Commentary, Art. 10, §5.

[52] Dumberry, (2006) 17 EJIL 605, 611–12.

[53] See e.g. *Bolivian Railway (UK/Venezuela)*, (1903) 9 RIAA 445, 453: '[t]he nation is responsible for the obligations of a successful revolution from the beginning, because in theory, it

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:10 Page Number: 176

of reasons;[54] thus Schwarzenberger described the national will theory as 'no more than an empty fiction in the verbiage of political philosophy'.[55]

For the most part, application of ARSIWA Article 10(1) will be binary: either the insurrection has succeeded or it has not. But problems may arise in situations of national conciliation, where a former revolutionary movement is adopted by the government of the state, for example via a peace agreement, in an attempt at national reconciliation.[56] To apply Article 10(1) in such a case could act as a disincentive. The commentary states that Article 10 will only be triggered in the event of 'a real and substantial continuity between the former insurrectional movement and the new government it has succeeded in forming'.[57]

6.3.3 *Responsibility where the insurgency creates a new state*

The second hypothesis is contained in ARSIWA Article 10(2), which provides that when an 'insurrectional or other' movement succeeds in establishing a new state, the acts of the movement will be attributed to the new state. In contrast to ARSIWA Article 10(1), any acts undertaken by the predecessor state in attempting to suppress the insurgency will not be attributed to the new state.

The rule stated within Article 10(2) is again relatively uncontroversial.[58] As Dumberry notes, however, state and judicial practice is relatively sparse.[59] Some early indications appear in the context of the American Civil War and the consequences arising from the actions of the Confederate States of America. During the war, the British Law Officers were asked who should be held responsible for the acts of the Confederacy. Phillimore advised that, in the event that the rebels were to

represented *ab initio* a changing national will, crystallizing in the finally successful result'. Further: Dumberry, (2006) 17 EJIL 605, 610–11.

[54] See e.g. Ago, ILC Ybk 1972/II, 145. Also ILC Ybk 1975/II, 100:

> [T]he very concept of the 'national will' is to be treated with caution, quite apart from the fact that, in general, international law is not greatly concerned with whether a given government is or is not the representative of the 'true' national will. Even leaving that aside, it is difficult to maintain that the outcome of the fighting should, like a judgment of God, establish retrospectively that the victors, from the outset of the civil war, were more representative of the true national will than the defeated.

[55] Schwarzenberger, 1 *International Law* (3rd edn, 1957), 628.

[56] See e.g. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, available at www.sierra-leone.org/lomeaccord.html, Pt II.

[57] ARSIWA Commentary, Art. 10, §7.

[58] Crawford, First Report, 52.

[59] Dumberry, (2006) 17 EJIL 605, 612–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:10 Page Number: 177

succeed in separating from the Union, responsibility should be sheeted home to the resulting new state:

> In the event of the war having ceased, and the authority of the Confederate State being *de jure* as well as *de facto* established, it will be competent to Her Majesty's Government to urge the payment of a compensation for the losses inflicted on Her Majesty's subjects by the Confederate Authorities during the War.[60]

This view was shared by the US Supreme Court, which when called on determine the responsibility of the Union for acts of the Confederacy, noted that liability for the acts of a rebellion

> both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeeds and becomes recognized, its acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the state governments under the old confederation on their separation from the British Crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy's property made by them were sustained as if made by an independent nation. But if they had failed in securing their independence, and the authority of the King had been reestablished in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.[61]

Another example of the principle described occurred in the *Socony Vacuum Oil Company* case before the US International Claims Commission.[62] There the claimant, a US national, attempted to bring a claim against Yugoslavia with respect to the expropriation of property by the 'independent' state of Croatia. The Commission recognized that this was in fact a puppet regime established by Germany and Italy, which never held complete control of its purported territory and disappeared from view as the Red Army advanced in 1945. It was characterized as an insurrectional group backed by Berlin which had failed to secede from Yugoslavia.[63] The Commission, *obiter*, contrasted the US secession from the British Crown in 1776, and indicated that in such a case, the United States would be responsible for the actions of revolutionaries during the War of Independence.[64]

[60] Opinion of 16 February 1863, in McNair, 2 *Opinions* 257. The opinion itself was requested in relation to the predations of the CSS *Alabama*.
[61] *Williams* v. *Bruffy*, 96 US 176, 186 (1877). [62] (1955) 21 ILR 55. [63] Ibid., 57–60.
[64] Ibid., 60–1. The Commission cited the above passage from *Williams* v. *Bruffy*, but misattributed it to Moore.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:10 Page Number: 178

A rather more recent example concerned the 1962 Declaration[65] which formed part of the Evian Accords concluding the Algerian War, in which the Front de Libération Nationale (FLN) succeeded in establishing Algeria as an independent state. By its terms, Article 18 of the agreement provides that 'Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities'. Although Algeria has in general refused to honour the undertaking to the extent of taking responsibility for the actions of the FLN, the Declaration has always been interpreted within French jurisdictions as effectively dividing responsibility for acts committed during the Algerian War between the French and Algerian states.[66] As a result of a request for interpretation made by the French courts,[67] the French Foreign Ministry stated that Algeria should not be held responsible for the acts and measures taken by France that were specifically directed towards the suppression of the FLN.[68] This interpretation has been consistently applied by the French courts not only to limit the responsibility of the French state for acts of the FLN, but also to attribute these actions to Algeria. In one case, for example, the Conseil d'état affirmed that if the general rule of the transfer

> n'a pas pour effet de mettre à la charge de l'Etat algérien la réparation des dommages causés par les mesures prises spécialement et directement par les autorités françaises en vue de faire échec aux mouvements insurrectionnels, l'indemnisation des dommages imputables à des éléments insurrectionnels intéresse l'Etat algérien . . .[69]

As with ARSIWA Article 10(1), Article 10(2) is underpinned by a theory of organic or structural continuity between the insurrectional movement and the new state:[70] 'from being only an embryo State, the insurrectional movement has become a State proper, without any break in

[65] Déclaration de principes relative à la coopération économique et financière, 19 March 1962, [1962] JORF 3019.
[66] Dumberry, (2006) 17 EJIL 605, 613–5; Cahin (2010), 250.
[67] *Re Union Régionale d'Algérie de la CFTC*, (1962) 44 ILR 43.
[68] Dumberry, (2006) 17 EJIL 605, 614.
[69] 15 March 1995, No. 119737, partially available at www.juricaf.org/arret. Translation: 'does not have the effect of placing on the Algerian State the obligation of reparation of injuries caused by measures specifically and directly taken by French authorities in order to defeat the insurrectional movements; the compensation of the damages attributable to the insurrectional element concerns the Algerian State'. Also *Hespel*, [1980] Rec. Lebon 866; *Consorts Hovelaque*, [1984] Rec. Lebon 726; *Grillo*, [1999] Rec. Lebon 907.
[70] Dumberry, (2006) 17 EJIL 605, 611–12.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:11 Page Number: 179

continuity between the two'.[71] While this approach is appropriate when considering a monolithic insurrectionist movement, difficulties emerge in situations where multiple insurgency groups act so as to bring about the creation of a new state, even where only one of those groups ultimately succeeds in forming a government.[72] Although there has been no judicial consideration of such situations, Dumberry suggests that the activities of *all* relevant insurgency groups may be attributed to the new state, irrespective of the relationship between them.[73] This must be very doubtful, considering the exceptional character of attribution under Article 10.

6.3.4 *Responsibility where the insurgency fails*

On first reading, Draft Article 14 expressed the 'negative' rule of attribution, providing in paragraph (1) that '[t]he 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.' Although it was deleted during the second reading, this still reflects the default position under international law.[74]

But the state's victory over an insurrectionist movement does not automatically excuse it from responsibility, a point made clear by ARSIWA Article 10(3), which preserves for application those grounds of attribution found in ARSIWA Articles 5–9.[75] Thus a state will be liable for the acts of its armed forces in suppressing a rebellion. Whether, as suggested in the *Home Missionaries Society* case, a state could be responsible for 'negligence in suppressing insurrection' is much more doubtful.[76] Arbitrator Huber in *British Claims in Spanish Morocco* said:

[71] ARSIWA Commentary, Art. 10, §6. Also ILC Ybk 1975/II, 101; Atlam (1987), 50–4; Zegveld (2002), 156.

[72] Dumberry, (2006) 17 EJIL 605, 612. One example of this is the independence of Angola from Portugal in 1975, which was brought about through the actions of at least three anti-colonial movements, the União Nacional para a Independência Total de Angola (UNITA), Movimento Popular de Libertação de Angola (MPLA) and Frente Nacional de Libertação de Angola (FNLA).

[73] Ibid.

[74] See e.g. *French Company of Venezuelan Railroads (France/Venezuela)*, (1902) 10 RIAA 285, 354, emphasizing that a state cannot be held liable for the actions of insurgents 'unless the revolution was successful'. Also *Pinson* v. *United Mexican States (France/Mexico)*, (1928) 5 RIAA 327, 353. Further: ARSIWA Commentary, Art. 10, §12.

[75] ARSIWA Commentary, Art. 10, §15.

[76] *Home Frontier and Foreign Missionary Society of the United Brethren in Christ* v. *Great Britain (US/UK)*, (1920) 6 RIAA 42, 44.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:11 Page Number: 180

If the State is not responsible for revolutionary events themselves, it may nevertheless be responsible [where] the authorities do not counter the consequences to the extent possible . . . The principle of non-intervention in the relations between a State and foreigners in its territory presupposes not only normal conditions of administration and justice, but also the willingness of the State to achieve its primary goal: the maintenance of internal peace and social order. The State is bound to a certain vigilance . . . [A] State may not require another State, injured in the interests of its nationals, to remain indifferent if opportunities for relief are, without plausible reason, manifestly neglected, or if the authorities, warned in time, do not take any preventative measure, or if, again, protection is not granted under conditions equal to citizens of all nations.[77]

But this, if correct, would be an aspect of some duty of due diligence, not a rule of attribution.[78]

In addition, international law now apparently contemplates that the insurrectional movement may *itself* be held internationally responsible for its acts.[79] This encompasses not only the notion that a state may bring a distinct and quantified claim against an insurrectionist movement, as did the British government with respect to the Confederacy during the American Civil War and the nationalist government during the Spanish Civil War,[80] but also the wider notion of the responsibility of the movement *as an entity*. This practice may be seen in the resolutions of the Security Council, which has referred to the 'heavy responsibility which would fall on any [Arab or Jewish] party failing to observe such a truce' in relation to the 1948 call for a ceasefire in the Holy Land,[81] and imposed on rebel groups in the Democratic Republic of the Congo the obligation to 'bring to an end all extrajudicial executions, human rights violations and arbitrary harassment of civilians' in areas under their control.[82]

Another form of responsibility vis-à-vis insurrectionist movements of course arises under international criminal law. Thus the International Criminal Tribunal for the former Yugoslavia has pronounced that crimes against humanity 'can be committed on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization'.[83] The same reasoning has

[77] *British Claims in the Spanish Zone of Morocco (UK/Spain)*, (1925) 2 RIAA 615, 642.
[78] E.g. a failure to effectively protect the premises of a foreign diplomatic mission: ARSIWA Commentary, Art. 10, §15. Further: Cahin (2010), 253.
[79] Draft Articles Commentary, Art. 14, §3. Further: Cahin (2010), 253–5.
[80] Draft Articles Commentary, Art. 14, §28. [81] SC Res. 43 (1948), op. §2.
[82] SC Res. 1417 (2002), op. §4. [83] *Tadić*, (1997) 112 ILR 1, 220–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:12 Page Number: 181

been extended to acts of torture.[84] In all cases, however, criminal responsibility is individual not collective.

6.4 Ex post facto adoption of conduct

6.4.1 ARSIWA Article 11 in the ILC

ARSIWA Article 11 governs another situation in which the actions of a non-state entity can be attributed to a state, namely where the state has acknowledged and adopted the conduct of a non-state actor as its own after the event.[85] The analogy is that of ratification of unauthorized acts of an agent in the municipal law of agency. Indeed, the idea was expressed by Vattel:

> as it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members.
>
> But if a nation or chief approves and ratifies the act of the individual, it then becomes a public concern; and the injured party is to consider the nation as the real author of the injury, of which the citizen is perhaps the only instrument.[86]

Article 11 reads:

> 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.

The insertion of Article 11 into the ARSIWA came late in the ILC's consideration of state responsibility. Unlike all the other provisions on attribution, it had no basis in the Draft Articles as adopted on first reading.[87] It was introduced during the second reading as Draft Article 15*bis*, with the Special Rapporteur remarking:

[84] *Prosecutor* v. *Delalić*, IT-96–21-T, Trial Chamber, 10 December 1998, §473.

[85] ARSIWA Commentary, Art. 11, §1.

[86] Vattel (1758), Bk II, Ch. VI, §§73–4 (299). See also Grotius, *De Iure Belli ac Pacis* (1625), Bk II, Ch. XXI, §II.1 (Tuck ed. 2005, 1055): 'No civil Society, or other publick Body, is accountable for the Faults of its particular Members, unless it has concurred with them, or has been negligent in attending to its Charge'. It is Vattel's formulation, however, that reflects best the framework of modern international law: de Frouville (2010), 258–61.

[87] Although Ago appears to have considered the issue tangentially within his Fourth Report, he did not address it as a separate issue: ILC Ybk 1972/II, 101.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:12 Page Number: 182

All the bases for attribution covered in chapter II (with the exception of the conduct of insurrectional movements under article 15) 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 allegedly wrongful conduct. But that is not a necessary prerequisite to responsibility. A State might subsequently adopt or ratify conduct otherwise not attributable to it; if so, there is no reason why it should not be treated as responsible for the conduct. Adoption or ratification might be expressed or might be inferred from the conduct of the State in question. This additional possibility needs to be considered.[88]

Draft Article 15*bis* was well received within the Commission, which by and large accepted the need for such a provision,[89] and was forwarded to the Drafting Committee.[90]

6.4.2 *Judicial consideration of* ex post facto *adoption*

As a general rule, states are loath to adopt conduct which is not their own, for the obvious reason that to do so may give rise to indeterminate liability. Nevertheless, some clear examples are evident in case law and state practice.

6.4.2.1 *Lighthouses Arbitration*

In *Lighthouses Arbitration*[91] an arbitral tribunal held Greece liable for the breach of a concession agreement entered into by Crete at a period where it was still considered an autonomous territory of the Ottoman Empire.[92] It did so partly on the basis that, following the voluntary absorption of Crete by Greece in 1913–14,[93] 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'.[94]

Quite aside from such questions of succession to responsibility (discussed in Chapter 13), it is clear that if a successor state, faced with a

[88] Crawford, First Report, 54. Also ILC Ybk I, 249 (Crawford).
[89] ILC Ybk 1998/I, 250 (Hafner), 254 (Addo), 255 (Pellet), 268 (Economides), 269 (Crawford, Special Rapporteur). Cf. ibid., 255–6 (Bennouna).
[90] Ibid., 269.
[91] *Lighthouses Arbitration between France and Greece (Claims No. 11 & 4)*, (1956) 23 ILR 81. Further: Crawford, First Report, 54.
[92] A controversial question at the time: Ion, (1910) 4 AJIL 276.
[93] Crete declared unilateral union with Greece in 1908, but this was not recognized by Athens until 1913 and not by other states until after the First Balkan War: Treaty of London, 30 May 1913, 218 CTS 159, Art. 4. See further the Tribunal's historical survey in the *Lighthouses Arbitration*, (1956) 23 ILR 659, 663–6.
[94] (1956) 23 ILR 81, 92. More widely: ibid., 91–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:12 Page Number: 183

continuing wrongful act on its territory, endorses and continues the situation, the inference may be drawn that it has accepted responsibility for the wrongful act. Furthermore, ARSIWA Article 11 is framed in terms of *any* conduct which is not otherwise attributable to the state in question. Thus it is not limited to the conduct of private individuals or actors but also covers that of states or former states or territories.

6.4.2.2 The *Eichmann* case

The *Eichmann* case[95] concerned Adolf Eichmann, an SS *Obersturmbannführer* who was a principal perpetrator of the Holocaust. At the end of the Second World War he fled to Argentina and lived there under a pseudonym until 1960, when he was captured by a group of Israelis and transferred to Israel. In response to the violation of its territorial sovereignty, Argentina accused the Israeli government of involvement in Eichmann's kidnapping, a charge neither confirmed nor denied by Israel. During the debate in the Security Council over Israel's acts, the Israeli foreign minister referred to Eichmann's captors as a 'volunteer group'[96] separate from the Israeli state. In the unlikely event that the group that captured Eichmann were non-state actors of whose plans Israel was genuinely unaware,[97] its conduct in accepting custody of Eichmann, and in subsequently trying and executing him, may be taken as adoption of the abduction, giving rise to attribution under ARSIWA Article 11.[98]

6.4.2.3 The *Tehran Hostages* case

The archetype of how Article 11 works remains the case of *United Diplomatic and Consular Staff in Iran (US v. Iran)*.[99] The facts are well known: in November 1979, following the Iranian Revolution that ousted the government of Shah Reza Pahlavi earlier that year, the US embassy in Iran was overrun by several hundred militants, who seized the compound and took the personnel hostage. Just prior to the attack, the Iranian diplomatic police were reported to have disappeared from the scene,

[95] *A-G (Israel)* v. *Eichmann*, (1961) 36 ILR 18 (District Court); (1962) 36 ILR 277 (Supreme Court). Further: Silving, (1961) 55 AJIL 307; Fawcett, (1962) 38 BYIL 181; Villalpando, 'Eichmann case', (2007) MPEPIL.

[96] See Silving (1961), 311–18.

[97] Cf. SC Res. 138 (1960), which by its terms implies that Israel was at the very least aware of and consented to the abduction.

[98] ARSIWA Commentary, Art. 11, §5.

[99] ICJ Rep. 1980 p. 3. Further: Buffard and Wittich, 'United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)', (2007) MPEPIL.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:13 Page Number: 184

and no subsequent attempt was made by the Iranian government to rescue the hostages,[100] despite the situation continuing for over a year.[101]

In late 1979 the United States filed proceedings before the International Court, alleging that Iran was in breach, *inter alia*, of Article 22(2) of the Vienna Convention on Diplomatic Relations (VCDR)[102] for failing to 'take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity'.[103] It further alleged that the actions of the militants were directly attributable to Iran, on the basis of the official attitude of the Iranian state and public pronouncements on the situation by the Ayatollah Khomeini and other senior Iranian officials which expressly approved of and maintained the situation which the militants had created. The Court found in favour of the United States on this point, stating:

> 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 the State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs ... is reported to have said in a television interview that the occupation of the United States Embassy 'had been done by our nation'.[104]

[100] This was in marked contrast to an earlier incident in February 1979, in which the Iranian response to an attack on the US embassy was immediate and effective: ICJ Rep. 1980 p. 3, 31.

[101] With the exception of thirteen individuals released in late November 1979, and a severely ill US vice-consul who was released in July 1980, the remaining hostages were released on 20 January 1981 following the conclusion of the Declaration of the Government and Popular Republic of Algiers, 19 January 1981, 20 ILM 224.

[102] 18 April 1961, 500 UNTS 95.

[103] The US also alleged that Iran had breached the Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261 and the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America, 15 August 1955, 284 UNTS 110.

[104] *Tehran Hostages*, ICJ Rep. 1980 p. 3, 35.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:13 Page Number: 185

It is not clear from this passage whether the Court considered that the effect of the 'approval' of the conduct of the militants was merely prospective, or whether it made the Iranian state itself responsible for the whole process of the seizure of the embassy and the detention of its personnel *ab initio*. Indeed, it has been argued by some commentators, that *Teheran Hostages* stands for precisely the *opposite* proposition,[105] relying on the Court's remarks that:

> congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.[106]

In the light of such statements, it might be argued that the Court was stating that the congratulations of the Ayatollah simply confirmed Iran's involvement in the attack on the embassy from the outset,[107] in the same way that France's acknowledgement that the two individuals responsible for the destruction of the MV *Rainbow Warrior* in Auckland harbour were its agents engaged French responsibility under ARSIWA Article 4.[108] Such criticisms, however, do not properly take account of the Court's acknowledgement that statements of approval were 'highly significant in another context', namely the question whether as a result of such support, the legal situation of attribution had been altered. As a question of fact, the attacks remained independent. But the normative consequences which flowed from that fact were altered by the approval and adoption such that the attacks could now be attributed *a postiori* to the Iranian state.

In reality, it made little difference which position was taken, since Iran was held responsible in relation to the period prior to the putative adoption for its lapses under VCDR Article 22(2).[109] But circumstances

[105] Condorelli and Kreß (2010), 231–2.

[106] *Tehran Hostages*, ICJ Rep. 1980 p. 3, 29–30.

[107] Condorelli and Kreß (2010), 232. Further: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 43–5: '[declarations may constitute] evidence of specific facts and of their imputability to the States in question . . . [Such declarations may] certainly [constitute] recognition as to the imputability of some of the activities complained of'.

[108] *Rainbow Warrior (New Zealand/France)*, (1986) 74 ILR 241. Further: Wexler (1987); Hoss and Morgan-Foster (2010); Trapp (2011), 36–7. Also Chapter 4.

[109] Ibid., 31–3. Subsequent attacks, redolent of *Tehran Hostages*, occurred with respect to militant attacks on the UK embassies in Tehran and Tripoli in 2011. In both cases, however, the United Kingdom preferred to frame its complaints against Iran and Libya respectively in terms of VCDR, Art. 22(2): 'Foreign Secretary statement on storming of

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:13 Page Number: 186

can be envisaged in which no prior responsibility could have existed, for example where the state in question adopted the wrongful conduct as soon as it became aware of it, or as soon as it assumed control over the territory concerned. If the adoption is unequivocal and unqualified, as was the statement of the Iranian foreign minister, there is good reason to give it retroactive effect.[110] In the context of ARSIWA Article 11, this has the desirable consequence of allowing the injured State to obtain reparation in respect of the whole transaction or event.

6.4.2.4 The *Gabčíkovo-Nagymaros* case

A further example of *ex post facto* adoption of conduct in the context of state succession is provided by the *Gabčíkovo-Nagymaros* case.[111] The case concerned the fallout from a 1977 treaty[112] concluded between Hungary and Czechoslovakia relating to the construction and operation of a series of locks on the Danube – one at Gabčíkovo in Czechoslovakian territory, and the other at Nagymaros in Hungary. On 1 January 1993, Czechoslovakia divided and Slovakia became an independent state. On 7 April 1993, Slovakia and Hungary concluded a Special Agreement for the submission of the dispute concerning the dams to the International Court.[113] Its Preamble provided:

> *Bearing in mind* that the Slovak Republic is one of the two successor states of the Czech and Slovak Federal Republic and is the sole successor state in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project.

The Court took this statement to mean that Slovakia succeeded to Czechoslovakian responsibility with respect to the project:

> According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia may

British Embassy in Iran', 29 November 2011, available at www.fco.gov.uk/en; 'Libya crisis: Expelled Libyan ambassador departs UK', 2 May 2011, available at www.bbc.co.uk/news.

110 As indeed occurred in the *Lighthouses Arbitration*, (1956) 23 ILR 81, 91–2.

111 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7. Further: Schrijver and Prislan, 'Gabčíkovo-Nagymaros case' (2008) MPEPIL.

112 Treaty concerning the Construction and Operation of the Gabčíkovo-Nagymaros Series of Locks, 16 September 1977, 1109 UNTS 211.

113 Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project, 7 April 1993, 32 ILM 1293.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:14 Page Number: 187

thus be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia.[114]

Thus the specific adoption in the Special Agreement of Czechoslovakia's actions with respect to the Gabčíkovo-Nagymaros project can also trigger responsibility on the basis of ARSIWA Article 11. In other words, the relevant acts of Czechoslovakia could be considered attributable to the Slovakian state.

6.4.3 *The operation of ARSIWA Article 11*

These cases provide considerable guidance as to the operation of Article 11. First, the act of adoption may be express, as in *Teheran Hostages* and *Gabčíkovo-Nagymaros*, or implied, as in *Lighthouses Arbitration* and *Eichmann*. Second, the phrase 'if and to the extent that' within Article 11 indicates that a state may selectively identify those non-state actions that it wishes to adopt, and is not required to approach the matter from an 'all or nothing' standpoint.[115]

An act of acknowledgement and adoption should be distinguished from a mere expression of support. In defining the principle in *Teheran Hostages*, the Court used phrases such as 'approval', 'endorse', the 'seal of governmental approval' and 'the decision to perpetuate [the situation]'.[116] The ILC, however, shied away from making such actions on the part of the state the basic threshold for attribution. On this point, the commentary states:

> [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 and 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 . . . [T]he 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.[117]

But, as de Frouville points out, if oral approval is insufficient to ground attribution, it is difficult to see how simple conduct can reveal the intention of the state to adopt the non-state acts in question.[118] Some definitive act of adoption is required.

[114] ICJ Rep. 1997 p. 7, 81.
[115] ARSIWA Commentary, Art. 11, §9.
[116] ICJ Rep. 1980 p. 3, 33–5.
[117] ARSIWA Commentary, Art. 11, §7.
[118] De Frouville (2010), 275.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:14 Page Number: 188

Care should thus be exercised when considering the possibility of using ARSIWA Article 11 to 'entrap' other states by deeming them to have adopted conduct which is merely tolerated or not disowned. Undercurrents of this may be seen in the so-called 'Bush Doctrine', in which the United States claimed to make no distinction for attribution purposes between the terrorists responsible for the 9/11 attacks and the states which harboured them.[119] On this basis the United States could have equated the refusal by the Taliban's, the then de facto rulers of Afghanistan, to hand over Osama Bin Laden in September 2001 with the adoption of Al-Qaeda's actions, thereby attributing the 9/11 attacks to Afghanistan and using this as a basis for self-defence under Article 51 of the UN Charter.[120] The adoption required by ARSIWA Article 11 is not to be lightly inferred.

6.5 State organs and international organizations

The ARSIWA make no provision for defining the relationship of international responsibility as between states and international organizations. ARSIWA Article 57 simply provides that '[t]hese articles are without prejudice to any question of responsibility under international law of an organization, or of any State for the conduct of an international organization'. The commentary to this provision notes that the ILC chose to sidestep the question on the basis that it raises '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'.[121] These questions have since become even more controversial.

It is necessary to start from first principles. International organizations – like states – exist on the international plane and possess separate legal personality.[122] This is reflected in the ILC's 2011 Draft Articles

[119] See: Gray, (2006) 5 Chin. JIL 555; Gray, *International Law and the Use of Force* (3rd edn, 2008), 209–16.

[120] Such an approach does not appear to have occurred to the United States on the eve of its invasion in October 2001: Murphy, 1 *United States Practice in International Law* (2002), 428ff.; cf. Byers, (2002) 51 ICLQ 401, 409: 'Subsequent statements by the Taliban, apparently endorsing the terrorist acts, may further have engaged their legal responsibility even if, under pre-existing customary international law, this might not have made them responsible for an "armed attack"'.

[121] ARSIWA Commentary, Art. 57, §4. Also ILC Ybk 1998/I, 250–1 (Crawford).

[122] See *Brownlie's Principles*, 166–71, and see *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 174, 179.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:14 Page Number: 189

on the Responsibility of International Organizations (DARIO),[123] which provide in Article 2(a):

'[I]nternational organization' means an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

By virtue of their separate legal personality, the basic position under international law is that the acts of an international organization do not without more give rise to responsibility on the part of its members.[124]

But, like states, international organizations are corporate entities, and as such cannot carry out their functions and activities without the intermediate involvement of natural persons. Like states, international organizations will in many cases employ their own organs, and may consequently be held liable for their actions.[125] But unlike states, international organizations are unable to draw on a large permanent staff of appropriately qualified persons to carry out special tasks. As a consequence, they often borrow or draw on the organs of member states.[126] This is particularly the case with peacekeeping missions[127] and other military operations[128] ordered by and carried out under the authority of the UN or other organizations;[129] while the operation itself might be

[123] ILC Report 2011, UN Doc. A/66/10, 52.

[124] See DARIO, Art. 62 and Commentary. Also *Brownlie's Principles*, 182–4. The generally acknowledged position is that of the English Court of Appeal in the *International Tin Council Appeals*, where it was held that direct actions in contract and tort by creditors against the member states of an international organization could not succeed: [1988] 3 All ER 257, 307 (Kerr LJ), 341–54 (Ralph Gibson LJ); cf. ibid., 326–34 (Norse LJ) (proposing a residual liability of member states for debts not discharged by the organization). This was later upheld on appeal to the House of Lords: [1990] 2 AC 418, 480 (Lord Templeman), 513 (Lord Oliver). For a case of delictual responsibility created by a specific treaty, see the Convention on International Liability for Damage Caused by Space Objects, 29 March 1972, 961 UNTS 187, Art. XXII(3).

[125] DARIO, Arts. 6–9.

[126] Gaja, Second Report on the Responsibility of International Organizations, ILC Ybk 2004/II(1), 10.

[127] Ibid., 11.

[128] E.g. actions recently taken by the EU, NATO and a multinational force under US leadership with UN approval in relation to Somali piracy in the Gulf of Aden: Geiß and Petrig, *Piracy and Armed Robbery at Sea* (2011), 116–30.

[129] The League of Nations was constitutionally prevented from engaging in such intervention by Arts. 16 and 17 of the League of Nations Covenant, which gave the League the power only to order economic sanctions and to 'recommend [that members] severally contribute to the armed forces to be used to protect the covenants of the League'. Nonetheless, the League did administer, after a fashion, several military

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:14 Page Number: 190

supervised by an international organization, the troops in the field are still very much organs of the contributing member states, giving rise to live questions of responsibility.

6.5.1 *Early theory and practice of international organizations*

How then, to divide responsibility in the case of a military intervention between the organization putatively in charge of the mission, and the states contributing forces to ensure its successful prosecution? Until comparatively recently, the question was considered to be fairly obscure, so much so that Brownlie declared that his 2005 analysis of the subject was necessarily brief, as 'not very much is known about it' and '[m]ost works of reference ignore it'.[130]

In fact despite a relative lack of state practice, the essential premises of state responsibility for the acts of international organizations were by then present if not well established. Earlier writers focused on the factual relationship between the organization, the state and the military forces in question.[131] With respect to early UN-backed interventions, Amrallah stated:

> To determine whether an unlawful act is imputable to the UN, the fundamental rule of [the] international law of responsibility ... should be applied, i.e. the international responsibility should be borne by [the] state whose organ or agent had committed the wrongful act. The UN may be held responsible for the unlawful act committed by a member of its force so long as this member could be considered [as] acting as an organ or agent of the UN ... The UN should not be held responsible for activities carried out by a member state using its own organs

operations, although these do not appear to have contributed appreciably to the modern law: Seyersted, (1961) 37 BYIL 351, 356–9.

[130] Brownlie, in Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 355, 355. Brownlie added (ibid., 362):

> The major characterization [of the problem] is that of State responsibility. This approach which appears to give centrality to the creation of an intergovernmental organization is flawed and unattractive in other ways. It is illogical to suppose that a group of States can manufacture an immunity from responsibility towards third States by the creation of an international legal personality. And the same logic (of several responsibilities) applies to the activity of joint agencies.

[131] See e.g. Ritter, (1962) 8 AFDI 427, 442; Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (1968), 229; Amrallah, (1976) 32 REDI 57, 73–4; Butkiewicz, (1981–2) 11 Pol. YIL 117, 122–5, 134–5; Hirsch, *The Responsibility of International Organizations towards Third Parties* (1995), 67–71; Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005), 403. Further: Gaja, Second Report, ILC Ybk 2004/II(1), 12 n. 64.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:15 Page Number: 191

and under its full organic jurisdiction, even if those activities were in application of a decision [taken] by the UN . . .[132]

In similar vein, Butkiewicz remarked:

The legal status of the members of the UN peace-keeping forces is not uniform, because of the varying degree of intensity of the functional link binding them with the state on the one hand, and the organization on the other. In the status of the basic personnel the dominant link is that with the state. This excludes the possibility of attribution to the organization of the acts of the basic personnel on the ground of a functional link . . . On the other hand, the attribution of the acts of the peacekeeping forces to the organization at whose disposal they have been placed is fully justified.[133]

The relationship between state control on the one hand, and the control of an organization on the other – what Butkiewicz referred to as 'the varying degree of intensity of the functional link' – can be demonstrated by the evolving attitude of the UN in its early peacekeeping actions. In the case of the Korean War,[134] the Security Council on the outbreak of hostilities in 1950 adopted a resolution recommending that UN members 'providing military forces and other assistance' place them under the unified command of the United States, and requested that the United States designate a commander.[135] The resulting force took orders solely from the United States, and was in no way under the control of the UN or of any other contributing state.[136]

In the course of the conflict, the USSR, the People's Republic of China and the Democratic People's Republic of Korea presented several complaints alleging unlawful conduct on the part of members of the unified command.[137] These were always directed not at the UN but at the United

[132] Amrallah (1976), 73–4. [133] Butkiewicz (1981–2), 134.
[134] Generally: Seyersted (1961), 361–74; Bowett, *United Nations Forces* (1964), Ch. 3.
[135] SC Res. 83 (1950). Further: Bowett (1964), 40–1.
[136] Seyersted (1961), 363–70; Bowett (1964), 40–7; Simmonds (1968), 6–8; Hirsch (1995), 68. This was recognized expressly by the British Comptroller of Patents when determining whether an applicant's patent for a method of bright nickel plating ought to be extended for six years on the basis of a shortage of nickel from 1950–7 caused by 'hostilities between His Majesty and any foreign state', in *Re Harshaw Chemical Company's Patent*, (1964) 41 ILR 15, 20: 'the fact that the United Kingdom troops engaged in the hostilities were under a unified command led by the USA [meant that] the action in Korea was not undertaken by a United Nations force as such maintained and controlled by the United Nations'.
[137] Although the unified command did, through the US government, report to the UN, and operated in accordance with the major policy recommendations of the Organization: Seyersted (1961), 422–3, 430.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:15 Page Number: 192

States – presumably for reasons of Cold War politics – and in the face of consistent UN denials of responsibility the United States eventually paid compensation.[138]

The early counterpoint to the Korean War arose in the case of the UN intervention in the Congo from 1960 to 1964.[139] The intervention was sparked by two cables from the Congolese government regarding the actions of Belgian troops in the Congo, which prompted UN Secretary-General Dag Hammarskjöld for the first time to invoke Article 99 of the UN Charter and call a meeting of the Security Council. The Security Council duly authorized him to 'take the necessary steps, in consultation with the Republic of the Congo, to provide the Government with such military assistance as may be necessary until ... the national security forces may be able ... to meet fully their tasks',[140] leading to the formation of the United Nations Organization in the Congo (ONUC). The resulting chain of command placed all contributing forces under the supervision and direction of a UN commander who reported directly to the Secretary-General,[141] a point revealed in Hammarskjöld's interpretation of his mandate:[142]

> Although the United Nations Force under the resolution is dispatched to the Congo at the request of the [Congolese] Government ... and although it may be considered as serving as an arm of the Government ... the force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security-Council ... the Force is thus not under the orders of the Government nor can it ... be permitted to become a party to any internal conflict ...
>
> [One consequence of this autonomy is that] authority granted to the United Nations Force cannot be exercised within the Congo either in competition with representatives of the host government or in cooperation with them in any joint operation. This naturally applies *a fortiori* to representatives and military units of other Governments ...[143]

The actions of ONUC, deriving from acts carried out by the armed forces of contributing states placed under the command and exclusive

[138] Seyersted (1961), 423; Amrallah (1976), 67; Hirsch (1995), 68–9; Gaja, Second Report, ILC Ybk 2004/II(2), 10.

[139] Generally: Schachter, (1961) 55 AJIL 1; Seyersted (1961), 390–402; Bowett (1964), Ch. 6; Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (1978).

[140] SC Res. 143 (1960), op. §2.

[141] Seyersted (1961), 393–6; Bowett (1964), 205–19; Simmonds (1968), 159–68.

[142] See also the command diagram produced by the Security Council, and extracted in Bowett (1964), 210.

[143] 18 July 1960, UN Doc. S/4389, §§7–15. Further: Abi-Saab (1978), 15–18.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:15 Page Number: 193

control of the UN, led to the largest number of claims ever brought against the Organization. Injuries suffered by the nationals of various states led to the UN concluding a number of bilateral agreements providing for lump sum compensation.[144] The notion that claims could have been brought directly against the contributing states does not appear to have occurred to anyone.[145] The Organization, however, denied responsibility for acts occurring in connection with ONUC which were outside its effective control.[146]

6.5.2 Peacekeeping policy and DARIO Article 7

As the UN Legal Counsel has stated, it is 'in connection with peacekeeping operations where principles of international responsibility ... have for the most part been developed in [the] practice of the Organization'.[147] In earlier operations such as Korea, the Congo and Cyprus,[148] through to more recent missions such as Somalia, Rwanda and Kosovo, the UN has developed a comprehensive position on the division of responsibility between the Organization and contributing states. This is reflected in the response of the UN Secretariat to the ILC's call for comment on the attribution of the conduct of peacekeeping forces to the UN:

> A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by Member States under United Nations command, although remaining in their national service, are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the authority of the force commander ...

[144] See e.g. the agreements with Belgium, 20 February 1965, 535 UNTS 191; Switzerland, 3 January 1966, 564 UNTS 193; Greece, 20 January 1966, 565 UNTS 3; Luxembourg, 28 December 1966, 585 UNTS 147; and Italy, 18 January 1967, 588 UNTS 197.

[145] Amrallah (1976), 63; Butkiewicz (1981–2), 135; Hirsch (1995), 69–70.

[146] Notably an incident in which an aircraft of the United Arab Republic attempted to resupply its ONUC contingent in inclement weather and was wrecked on landing. The UN denied responsibility on the basis that 'ONUC had not advised in advance ... and did not subsequently assume responsibility for the flight which, as indicated below, was outside its authority and initiation from the outset': 17 February 1961, UN Doc. S/4724. Further: Seyersted (1961), 421; Amrallah (1976), 74; Hirsch (1995), 70.

[147] Memorandum to Director of the UN Codification Division, 3 February 2004, quoted in Gaja, Second Report, ILC Ybk 2004/II(2), 11. On the practice of other organizations, such as NATO, see Hirsch (1995), 71–3.

[148] See e.g. the instance in which the UN accepted responsibility for an accident involving a British helicopter placed at the disposal of the UN Peacekeeping Force in Cyprus (UNFICYP) in 1980: (1980) *United Nations Juridical Yearbook* 184–5; Gaja, Second Report, ILC Ybk 2004/II(1), 11.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:16 Page Number: 194

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and, if committed in violation of an international obligation, entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations *vis-à-vis* third States or individuals.[149]

This position is premised on the formal legal control of a peacekeeping operation which results from its creation by the Security Council or General Assembly.[150] It does not, however, fully reflect the reality of a peacekeeping operation, in which a state contingent will remain under the control of its contributing state with respect to disciplinary matters. The state will also retain exclusive jurisdiction in criminal matters.[151]

The retention of criminal jurisdiction has in the past been held relevant in attributing conduct to a contributing state, despite the presence of formally exclusive control by the UN,[152] though such a conclusion – at least insofar as it purports to exclude UN responsibility – goes too far.[153] But the UN has maintained its early position of principle, based on the criterion of effective control in determining attribution in the context of peacekeeping missions. Although the legal control of the UN might

[149] ILC Ybk 2004/II(1), 28. The UN Secretariat has further confirmed that the principles applicable to peacekeepers may be extended to other state organs placed at the disposal of the Organization, e.g. disaster relief units: (1971) *United Nations Juridical Yearbook* 187.

[150] On the legal bases of peacekeeping operations, see Kondoch, in Gill and Fleck (eds.), *Handbook of the International Law of Military Operations* (2010) 515, 519–20.

[151] P. Kirsch (ed.), 'Canadian practice in international law: at the Department of Foreign Affairs in 1995–96', (1996) 34 Can. YIL 387; Gaja, Second Report, ILC Ybk 2004/II(1), 12. This is generally specified in agreements concluded between the UN and contributing states: see e.g. the UN Model Memorandum of Understanding (as amended by GA Res. 61/276B, 24 July 2007), Art. 7*quinquiens*, extracted in Oswald, Durham and Bates (eds.), *Documents on the Law of UN Peace Operations* (2010), 51.

[152] See e.g. *Attorney-General* v. *Nissan*, [1970] AC 179, 222 (Lord Morris):

> [T]hough national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national states in respect of any criminal offences committed by them in Cyprus.
>
> On this basis, the House of Lords found that the United Kingdom was required to pay compensation for the temporary occupation of a building by British forces which were part of the UNFICYP. The decision overturned that of Lord Denning MR and the Court of Appeal, who held that the troops were to be considered UN agents: *Nissan* v. *Attorney-General*, [1968] 1 QB 286, 314.

[153] Gaja, Second Report, ILC Ybk 2004/II(1)l, 12.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:16 Page Number: 195

create an initial presumption of attribution to the Organization, the precise factual context is determinative.[154] This was acknowledged by the Secretariat, whose comments to the ILC concluded with the observation:

> The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In Chapter VII-authorized operations conducted under national command and control, the conduct of the operations is imputable to the State or States conducting the operation. In joint operations, namely, those created by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where *effective* command and control is vested and practically exercised.[155]

Thus, in relation to the second UN Operation in Somalia (UNOSOM II), a Commission of Inquiry established to investigate armed attacks on UNOSOM II personnel,[156] noted:

> The Force Commander of UNSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command.
>
> Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel.[157]

The emphasis on effective control in determining the division of international responsibility between the UN and contributing states,

[154] Kondoch (2010), 528–9.

[155] ILC Ybk 2004/II(1), 28. Similar observations had been made by municipal courts as early as 1979, as where the Vienna Oberlandsgericht determined that the Austrian state could be held responsible where a member of the Austrian contingent in the UN Disengagement Observation Force in the Golan Heights (1975–6) caused damage to a barracks: see *NK* v. *Austria*, (1979) 77 ILR 470, 472:

> [W]hat is decisive is not whose organ (from an organizational standpoint) the person alleged to have caused the damage actually was, but rather in whose name and for whom (from the functional standpoint) that person was acting at the moment when the act occurred. What is decisive is therefore the sphere in which the organ in question was acting at the relevant time.

[156] Further: SC Res. 885 (1993).

[157] 1 June 1994, UN Doc. S/1994/653, §§243–4. As an example of such operations, see the US-controlled Operation *Gothic Serpent*, which sparked the First Battle of Mogadishu: Bowden, *Black Hawk Down* (1999).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:16 Page Number: 196

was adopted as the base unit of analysis by the ILC in developing DARIO. Relevantly, DARIO Article 7 (formerly Draft Article 5[158]) provides:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

The commentary to Article 7 notes its conceptual similarity to ARSIWA Article 6, concerning the placing of an organ of one state at the disposal of another, but goes on to note that the replication of the latter provision would be inapposite in the context of the DARIO.[159] It stresses that the in-principle control of the UN over peacekeeping operations may be reduced and responsibility thus attributed elsewhere where de facto control over its elements lies elsewhere:

> What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish ... areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.[160]

The commentary also considers the possibility of dual attribution between an international organization and a contributing state, though it provides little by way of elaboration.[161] The potential for joint attribution in this respect was contested before the International Court by a number of states in the *Use of Force* cases[162] and before the European

[158] The gist of Draft Art. 5 remained effectively unchanged from the introduction of the provision to the ILC's draft by Gaja in 2004, and its eventual adoption as DARIO, Art. 7 in 2011: ILC Ybk 2004/II(1), 14.

[159] DARIO Commentary, Art. 7, §4. Further: Larsen, (2008) 19 EJIL 509, 512–20.

[160] DARIO Commentary, Art. 7, §5.

[161] DARIO Commentary, Ch. II, §4:

> Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

[162] See *Legality of the Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections of France, 5 July 2000, 28–33; *Legality of the Use of Force (Serbia and Montenegro v. Italy)*, Preliminary Objections of Italy, 5 July 2000, 19–20; *Legality of the Use of Force (Serbia and*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:17 Page Number: 197

Court of Human Rights in *Banković*,[163] when considering the bombing actions undertaken against the FRY by NATO forces.

6.5.3 *Judicial consideration of contributing state responsibility*

Shortly after the adoption of Draft Article 5, two courts had the opportunity to consider squarely the attribution of the actions of peacekeepers to contributing states.

6.5.3.1 *Behrami and Saramati*

The first such decision was based on two joined cases before the Grand Chamber of the European Court of Human Rights, *Behrami* v. *France* and *Saramati* v. *France, Germany and Norway*.[164] Both concerned the tripartite relationship surrounding the international intervention in Kosovo, as authorized by SC Resolution 1244 of 1999.[165] The Security Council established an international civilian presence, the UN Interim Administration Mission in Kosovo (UNMIK) and authorized the presence a multilateral military force, Kosovo Force (KFOR), under the unified command and control of NATO.[166]

Behrami concerned the death of a young boy and the serious injury of his brother resulting from the detonation of a cluster bomb dropped into the hills near Mitrovica by NATO during the air campaign which had preceded the adoption of SC Resolution 1244. The injured boy and his father brought proceedings against France, whose forces were principally responsible for KFOR's activities in the area, alleging violation of Article 2 (the right to life) on the basis that France had failed to take the appropriate steps to clear unexploded ordinance from the area.

Saramati concerned a resident of Kosovo arrested by UNMIK police and charged with attempted murder and other offences in April 2001. In June 2001, the Supreme Court of Kosovo ordered his release, but he was later rearrested on the orders of the commander of KFOR, a Norwegian general. He was detained as a security threat by KFOR until January 2002, when he was transferred to UNMIK custody, whereupon the KFOR commander (the office having now been passed to a French general) authorized his continued detention. Saramati brought an action against France,

Montenegro v. Portugal), Preliminary Objections of Portugal, 5 July 2000, 38–42; and the oral submissions of Portugal on 22 April 2004, ICJ Doc. CR 2004/18, 12–14, all available at www.icj-cij.org.

[163] See e.g. the submissions of France as summarized at *Banković* v. *Belgium*, (2001) 123 ILR 94, 103–5.

[164] (2007) 133 ILR 1. Noted: Bodeau-Livinec, Buzzini and Villalpando, (2007) 102 AJIL 323.

[165] SC Res. 1244 (1999).

[166] Further: Brownlie and Apperley, (2000) 49 ICLQ 878.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:17 Page Number: 198

Norway and Germany (on the basis that a German officer was allegedly involved in his initial arrest, an allegation later dropped) claiming a violation of ECHR Article 5 (the right to liberty of the person).

In both cases, the first question for determination was whether under ECHR Article 1 the applicants fell within the 'jurisdiction' of the respondents.[167] The Grand Chamber took as its starting point the fact that the Former Republic of Yugoslavia was not in control of the territory, but that it was 'under the effective control of the international presences which exercised the public powers normally exercised by the FRY'.[168] But the Chamber then continued to say that the issue was not merely one of jurisdiction: rather, the Chamber was required to determine whether it was competent *ratione personae* to examine state contributions to KFOR and UNMIK, a process which necessitated a discussion of attribution.

In framing the discussion, the Chamber had earlier seemed to indicate that the applicable law was reflected in the work of the ILC, citing Draft Article 5 and its associated commentary.[169] It also concluded that the supervision of minesweeping fell within the mandate of UNMIK, while the issuing of detention notices fell within the jurisdiction of KFOR.[170] With respect to the former, the Chamber concluded that as UNMIK was created via a Chapter VII resolution, it was a wholly subsidiary organ of the UN and its actions were thereby attributable to the Organization.[171] This effectively disposed of *Behrami* for want of jurisdiction *ratione personae*.

The Chamber's reasoning with respect to KFOR – operational command of which was exercised by NATO – in *Saramati* was more controversial. Rather than asking which international organization or state retained effective control of KFOR, the Chamber seemed to employ more formalistic criteria to determine responsibility, asking whether the Security Council 'retained *ultimate authority and control* so that operational command only was delegated'.[172] By reference to SC Resolution 1244, it determined that, notwithstanding 'the effectiveness or unity of NATO command in operational matters' concerning KFOR, the fact that KFOR was present in Kosovo under Security Council authorization was

[167] In the sense that the states in question had 'effective control of the relevant territory and its inhabitants': see *Banković* v. *Belgium*, (2001) 123 ILR 94, 113. Noted: Rüth and Trilsch, (2003) 97 AJIL 168. On the extraterritorial application of human rights treaties, see generally Milanović, *Extraterritorial Application of Human Rights Treaties* (2011).
[168] (2007) 133 ILR 1, 28. [169] Ibid., 14–15. [170] Ibid., 43. [171] Ibid., 48.
[172] Ibid., 45 (emphasis added).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:17 Page Number: 199

more material; put another way, 'KFOR was exercising lawfully delegated Chapter VII powers of the [Security Council] so that the impugned action was, in principle, "attributable" to the UN'.[173]

Behrami and Saramati has been the subject of considerable criticism,[174] especially for the Grand Chamber's failure adequately to take into account the precise relationship between the UN and NATO, despite finding expressly that the latter possessed effective operational control of the force in question, a point which the ILC had described as 'hardly controversial'.[175] At a more fundamental level, the judgment treats this form of attribution to all intents and purposes as an aspect of the law of international organizations, conflating thereby the primary norms of that system with the secondary rules of responsibility.[176] This was accomplished via reference to a published analysis of the implications of delegation of Chapter VII power by the Security Council,[177] developed before the ILC had commenced its work on the responsibility of international organizations or even finished the second reading of ARSIWA.[178] In truth, the main relevance of the internal constitutional arrangements of international organizations with respect to responsibility is in defining and determining the functions of organs and agents, in a similar way to the internal composition of a state in relation to the ARSIWA.[179]

But the decision also contains some unsettling policy implications. Although it may be seen as concerning relationships of responsibility as between two international organizations, there is no reason to think that it would be applied any differently to a relationship between an international organization and a state. If so, then a state can avoid all

[173] Ibid., 47–8.

[174] See e.g. Sari, (2008) 8 HRLR 151, 158–69; Larsen (2008), 520–5; Leck, (2009) 10 MJIL 346, 358; Milanović and Papić, (2009) 58 ICLQ 267, 281–9; Dannenbaum, (2010) 51 HILJ 113, 151–6; Kondoch (2010), 525–8; Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), 129–36, 151–6. The case was considered and rejected by the ILC: Gaja, Seventh Report, UN Doc. A/CN.4/610, 10–12. The UN also distanced itself from the case, with the Secretary-General reaffirming the formal position of the Organization that 'the international responsibility of the United Nations will be limited to the extent of its effective operational control': 12 June 2008, UN Doc. S/2008/354, §16. Cf. Cassese (2007), 667.

[175] ILC Ybk 2004/II(2), 47. [176] Brownlie (2005), 362.

[177] Sarooshi, *The United Nations and the Development of Collective Security* (1999), 163–6, cited at *Behrami* v. *France*; *Saramati* v. *France, Germany and Norway*, (2007) 133 ILR 1, 44. For criticism of Sarooshi's approach, see Milanović and Papić (2009), 284–5. Also Larsen (2012), 133–6.

[178] Milanović and Papić (2009), 283–6. [179] Ibid., 284.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:18 Page Number: 200

responsibility for the actions of its forces simply by creating an international organization and ensuring that it retains 'ultimate authority and control' for any operations carried out under its aegis.[180] Such a result is contrary to the object and purpose of the ECHR itself. As the Court has declared, albeit in a different context,

> where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences . . . there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.[181]

6.5.3.2 *Al-Jedda*

The decision of the Grand Chamber in *Behrami and Saramati* is often analysed alongside the contemporaneous decision of the UK House of Lords in *R (Al-Jedda)* v. *Secretary of State for Defence*.[182] That case concerned the arrest and detention of a dual British-Iraqi national by British forces in Iraq on the basis that he was a suspected member of a terrorist group. His detention was justified under the terms of SC Resolution 1546, which gave the multinational coalition in Iraq 'the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution'.[183] One such letter, from the US Secretary of State, stated that in order to maintain security, the multinational force would be ready to undertake internment where 'necessary for imperative reasons of security'.[184] The claimant sought judicial review of his detention on the grounds that it violated his right to personal liberty, as guaranteed by ECHR Article 5(1).

At first instance, the Divisional Court of the Queen's Bench Division determined that the claimant was not entitled to ECHR Article 5(1) protection, as his rights were qualified by conjunctive effect of SC Resolution 1546 and Article 103 of the UN Charter,[185] a position affirmed by

[180] Ibid., 289. Also *Brownlie's Principles*, 183.
[181] *Waite and Kennedy* v. *Germany*, (1999) 118 ILR 121, 135.
[182] [2008] 1 AC 332. Noted: O'Keefe, (2007) 78 BYIL 564; Orakhelashvili, (2008) 102 AJIL 337. See e.g. Larsen (2008), 525–7; Milanović and Papić (2009), 289–93; Larsen (2012), 138–41.
[183] SC Res. 1546 (2004), op. §10. [184] Ibid., Annex.
[185] [2005] EWHC 1809 (Admin.), §112.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:18 Page Number: 201

the Court of Appeal.[186] The claimant appealed to the House of Lords, but before the appeal could be heard, the decision in *Behrami and Saramati* was handed down. The UK government realigned its pleadings, arguing that due to the terms of SC Resolution 1546, the UN had assumed ultimate control of the situation, absolving the United Kingdom of responsibility.

To apply *Behrami and Saramati* to Iraq, sheeting home responsibility for the occupation to the UN, would have amounted to the merest formalism, given the degree of operational latitude possessed by UK and US forces in Iraq. As Lord Bingham noted, hitherto nobody had even raised the possibility that the UN was responsible, for example, for the human rights abuses committed at Abu Ghraib prison in Baghdad.[187] In the event the House of Lords distinguished the situation in Iraq from that of Kosovo. According to Lord Bingham,

> The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK as a subsidiary organ of the UN. The multi-national force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and the observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to be significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.[188]

This attempt to distinguish *Al-Jedda* from *Behrami and Saramati* is not particularly persuasive,[189] as is made clear in the speech of Lord Rodger.[190] Lord Bingham focused on the Security Council's express authorization of the Kosovo mission, and on the words 'under United Nations auspices' as they appeared in SC Resolution 1244, which ratified the deployment of the UNMIK and KFOR notwithstanding the fact that NATO forces had already taken military action in the FRY.[191] But although these words did not appear in SC Resolution 1546, or its

[186] [2007] QB 621, 650. [187] [2008] 1 AC 332, 348.
[188] Ibid., 349. Also, ibid., 375 (Baroness Hale), 378 (Lord Carswell), 383–3 (Lord Brown).
[189] Milanović and Papić (2009), 291–2; Larsen (2012), 141.
[190] [2008] 1 AC 332, 366–7. See also Lord Brown (*dubitante*): ibid., 384.
[191] SC Res. 1244 (1999), op. §5. For comment: Milanović and Papić (2009), 292; Milanović, (2012) 23 EJIL 121, 135.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:18 Page Number: 202

predecessor, SC Resolution 1511,[192] this did not prevent the application of *Behrami and Saramati*: the Grand Chamber there did not seem to place any appreciable reliance on them.[193] Lord Rodger concluded that there was little difference between the Security Council's purported delegation of power to the multinational force, and its delegation with respect to KFOR. On this basis, he extended the reasoning in *Behrami and Saramati* to the multinational force in Iraq, and withheld attribution from the United Kingdom.[194]

By distinguishing *Behrami and Saramati* from the facts in front of them, however, the House of Lords was able to identify and apply the effective control test of Draft Article 5, affirming thereby the obvious fact of the United Kingdom's effective control over its own forces in Iraq.[195] It continued, however, to note that ECHR Article 5(1) was nonetheless displaced by SC Resolution 1546 and Article 103 of the UN Charter, causing it to reject the appeal.[196]

Having exhausted the judicial remedies available to him in the United Kingdom, Al-Jedda then took the matter before the European Court of Human Rights,[197] giving the Grand Chamber the opportunity to reaffirm its approach in *Behrami and Saramati*.[198] The Chamber, however, followed the majority in *Al-Jedda* in distinguishing the operations of the multinational force in Iraq from those of KFOR:

> The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multi-National Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483 ... The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States and the United Kingdom, through the Coalition Provisional Authority which they had established at the start of the occupation, continued to exercise

[192] SC Res. 1511 (2003).
[193] *Behrami and Saramati*, (2007) 133 ILR 1, 45–8.
[194] [2008] 1 AC 332, 367.
[195] Ibid., 338, 348–9 (Lord Bingham).
[196] The House did, however, affirm that the terms of SC Res. 1546 (2004) were to be interpreted strictly so as to minimize the extent of the infringement: ibid., 351–5 (Lord Bingham), 373–4 (Lord Rodger), 376–7 (Baroness Hale), 378–9 (Lord Carswell), 383–4 (Lord Brown).
[197] *Al-Jedda* v. *UK*, [2011] ECtHR 27021/08.
[198] The Court had previously applied *Behrami and Saramati* to declare inadmissible two further cases concerning KFOR: *Kasumaj* v. *Greece*, [2007] ECtHR 6974/05, §4; *Gajić* v. *Germany*, [2007] ECtHR 31446/02, §1. See also *Berić* v. *Bosnia and Herzegovina*, [2007] ECtHR 36357/04, §§27, 28. Further: Larsen (2012), 136–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:19 Page Number: 203

the powers of government in Iraq. Although the United States was requested to report periodically to the Security Council about the activities of the Multi-National Force, the United Nations did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.[199]

But the Grand Chamber refused to comment on whether the ultimate authority and control test of *Behrami and Saramati*, or the effective control test of Draft Article 5, represented the correct test for attribution in the circumstances. It simply stated that on the facts neither test had been satisfied.[200] In so doing, it preserved its earlier case law while reaching an outcome reflecting the reality of the situation.[201]

6.5.4 *The standard of 'effective control'*

6.5.4.1 Defining the basic concept

It is generally accepted[202] that the standard of effective control as identified in DARIO Article 7 is the preferred method for the determination of responsibility as between a state and an international organization. But questions remain as to its application, most notably as to the level of effective control required for attribution.

'Effective control' appeared first as a test of attribution in the *Nicaragua* case,[203] and was influential in the drafting of ARSIWA Article 8. It was further elaborated on by the International Court in *Bosnian Genocide*.[204] In describing the test of 'effective control' as it appears in DARIO Article 7, however, the ILC gave no indication as to the extent of the debt owed to these decisions, or to ARSIWA Article 8 itself. In one respect at least their influence is clear,[205] in that effective control

[199] [2011] ECtHR 27021/08, §80.

[200] Ibid., §84: 'the Court considers that the United Nations Security Council had neither effective control nor ultimate authority or control over the acts of omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations'. The same approach was taken in *Stephens* v. *Cyprus, Turkey and the United Nations*, [2011] ECtHR 45267/06. Further: Geiß and Petrig (2011), 125–6.

[201] For criticism: Milanović (2012), 137; Larsen (2012), 141–2.

[202] Although the customary status of DARIO, Art. 7 is still the subject of debate: Larsen (2008), 518.

[203] *Nicaragua*, ICJ Rep. 1986 p. 14, 62. Also *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 226. Further: Chapter 5.

[204] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 207.

[205] Larsen (2008), 512–20. The Commentary to DARIO, Art. 7 does, however, expressly acknowledge the influence of ARSIWA, Art. 6: DARIO Commentary, Art. 7, §4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:19 Page Number: 204

must be assessed from the point of view of the particular act in question. As the commentary states,

> The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based . . . *on the factual control that is exercised over the specific conduct* taken by the organ or agent placed at the receiving organization's disposal.[206]

It is also clear that both a state or states and an international organization may jointly exercise effective control over a particular act.[207] In the commentary to ARSIWA Article 6, it is noted:

> Situations can also arise where the organ of one State acts on the joint instructions of its own or 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 . . .[208]

Similarly, the Commentary to the DARIO notes:

> Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of the same conduct to an international organization.[209]

Although it sidestepped the issue of dual attribution in *Behrami and Saramati* by characterizing the case as a question of the law of international organizations, the European Court of Human Rights in *Al-Jedda* implicitly confirmed this as a possibility in the application of DARIO Article 7.[210]

A simple example of how DARIO Article 7 might operate in practice is the decision of the court of first instance of Brussels in *Mukeshimana-Ngulinzira* v. *Belgium*,[211] although the Court did not actually cite that provision. The case concerned the United Nations Assistance Mission for Rwanda (UNAMIR), a peacekeeping operation established by the

[206] DARIO Commentary, Art. 7, §4 (emphasis added), citing the comments of the UK in UN Doc. A/C.6/64/SR.16, 5–6.
[207] Larsen (2008), 516–17; Leck (2009), 361–4. Also and generally: Nollkaemper, (2011) 9 JICJ 1143.
[208] ARSIWA Commentary, Art. 6, §3. See further ARSIWA, Art. 47 and Chapter 10 on joint conduct.
[209] DARIO Commentary, Ch. II, §4.
[210] *Al-Jedda* v. *UK*, [2011] ECtHR 27021/08, §80. Also Geiß and Petrig (2011), 126–30; Milanović (2012), 136.
[211] ILDC 1604 (BE 2010).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:19 Page Number: 205

Security Council in 1993.[212] The military division in UNAMIR was composed of different sectors, with the Kigali sector under the command of a Belgian officer, Colonel Marchal. Belgium also contributed a battalion of peacekeepers under the command of a Lieutenant-Colonel Dewaz, with one element based at a compound built around a local technical school under the command of a Captain Lemaire. Between 7 and 11 April 2004, some 2,000 Tutsi and moderate Hutu sought refuge at the compound. Eventually they were permitted entry, and the compound became a de facto refugee camp under the protection of the Belgian soldiers and UNAMIR. On 11 April 2004 the Belgian soldiers evacuated the compound, firing their weapons in the air to prevent the refugees from impeding their departure. No further measures of protection were taken, and shortly afterwards Interahamwe militiamen slaughtered the majority of those inside. Nine persons (either survivors or relatives of those killed) brought civil lawsuits against the Belgian state and Marchal, Dewaz and Lemaire. The responsibility of the UN was not considered.

The court began – like the House of Lords in *Al-Jedda* – by distinguishing the situation in Rwanda from that of Kosovo.[213] In determining whether Belgium or the UN had control over the decision to evacuate the compound, the court took note of the fact that at no time was the subject discussed between Marchal and the UN commander – rather, there was only a discussion between Marchal and the general staff of the Belgian Army. The court concluded that the decision to evacuate was made by Belgium, and not by UNAMIR,[214] although the responsibility of the Belgian state was ultimately precluded by reason of a municipal statute of limitations.[215]

6.5.4.2 Positive and negative conceptions of 'control': the *Dutchbat* case

Beyond this, the outer limits of effective control in the context of DARIO Article 7 are uncertain. According to Larsen, 'the adoption of the "effective control" test seems not wholly to reflect the complexities of the existing practice'.[216] Towards the end of the ILC's consideration of the

[212] SC Res. 872 (1993), op. §2. Also SC Res. 918 (1994), op. §§3–4, expanding the mission's mandate and rules of engagement to include resort to force in the protection of displaced persons, refugees and civilians in danger.

[213] *Ngulinzira*, ILDC 1604 (BE 2010), §26.

[214] Ibid., §38.

[215] Ibid., §§36–7. The individual liability of the commanders and issues pertaining to quantum were reserved for a later date: ibid., §§48, 52.

[216] Larsen (2008), 518. Within the ILC, there appears to have been acceptance of the essential ambiguity of the term, and an expectation that its practical application would prove possible: ILC Ybk 2004/I, 76 (Mansfield). Cf. ibid., 90 (Brownlie), arguing that

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:20 Page Number: 206

issue, questions emerged as to whether actual, positive control over the particular act (i.e. the giving of direct instructions) were required in order for attribution to occur, or whether the capacity to exercise control combined with a failure to prevent a particular act from taking place could be sufficient. Such comments were driven in large part by a desire to ensure that the law of responsibility for states and organizations constituted an effective regime of accountability. One influential comment by Dannenbaum was as follows:

> Under the proposed interpretation ... the question is not simply 'who gave the orders?' but rather, 'given the command and control authority and responsibility with which the entity was endowed, and given the *de facto* actions that each took, which entity [i.e. the organization or the contributing state] was positioned to have acted differently in a way that would have prevented the impugned conduct?' ... Defined succinctly, 'effective control' for the purposes of apportioning liability in situations of the kind addressed by Draft Article 5, is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question.[217]

On this basis, 'effective control' may be conceptualized as a measure of an actor's ability to *prevent* an act,[218] an approach which appears to have informed the decision of the Court of Appeal in The Hague in the joined cases of *Nuhanović and Mustafić* v. *Netherlands* (*Dutchbat*).[219]

The facts of *Dutchbat* are superficially similar to those of *Ngulinzira*. On 3 March 1994, the Dutch Battalion ('Dutchbat') was inserted into the area surrounding Srebrenica, in Bosnia-Herzegovina, as part of the UN Protection Force tasked with protecting the 'safe areas' identified by the Security Council.[220] One such safe area was a factory site in Potočari, just outside Srebrenica, which contained the main Dutchbat compound. Between 5 and 11 July 1993, some 5,000 Muslim refugees fleeing the Bosnian Serbian attack on Srebrenica were admitted to the compound, and a larger number stayed in the Potočari area, putatively under Dutchbat protection.

By the time of the takeover of Srebrenica by the Serbs, it was recognized by military officials that the mission to protect what had become a Muslim enclave had failed.[221] The decision was made to withdraw

effective control should be replaced by authority or apparent authority of the organization as a basis for attribution.

[217] Dannenbaum (2010), 157. [218] Ibid., 158–3.

[219] LJN: BR5388, 5 July 2011; LJN: BR5386, 5 July 2011. Further: Nollkaemper (2011); Boutin, (2012) 25 LJIL 521.

[220] SC Res. 836 (1993), op. §5. [221] LJN: BR5388, 5 July 2011, §2.19.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:20 Page Number: 207

Dutchbat and to evacuate Potočari. In preparing for the evacuation, the Dutchbat commander, Lieutenant-Colonel Karremans, met the commander of the Serbian forces, General Mladić.[222] Mladić assured Karremans that his forces were not targeting the civilian population, and was placed in charge of evacuating the refugees. Shortly afterwards, Dutchbat received reports that some of the refugees, and particularly able-bodied men, 'were deported in order to be killed or to suffer serious physical abuse'.[223] Nevertheless, the evacuation continued. Several years later, the families of three of the victims of what by then was known as the Srebrenica massacre brought actions against the Netherlands under Dutch tort law. At first instance,[224] the district court of The Hague rejected the claims on the basis that the conduct in question was attributable only to the UN.[225] This decision was reversed by the Court of Appeal, which found that the conduct in question could be attributed to the Netherlands by reason of 'effective control'.

The court began by determining that the law of state responsibility was the applicable law for the question of attribution, as the primary matter before the court concerned the relationship between two subjects of international law.[226] It further continued to adopt the effective control test for the purpose of the analysis, noting:

> [The appellant] argues that in relation to the criterion for the attribution of the conduct of Dutchbat to the UN or to the State, the question should be who had 'effective control' and not, as assumed by the District Court, who exercised 'command and control' [i.e. the test in *Behrami and Saramati*]. This ground for appeal is correct. In international law literature, as also in the work of the ILC, the generally accepted opinion is that if a State places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed depends on the question which of both parties has 'effective control' over the relevant conduct.[227]

[222] See now *Prosecutor* v. *Mladić*, ICTY Case No. IT-09-92-PT, Prosecutor's Fourth Amended Indictment, 16 December 2011.

[223] Ibid., §6.7.

[224] *HN* v. *Netherlands*, LJN: BF0181/265615, 10 September 2008.

[225] The liability of the UN was never discussed by the Court, it having been determined in another proceeding that the Organization had immunity before the Belgian courts: *Mothers of Srebrenica* v. *the Netherlands and the United Nations*, LJN: BL8979, 30 March 2010.

[226] The appellants had previously argued that national (i.e. Bosnian) law was applicable, presumably in order to avoid the implications of the decision in *Behrami and Saramati*, which had been applied in the lower court: LJN: BR5388, 5 July 2011, §5.3.2.

[227] Ibid., §5.8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:20 Page Number: 208

The court continued,

> The question whether the State had 'effective control' over the conduct of Dutchbat ... must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, *but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned*. Moreover, the Court adopts as a starting point that the possibility that more than one party has 'effective control' is generally accepted, which means that it cannot be ruled out that the application of this criterion result in the possibility of attribution to more than one party.[228]

The court considered two mechanisms of control possessed by the Netherlands. In the first place, it assessed the legal control of the Netherlands over its peacekeepers by virtue of its retention of formal powers with respect to personnel and discipline,[229] as well as its capacity to withdraw its troops from UNPROFOR.[230] The court attached additional relevance to the fact that with the evacuation of the compound from 11 July 1995, the Dutchbat mission entered a new phase, in which the UN and the Dutch government had legal authority (*zeggenschap*[231]) over the peacekeepers, as this concerned their withdrawal from the region.[232] The decision to evacuate was taken in consultation between the French General Janvier on behalf of the UN and senior Dutch officials, which the court took to be evidence that the Dutch government 'participated in that decision making at the highest level'.[233]

The court found that the legal control afforded to the Netherlands after 11 July 1995 gave it the authority to instruct Dutchbat, and thus effective control over its actions. It should, however, be pointed out that the effective control may nonetheless arise in the absence of legal authority: an instruction given (even without legal authority) and followed by a national contingent by its contributing state will give rise to a finding of effective control and thus attribution.[234]

[228] Ibid., §5.9 (emphasis added).

[229] This finds support in the DARIO Commentary, Art. 7, §7: '[a]ttribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect'.

[230] LJN: BR5388, 5 July 2011, §5.10.

[231] Nollkaemper (2011), 1150.

[232] LJN: BR5388, 5 July 2011, §5.18.

[233] Ibid., §5.12.

[234] Nollkaemper (2011), 1151. This point was conceded by the District Court at first instance, although it was ultimately determined that there was insufficient evidence for such a finding: *HN* v. *Netherlands*, LJN: BF0181/265615, 10 September 2008, §4.14.1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:21 Page Number: 209

In the second place, the court examined the factual control possessed by the Netherlands over Dutchbat, holding that the decision to evacuate the compound, and thus place the victims in danger, was the result of decisions taken by the Dutch government in consultation with the UN.[235] It further noted:

> [I]t is beyond doubt that the Dutch Government was closely involved in the evacuation and the preparations thereof, and that it would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time. The facts do not leave room for any other conclusion than that, [if] the Dutch Government would have given the instruction to Dutchbat not to allow [the victims] to leave the compound or to take [them] along respectively, such an instruction would have been executed.[236]

The court in *Dutchbat* was making the point that effective control over the actions of peacekeepers goes beyond merely ordering the conduct. Rather, the manner in which a state exercises its legal control over peacekeepers and influences their actions on the ground may place it in a position of effective control by virtue of the fact that it can prevent wrongful acts from occurring.[237] This is in line with Dannenbaum's suggestion that acts be attributed to the state or organization best positioned in legal terms to prevent them.[238]

The decision in *Dutchbat* represents a step forward in ensuring an effective regime of responsibility with respect to peacekeeping actions.[239] It not only adopts a liberal view of 'control', but also affirms unequivocally the possibility of dual attribution. But it is too early to determine whether the liberal conception of control put forward by Dannenbaum and *Dutchbat* can be considered a legitimate addition to the law of state responsibility. For one thing, the decision remains under appeal before the Dutch Supreme Court.[240] For another, the ILC, although it mentioned both the district court and Court of Appeal judgments in *Dutchbat* in its commentary to DARIO Article 7,[241] reserved

[235] LJN: BR5388, 5 July 2011, §5.19. [236] Ibid., §5.18. [237] Boutin (2012), 529.
[238] Dannenbaum (2010), 157. Also Leck (2009), 359, suggesting that there should be taken into account 'various factors, such as whether the parties exercised due care in preventing wilful or negligent actions or omissions and the degree to which they did'.
[239] Boutin (2012), 533–4. Cf. Nollkaemper (2011), 1157, arguing that the facts of the case are too specific to warrant wide application of its principles.
[240] But cf. Nollkaemper (2011), 1153, noting that the Dutch Supreme Court does not lightly take a different view to the Court of Appeal with respect to questions of international law.
[241] DARIO Commentary, Art. 7, §14.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:21 Page Number: 210

its opinion as to whether it considered such an extension to be within the ambit of the provision.

Likewise, it is too much to suggest that the case stands for the proposition that the mere possibility of effective control is sufficient to ground attribution. Certainly, other cases on effective control, such as *Nicaragua* and *Bosnian Genocide*, although they arise in a different context, are framed largely in terms of positive acts committed by the state. Moreover, the characteristic retention of criminal jurisdiction by contributing states over peacekeeping forces would tend to suggest that *some* level of state control is always present, making the distinction between the state and organization in terms of attribution – long maintained by the UN as an article of faith – effectively meaningless.

6.5.5 Distinction between attribution of acts and secondary responsibility with regard to international organizations

In addition to issues of attribution discussed here, DARIO Part V also deals with what it terms 'Responsibility of a State in connection with the act of an international organization'. It consists of five articles, covering five more-or-less distinct situations:

- aid or assistance by a state in the commission of an internationally wrongful act by an international organization (DARIO Article 57; cf. ARSIWA Article 16);
- direction or control exercised by a state over the commission of an internationally wrongful act by an international organization (DARIO Article 58; cf. ARSIWA Article 17);
- coercion of an international organization by a State (DARIO Article 59; cf. ARSIWA Article 18);
- responsibility of a State seeking to avoid compliance (DARIO Article 60); and
- responsibility of a state member of an international organization for the internationally wrongful act of that organization (DARIO Article 61).

The first three of these provisions closely track the relevant ARSIWA articles (discussed in Chapter 12). The other two are additional: Article 60 is a kind of anti-evasion provision with little precedent; Article 61 is a contribution, probably *de lege ferenda*, to the law of international organizations, and moreover it creates what Article 61(2) describes as a merely 'subsidiary' form of responsibility. Analytically there are important distinctions between these various provisions, and not all of them involve ancillary or secondary responsibility: notably Article 60 does not. For the

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:22 Page Number: 211

sake of convenience they will be dealt with together in Chapter 12. It is only necessary here to observe that the discussion in the present chapter has concerned the attribution or otherwise of acts of state personnel carrying out activities under the auspices of international organizations, whereas DARIO Part V is concerned with what is indisputably conduct of the organization in reaction to which a state's responsibility is engaged by some involvement in the conduct on the part of that state. The two fields in practice overlap, but the difference between them justifies their separate treatment.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 6 Title Name: CRAWFORD
Date:19/3/13 Time:17:48:22 Page Number: 212

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-III Title Name: CRAWFORD
Date:11/3/13 Time:14:33:40 Page Number: 213

Part III

Breach

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-III Title Name: CRAWFORD
Date:11/3/13 Time:14:33:40 Page Number: 214

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:09 Page Number: 215

7 Breach: the material element

7.1 Introduction

Part One, Chapter III of ARSIWA is intended to provide a framework for the threshold determination that a state has breached one of its international obligations. It covers both the material element – *whether* a breach has occurred – and the temporal element – *when* a breach is taken as having occurred; the latter is addressed separately in Chapter 8.

Breach is one of the two fundamental components of an internationally wrongful act, the concept at the heart of the state responsibility regime.[1] ARSIWA Article 12 provides that '[t]here 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'.[2] Beyond that general statement, however, it is difficult to be more specific without moving away from underlying secondary rules into the realm of the primary obligations of the state. After all, there is no code of international law: the codification process is less a movement than a menu. A state's obligations, notably under treaties, are what they are, and correlatively a breach is a breach: it all depends on the circumstances.

Nonetheless, certain features of the material element of breach may usefully be elucidated beyond the bare bones of ARSIWA Article 12. The first point is to explain further the autonomy of the primary obligation, before discussing the questions of breaches by acts and omissions, and

[1] The other necessary constituent element is that the conduct amounting to breach is attributable to the state under international law; see ARSIWA, Art. 2. On attribution see Chapters 4–6.

[2] This combines earlier Draft Articles, Arts. 16, 17 and 19(1); see Crawford, Second Report, 10–16; ILC Ybk 1999/II(2), 54–5

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:09 Page Number: 216

the role of intention and fault. Certain classifications of obligation that may be relevant to breach will then be discussed. The chapter concludes with some observations in respect of three miscellaneous issues: anticipatory breach, illusory obligations and 'non-violation complaints'.

7.2 The autonomy of the primary obligation

In determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, as applied to the facts of the case in hand. The content of the obligation will dictate the answers to specific questions, such as whether or not damage is required as an element of breach in a particular case.[3] But all of the detail of substantive primary obligations falls clearly within the scope of the primary rules of international law.[4]

The distinction between primary and secondary obligations may be described as technical, and at times artificial and difficult to apply,[5] but it has been indispensable in defining the limits of codification efforts in the context of state responsibility. The ILC distinguished rules regulating state responsibility, the subject of the project, from rules the violation of which gave rise to responsibility, which were to be excluded.[6] Nonetheless, earlier versions of the ILC Articles attempted to include some of the substantive rules connected with state responsibility, ranging from various provisions on human rights and the protection of aliens, to a rule about repudiation of public debts, to a rule about the relations of foreign parent companies and local subsidiaries. Such an approach would inevitably raise questions about why some primary obligations were mentioned and not others. Codifying the primary rules – although it might enable a more focused determination of whether a breach of a particular obligation has occurred – would involve the restatement of the entire body of conventional and customary international law, and run the risk of telling states what kinds of obligations they may have.

For these reasons, the ILC chose to focus on the underlying framework and structure of the secondary system of state responsibility, leaving the

[3] See ARSIWA Commentary, Art. 2, §9. For discussion of the role of 'damage' as a prerequisite for state responsibility, see Crawford, First Report, 27–9, and see Chapter 2.

[4] The focus of the ARSIWA is on obligations, not rules: see Ago, Second Report, ILC Ybk 1970/II, 192; Nishimura, in Crawford, Pellet and Olleson (2010) 365, 366. See further ARSIWA Commentary, Art. 2, §13: what matters 'is not simply the existence of a rule but its application in the specific case to the responsible State'.

[5] See David (2010); Combacau and Alland, (1985) 16 NYIL 81.

[6] David (2010), 27.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:10 Page Number: 217

primary content of obligations (and correspondingly the specific requirements for breach in any given case) to be determined by other processes. The distinction was indirectly endorsed by the International Court in *Gabčíkovo-Nagymaros*, when it observed that the law of treaties and the law of state responsibility each have a scope that is distinct:

> A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of state responsibility.[7]

For this reason, the provisions on breach in Chapter III of Part One are framed in broad, general terms and deal with all international obligations at an abstract level without touching on specifics. Article 12 spells out the essence of a breach, being conduct by the state that is 'not in conformity with what is required of it' by the obligation in question. This is flexible enough to encompass all forms of breach – whether the underlying obligation requires compliance with strict and detailed requirements or whether it merely sets a minimum standard of conduct; whether the breach completely disregards the obligation or is only partly contrary to what is required; whether the conduct amounts to acts, omissions or a combination of both. A determination of whether there has been a breach is achieved in all cases by comparing the conduct in fact engaged in by the state with the conduct legally prescribed by the relevant primary obligation.[8]

7.3 Acts and omissions

Although Article 12 only refers to 'acts' of states expressly in its definition of breach, Article 2 makes it clear that both acts and omissions by state organs can amount to conduct that is internationally wrongful.[9] In principle there is no reason to distinguish between the two.[10] State responsibility is frequently invoked on the basis of an

[7] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 38.
[8] ARSIWA Commentary, Art. 12, §2.
[9] See ARSIWA Commentary, Art. 2, §4. See also ibid., Art. 1, §8, which states that 'the term "act" is intended to encompass omissions', and ARSIWA, Art. 15(1), which refers to '[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful . . .'.
[10] Latty, in Crawford, Pellet and Olleson (2010) 355, 355.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:10 Page Number: 218

omission – Albania's failure to warn third states of the presence of mines in its waters in *Corfu Channel*,[11] Iran's failure to take appropriate steps in response to the hostage crisis in *Tehran Hostages*,[12] among numerous examples.[13] It must be recalled, however, that omission is more than simple 'not-doing' or inaction: it is legally significant only when there is a legal duty to act which is not fulfilled, and its significance can only be assessed by reference to the content of that duty.[14] So an omission is the failure to do that which should be done; the absence of any primary obligation 'to do' will mean that no omission may be complained of.[15]

As the commentary points out, in some cases it may be the combination of an act and an omission that forms the basis for responsibility.[16] Further, the distinction between what is an act and what is an omission may be difficult to draw. On the whole, however, the consequences of the distinction between acts and omissions are limited; responsibility rests on the existence of a breach, not whether the breach came about through action or omission on the part of the state.[17] The one area where the distinction may be of use is in determining the content of the obligation of cessation that flows from the internationally wrongful act. The content and character of the primary obligation will affect whether or not the secondary obligation to put an end to the wrongful conduct amounts to a requirement to take positive action that the state has previously failed to perform (in the case of an omission), or whether it will be an obligation with different content to that of the obligation breached (in the case of an action).[18]

In *Bosnian Genocide* the Court distinguished complicity in genocide from a failure to prevent genocide by characterizing complicity as requiring commission of an act, whereas it found that a violation of the obligation to prevent resulted from omission – that is, a failure to adopt and implement suitable measures of prevention.[19] This approach has been criticized for being simplistic and ignoring the subtleties that

[11] *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4, 23: 'nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania'; see also ibid., 52 (Judge Winiarski, diss.).
[12] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 32–3. See also *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran and others*, (1984) 6 US–Iran CTR 219, 225.
[13] See further Latty (2010). [14] Honoré, *Responsibility and Fault* (2002), 47.
[15] Latty (2010), 357–8. [16] ARSIWA Commentary, Art. 2, §4 n. 67.
[17] Latty (2010), 356–61. [18] Ibid., 362–3.
[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 222–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:10 Page Number: 219

the distinction can generate.[20] It is well established that there can be wrongful acts through omission; also, a breach that appears to arise from omission may in fact be the outcome of the commission of positive acts, for example where measures to prevent genocide (or some other given event) were taken but they were inadequate or inappropriate to achieve that goal. For the purposes of determining breach, then, it is clearer to distinguish between obligations 'to do' and obligations 'not to do'.[21]

As discussed in Chapters 2 and 3, the concept of responsibility as it appears in the ARSIWA is not predicated on the subjective fault or '*culpa*' of the state that committed the internationally wrongful act. The issue to be considered by the law of responsibility – at least in a material sense – is whether the breach in question occurred. If the primary obligation requires fault or intent, then that is the position; if not, then no such requirement is imposed *ab extra*.

7.4 The classification of obligations

Obligations can be classified in a number of ways – including by reference to the origin or source of the obligation (for example, customary versus conventional obligations); by reference to the content of the obligation and whether it is positive or negative in character; or by reference to the specific function and goal of the obligation (for example, obligations of prevention versus obligations of repression; obligations to perform certain conduct versus obligations to achieve a certain result).[22] As Dupuy has pointed out, however,

> at least within the scope of state responsibility as defined by the ILC, . . . the only apposite categorization of obligations is one which assists in determining the consequences of their violation, in terms of content, form and degree, or, to put it differently and in a broader sense, in terms of legal *regime*.[23]

ARSIWA Article 12 makes it clear that the origin and character of an obligation are irrelevant to the question whether a breach has occurred, for the purposes of establishing responsibility.[24] Subject to the *lex specialis* principle, the general provisions on breach apply to all forms of breach

[20] See Latty (2010), 359. [21] Ibid., 360.
[22] See generally Economides, in Crawford, Pellet and Olleson (2010) 371.
[23] Dupuy, (1999) 10 EJIL 371, 374.
[24] ARSIWA Commentary, Art. 12. On the origin (source) of the obligation, see further Nishimura (2010); on the content (character) see Economides (2010), 371.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:11 Page Number: 220

across all fields of international law – even though breaches themselves may fall into different categories for the purposes of establishing *when* a breach has occurred.[25]

It is true that in earlier drafts of the Articles distinctions were made between various classifications and categories of obligation. In particular, obligations of conduct (also called obligations of means) were separated from obligations of result, and obligations of prevention were also in their own class. It was ultimately decided that there was no need for these categories to be expressly differentiated in ARSIWA,[26] but some of the distinctions may still serve a useful purpose in practice. It is also worth considering the effect that the difference between substantive and procedural obligations could have on a determination of breach.

7.4.1 Obligations of conduct and result

Draft Articles 20 and 21, adopted on first reading, drew a distinction between obligations of conduct and obligations of result. They provided as follows:

Article 20

Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21

Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.
2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, 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 State also fails by its subsequent conduct to achieve the result required of it by that obligation.

[25] See ARSIWA, Arts. 14 and 15; Chapter 8.

[26] See Crawford, Second Report, 10, 28–9; Summary record of the 2605th meeting, ILC Ybk 1999/I, 276–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:11 Page Number: 221

The distinction was seen as being 'of fundamental importance in determining how the breach of an international obligation is committed in any particular instance'.[27]

The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means.[28] By contrast, obligations of result do not do so, leaving it to the state party to determine the means to be used.[29] The commentary argues that which type of obligation should be imposed in any case was not a matter for the Articles but for the authors of the primary rule. But some generalizations can be attempted. Obligations of conduct (involving either acts or omissions) are more likely to be imposed in the context of direct state-to-state relations, whereas obligations of result predominate in the treatment of persons within the internal legal order of each state.[30] Obligations in the field of human rights, for example, involve obligations of result, since they do not prescribe precisely how the relevant rights are to be respected, and they are consistent with a diversity of laws and institutions.[31] In this sense the distinction is implicated with a view of the state and of sovereignty: a choice of means is more likely to exist in internal than in international matters. But this is not a hard and fast rule. For example, a uniform law treaty is conceived as imposing an obligation of conduct, requiring immediate action to make the provisions of the uniform law a part of the law of the state concerned (and perhaps nothing more than that).[32]

The distinction between obligations of conduct and result is unfamiliar to the common law tradition.[33] It derives from civil law systems, especially French law, which treats obligations of conduct as being in the nature of 'best efforts' obligations, and obligations of result as being tantamount to guarantees of outcome.[34] However, the distinction as

[27] Draft Articles Commentary, Art. 20, §4.
[28] See e.g. Economides (2010).
[29] Draft Articles Commentary, Art. 20, §8.
[30] Ibid., §6.
[31] The Draft Articles Commentary insisted that obligations as to the treatment of persons by the state amounted to 'extended obligations of result', with the consequence that they are not breached by incompatible enacting legislation until the legislation was actually applied and put into effect and the state fails to remedy any resulting grievance; but see the critical analysis in Crawford, Second Report, 24–6.
[32] Draft Articles Commentary, Art. 20, §8. See Conforti, (1988) 24 RDIPP 233.
[33] See Brownlie (1983), 241; Economides (2010), 375.
[34] See Combacau's lucid explanation of the function of the distinction in Kohen, Kolb and Tehindrazanarivelo (eds.), *Mélanges offerts à Paul Reuter: Le droit international, unité et diversité* (1981) 181, 196: 'C'est ... le degré de probabilité de la réalization de l'objectif poursuivi par le créancier qui commande la nature de l'obligation imposée au débiteur:

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:12 Page Number: 222

framed in the Draft Articles effectively – and for no apparent reason – reversed the consequences that would attach to it, with obligations of conduct treated as the more stringent, due to their determinacy.[35] According to the commentary, the principal consequence for the purposes of Draft Articles 20 and 21 was that

> [t]he existence of a breach of an obligation of [result] is ... determined in international law in a completely different way from that followed in the case of an obligation 'of conduct' or 'of means' where ... the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State.[36]

Governments and commentators were largely sceptical about the value of retaining the distinction in the Draft Articles. Draft Articles 20 and 21 were seen as overly complex, as a source of confusion in their obscure relationship to the traditional domestic law concepts, and as relating to the content and meaning of the primary rules, rather than secondary rules of responsibility.[37] Evidence that international courts and tribunals find the distinction useful in deciding questions of state responsibility is also limited, and suggests that even where it is used as a means of classifying obligations, the distinction is not applied consistently.[38] The question is usually one of interpretation of the relevant obligation, and the value of the distinction lies in its relevance to the measure of discretion left to the respondent state in carrying out the

là où la réalization en est hautement probable, la loi ou le contrat instituent des obligations de résultat; là où elle est plus essentiellement aléatoire, ils se bornent à réduire l'aléa et ne mettent en œuvre qu'une obligation de moyens.' Translation: 'It is ... the degree of probability of the achievement of the objective pursued by the creditor which controls the nature of the obligation imposed on the debtor: where its achievement is highly probable, the law or contract institutes obligations of result; where it is essentially more unpredictable, [the law or contract] limits itself to reducing the risk and engaging only an obligation of means'. See also Dupuy, (1984) 188 Hague *Recueil* 9, 47–8; Zweigert and Kötz (1998), 501–2.

[35] See Crawford, Second Report, 21–2; ILC Ybk 1999/II(2), 57; Dupuy (1999), 375–8; Economides (2010), 375–6.

[36] Draft Articles Commentary, Art. 20, §5.

[37] Crawford, Second Report, 21–2.

[38] Examples discussed in Crawford, Second Report, 22–4 include the decision of the European Court of Human Rights in *Colozza and Rubinat*, (1985) 81 ILR 73; the decision of the Chamber in *Elettronica Sicula SpA (ELSI) (US v. Italy)*, ICJ Rep. 1989 p. 15; and the decision of the Iran–US Claims Tribunal in *Iran* v. *US, Case Nos. A1(IV) and A24*, (1996) 32 Iran–US CTR 115 (for the final resolution of the case see Award 590-A15(IV)/A24-FT, 28 December 1998). To these may be added *Bosnian Genocide*, ICJ 2007 p. 43, 221, in which the Court described the obligation to prevent genocide as an obligation of conduct, not one of result.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:12 Page Number: 223

obligation. That discretion is necessarily constrained by the primary rule, and the crucial issue of appreciation is, to what extent? The distinction may help in some cases in expressing conclusions on this issue; whether it helps in arriving at them is another matter.[39]

Overall, the analysis of Draft Articles 20 and 21 yielded three conclusions.[40] First, while it may be possible accurately to classify certain obligations as obligations of conduct or result, and while that may illuminate the content or application of the norms in question, such a classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose. The problem with Draft Articles 20 and 21 was that they implied the need for an intermediate process of classification of obligations before questions of breach could be resolved. But in the final analysis, whether there has been a breach of an obligation always depends on the precise terms of the obligation, and on the facts of the case. Taxonomy may assist in, but is no substitute for, the interpretation and application of primary rules.

A second and related conclusion is that it is difficult to overemphasize the great variety of primary rules and the very different ways in which they are stated; thus obligations of conduct and result do not present a dichotomy but rather a spectrum. To take an example, UNCLOS Article 61 provides:

Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall co-operate to this end.
3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

[39] Crawford Second Report, 24. [40] Ibid., 26–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:12 Page Number: 224

4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

Article 61 contains a number of interrelated obligations, many with qualifications ('as appropriate', 'as qualified by', 'where appropriate'). Article 61(1) requires the coastal state to determine the 'allowable catch' – apparently an obligation of conduct – but it seems clear that not just any determination will suffice: there are ends to be achieved, but expressed with varying degrees of firmness ('shall ensure', 'shall ... be designed to maintain or restore populations', 'with a view to maintaining or restoring populations'), factors, sometimes countervailing, to be taken into account ('the economic needs of coastal fishing communities'), and data to be exchanged (but with no express obligation to collect it). Moreover Article 61 is to be read against the background of Article 56, which gives the coastal state 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living' of the exclusive economic zone (EEZ). Such a complex provision – an entirely typical product of multilateral negotiations – is not usefully parsed by reference to the distinction between obligations of conduct and result.

Third, distinguishing between the two may be inconclusive if the obligation in question is in truth a hybrid, or belongs to a different class – for example, obligations of prevention (discussed below in the context of Draft Article 23) or what the International Court has described as 'obligations of performance'.[41]

In any event, the distinction between obligations of conduct and obligations of result was not retained in the text of ARSIWA. The commentary to Article 12 notes that the distinction may assist in ascertaining when a breach has occurred, but that it is not exclusive and 'does not

[41] In *Gabčíkovo-Nagymaros* the Court found that the parties had accepted 'obligations of conduct, obligations of performance, and obligations of result'; ICJ Rep. 1997 p. 7, 77. But the Court does not seem to have derived any conclusion from these descriptions.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:13 Page Number: 225

seem to bear specific or direct consequences as far as the present articles are concerned'.[42] Nonetheless, the terminology of conduct and result seems to have been retained in the jurisprudence of the International Court, at least to an extent. In the *Avena* cases,[43] Mexico alleged that the United States was in breach of the Vienna Convention on Consular Relations[44] (VCCR) due to the latter's failure to extend consular assistance to certain Mexican nationals in US courts.[45] In *Avena* itself, the Court found in favour of Mexico, and in the *dispositif* ordered

> that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the: convictions and sentences of the Mexican nationals . . . by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.[46]

Thus it was left to the discretion of the United States to determine how the judgment in *Avena* was to be implemented. To this end President Bush issued a memorandum to the US Attorney General, providing that 'the United States will discharge its international obligations under the decision of the International Court of Justice . . . by having State courts give effect to the decision in accordance with the general principles of comity in cases filed against 51 Mexican nationals addressed in that decision'.[47]

Implementation of the decision at the level of the individual US courts, while successful in some cases,[48] was frustrated in others by domestic US criminal procedure (specifically, by the procedural default rule).[49] The

[42] ARSIWA Commentary, Art. 12, §11.

[43] *Avena and Other Mexican Nationals (Mexico v. US)*, ICJ Rep. 2004 p. 12; *Request for Interpretation of the Judgment of 31 March 2004 in the* Case concerning Avena and Other Mexican Nationals (Mexico v. US) *(Mexico v. US)*, ICJ Rep. 2009 p. 3. Further: Dupuy and Hoss, 'Avena and Other Mexican Nationals (Mexico v. United States of America)', (2009) MPEPIL.

[44] 24 April 1963, 596 UNTS 261.

[45] Further; *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 226.

[46] *Avena*, ICJ Rep. 2004 p. 12, 72.

[47] *Memorandum for the Attorney General from the President of the United States of America on Compliance With the Decision of the International Court of Justice in Avena*, 28 February 2005, www.unhcr.org/refworld/docid/429c2fd94.html. This gesture was reduced somewhat by US Secretary of State's 7 March 2005 declaration that the United States would be withdrawing from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 24 April 1963, 596 UNTS 497, depriving the Court of compulsory jurisdiction for all future claims.

[48] See *Torres* v. *Oklahoma*, No. PCD-04-442 (Oklahoma Ct Crim App, 13 May 2004). Further: Levit, (2004) 12 Tulsa JCIL 163; Finstuen, (2005) 58 Ok. LR 255.

[49] See e.g. *Sanchez-Llamas* v. *Oregon*, 548 US 331 (2006); *Medellín* v. *Texas*, 552 US 491 (2008).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:13 Page Number: 226

latter prompted Mexico to request an interpretation of the *Avena* judgment under Article 60 of the ICJ Statute[50] on the basis that a dispute had arisen between the parties as to the meaning and scope of the relevant part of the *dispositif*, namely the meaning of the obligation of result contained in paragraph 153(9) of the *Avena* judgment. The United States resisted the application, on the basis that there was in reality no disagreement between the parties – both agreed that paragraph 153(9) of *Avena* imposed an obligation of result on the United States. What they did *not* agree on, the argument ran, was whether the obligation had been breached, a determination outside the jurisdiction of the Court in the context of the interpretation of a prior judgment.

Despite making a determination at the provisional measures stage that a dispute existed between the parties,[51] the Court in *Avena Interpretation* ultimately accepted the US argument and held that an interpretation could not be given. It did, however, give an indication – albeit tangential – as to the content of the obligation of result imposed on the United States by the original *Avena* judgment. It said:

> The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute.[52]

7.4.2 *Due diligence and obligations of prevention*

The Draft Articles continued the analysis of different kinds of obligations by making special provision for obligations of prevention. Draft Article 23 provided as follows:

> *Article 23*
> *Breach of an international obligation to prevent a given event*
> When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there

[50] Further: Zimmerman and Thienal, in Zimmerman, Tomuschat and Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary* (2006) 1275.
[51] *Avena Interpretation*, Provisional Measures, ICJ Rep. 2008 p. 331, 326. [52] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:13 Page Number: 227

is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

The commentary dealt with obligations of prevention in the following way:

> The characteristic feature . . . is precisely the notion of an event, that is, an act of man or of nature which, as such, involves no action by the State . . . [I]f the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation . . . [T]he non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved.[53]

The commentary went on to assert that in the cases of obligations of prevention, the mere failure to prevent is not a sufficient condition for responsibility, although it is a necessary one: 'The State can obviously be required only to act in such a way that the possibility of the event is obstructed, that is, to frustrate the occurrence of the event as far as lies within its power.'[54]

Thus obligations of prevention are not warranties or guarantees that an event will not occur; rather, they are inherently obligations to take all reasonable or necessary measures to ensure that the event does not occur. Although it has been said that an obligation of prevention 'is essentially regarded as a duty of due diligence',[55] when it comes to assessing breach, obligations of prevention may be distinguished from obligations of due diligence in the ordinary sense. A true obligation of prevention is not breached unless the apprehended event occurs,[56] whereas an obligation of due diligence would be breached by a failure to exercise due diligence, even if the apprehended result did not (or not yet) occur.[57] Thus obligations of due diligence are relative, not absolute.[58] Despite the close relationship between obligations of prevention

[53] Draft Articles Commentary, Art. 21, §35. [54] Ibid., Art. 23, §6.

[55] Rao, Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (prevention of transboundary damage from hazardous activities), ILC Ybk 1999/I, 116.

[56] ARSIWA, Art. 14(3) provides that the breach of an international obligation requiring a state to prevent a given event 'occurs *when the event occurs* . . .' (emphasis added).

[57] See Draft Articles Commentary, Art. 23, §4 n. 6. On due diligence see further e.g. McCaffrey, Fourth Report on the Law of the Non-navigational Uses of International Watercourses, ILC Ybk 1988/II(1) 237–42; Pisillo-Mazzeschi, (1992) 35 GYIL 9; Rao, Second Report, ILC Ybk 1999/I.

[58] Economides (2010), 376.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:14 Page Number: 228

and those of due diligence (which also usually apply in the context of prevention),[59] the latter were omitted from Draft Article 23.

On one view Draft Article 23 was devoted to a particular obligation of result, 'namely the obligation for a state to prevent, by the means of its own choice, the occurrence of a given event'.[60] On a traditional categorization, however, the provision could also be construed as concerning an obligation of means, and thus once again the traditional conduct/result distinction was not clearly rendered in the Draft Articles.[61] It is tempting to analyse obligations of prevention as 'negative' obligations of result. For such obligations, the result in question is not the occurrence of something but its non-occurrence. On the other hand, whether this is so depends on the interpretation of the particular primary rule. As an example of an obligation of prevention, the Draft Articles Commentary cites Article 22(2) of the Vienna Convention on Diplomatic Relations (VCDR), which provides:

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.[62]

According to the commentary, this is an obligation 'whose breach similarly takes place only if that result [i.e. intrusion, damage or disturbance] can be seen not to have been ensured'.[63]

Although there are 'pure' obligations of prevention in the sense explained in the 1996 Commentary, it is clear that VCDR Article 22(2)

[59] In particular, obligations of due diligence are 'the standard basis for the protection of the environment from harm': Commentary to the ILC's Articles on Prevention of Transboundary Harm from Hazardous Activities, Art. 3, ILC Ybk 2001/II(2), 138; they are also particularly relevant in connection with protection of foreign nationals and their property, and protection of diplomatic and consular agents. For examples of due diligence obligations see e.g. Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, UN Doc. A/51/229 (not yet in force), Arts. 7(1), 21(2), 22; Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, Art. 22(2); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 12 April 2011, CETS 210, Art. 5(2). In the human rights context see also the UN Declaration on Elimination of Violence against Women, GA Res. 48/104, 20 December 1993, Art. 4(c).

[60] Economides (2010), 376. See also Hafner and Buffard, in Crawford, Pellet and Olleson (2010) 521, 522.

[61] Economides (2010), 376.

[62] VCDR, 18 April 1961, 500 UNTS 95. See Draft Articles Commentary, Art. 23, §§4, 12 n. 19.

[63] Ibid., §12. According to the commentary, diplomatic protests made at an earlier time are concerned with securing performance of the obligation and do not raise issues of responsibility: ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:14 Page Number: 229

is not such an obligation. It is an obligation of conduct. No doubt it does not involve a warranty or guarantee against intrusion, but it is a continuing obligation on the host state to take all appropriate steps to protect the mission, which becomes more demanding if for any reason the mission is invaded or disturbed. In the *Tehran Hostages* case, the International Court referred to these and other provisions of the VCDR as imposing on the receiving state 'the most categorical obligations . . . to take appropriate steps to ensure the protection of' the US missions and their personnel.[64] It went on to hold that, through its inaction in the face of various threats from the militants,

> the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion . . . [I]n the opinion of the Court . . . the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means . . . This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of article 22, paragraph 2 . . .[65]

Moreover, the interpretation of VCDR Article 22(2) favoured in the Draft Articles Commentary is undesirable in principle; states should not be able to neglect that 'special duty' on the basis that intrusion, damage or disturbance has not yet occurred and may never occur.

A better example of an obligation of prevention, also mentioned in the commentary to Draft Article 23,[66] is the principle enunciated in the *Trail Smelter* arbitration, that a state should use its best efforts to prevent cross-border damage by pollution to a neighbouring state. The commentary goes on to assert that, '[e]ven in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act'.[67] This is true if the situation which has to be prevented is not defined in terms of the occurrence of damage, but it *may* be so defined. States can assume

[64] *Tehran Hostages*, ICJ Rep. 1980 p. 3, 30.

[65] Ibid., 31–2. The Court concluded that the Iranian conduct 'clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises' (ibid., 35–6). See also Rosenne (1985), 50, 67. This point was also made by Germany in its comments on Draft Articles, Art. 20: UN Doc. A/CN.4/488, 67.

[66] Draft Articles Commentary, Art. 23, §11. For the decision see (1938 and 1941) 3 RIAA 1905.

[67] Draft Articles Commentary, Art. 23, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:14 Page Number: 230

obligations to prevent damage to particular persons or to the territory of other states, and it may be that on the proper interpretation of the particular obligation it is the occurrence of the damage which triggers responsibility, rather than the failure to take steps to prevent it. If responsibility is engaged by the failure to act in and of itself, regardless of the outcome, then the obligation is better categorized as an obligation of due diligence. But not all obligations directed towards preventing an event from occurring are of this kind, and it was not intended to be the function of ARSIWA to force all such obligations into a single form.

On the whole, Draft Article 23 and its commentary were problematic for their confusing treatment of obligations of prevention. The reaction from governments was lukewarm at best; the United Kingdom felt that the provision was uncontroversial but unnecessary, whereas France and others observed that once again the provision related more to primary obligations than secondary rules and had no place in the Articles.[68] In the end the ILC decided to delete Draft Article 23, and the final adopted text of ARSIWA only mentions obligations of prevention in the context of the temporal elements of breach.[69]

In the *Bosnian Genocide* case, the International Court had to consider the specific obligation of prevention in Article I of the Genocide Convention.[70] The Court was careful to observe that the duty to prevent varies from one instrument to another, depending on the primary rules, and that it was not establishing a general jurisprudence applicable to all obligations of prevention.[71] Nonetheless, its comments on prevention are of interest for present purposes. First, the Court described the obligation to prevent genocide as an obligation of conduct:

> [I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.

[68] See Crawford, Second Report, 27.
[69] ARSIWA, Art. 14(3); see further ARSIWA Commentary, Art. 14, §14. Further: Chapter 8.
[70] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.
[71] *Bosnian Genocide*, ICJ 2007 p. 43, 220–1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:15 Page Number: 231

In this area the notion of 'due diligence', which calls for an assessment *in concreto,* is of critical importance.[72]

The Court's formulation of the obligation to prevent genocide as an obligation of conduct reinforces the decision to delete Draft Article 23 from ARSIWA, and is preferable to the view that obligations of prevention are obligations of result.[73] Further, the Court's position is consistent with the traditional conception of obligations of conduct as best efforts measures,[74] as well as with the position on obligations of prevention taken by the ILC in the context of its work on international liability for injurious consequences arising out of acts not prohibited by international law.[75]

The decision is also noteworthy for its conclusion that a state can only be held responsible for breaching the obligation to prevent genocide if genocide was actually committed, which distinguishes it from an obligation of due diligence:

> 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 … [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.[76]

Thus, although the Court acknowledged that due diligence is an important factor in discharging the obligation of prevention, the latter cannot be categorized as an obligation of due diligence per se, because

[72] Ibid., 221.
[73] See also Economides (2010), 378. Cf. Hafner and Buffard (2010), 521–2.
[74] The Court later described the obligations of prevention in the Genocide Convention as 'positive obligations, to do their best to ensure that such acts do not occur'; *Bosnian Genocide*, ICJ 2007 p. 43, 223.
[75] Rao, Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (prevention of transboundary damage from hazardous activities), ILC Ybk 1999/I, 116.
[76] *Bosnian Genocide*, ICJ 2007 p. 43, 221–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:15 Page Number: 232

such an obligation would be breached by a state party's failure to take action, regardless of whether the prohibited event in fact took place. The obligation to prevent genocide requires both a failure to take steps *and* the occurrence of genocide before responsibility is triggered.[77]

7.4.3 Substantive and procedural obligations

As has already been emphasized, the primary content or character of an obligation does not affect the basic question whether its breach, attributable to the state, amounts to an internationally wrongful act. Thus substantive obligations and procedural obligations will be treated in the same manner for the purposes of establishing responsibility.

It is conceivable, however, that the distinction between substance and procedure may become relevant for determining whether an act has a continuing character for the purposes of deciding *when* the breach has occurred. For example, in the *Rainbow Warrior* arbitration, the tribunal relied on Draft Article 25(1) as a basis for holding that France's obligation to detain the two officers on the island of Hao had terminated in 1989.[78] Normally, an obligation to do something by a certain date would be interpreted as involving two distinct obligations – to do the thing, and to do it in a timely manner – with the result that the procedural failure to comply with the time frame does not terminate the substantive part of the obligation. On the contrary, the state concerned would normally be in continuing breach of the main obligation after the due date for its performance. The position might be different if the conduct required was of no value to the obligee after the due date, for example an obligation to inform another state of the intention to do something, prior to doing it; but once again this will be a matter for the primary rules.

7.5 Specific issues

Beyond the generally applicable rules for determining whether a breach has occurred, certain specific issues may sometimes arise which make that determination more complicated.

[77] This is consistent with ARSIWA, Art. 14(3), which provides that 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' (emphasis added).

[78] (1990) 20 RIAA 215.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:15 Page Number: 233

7.5.1 *Anticipatory breach*

In some cases, determining whether a breach has occurred may involve considering the conduct of a state *before* the alleged breach. If the breach of an obligation is merely threatened, preventive or remedial action may be called for, but the breach will by definition not yet have occurred.[79] But what if the state takes preparatory steps that are not on their face unlawful but which are unequivocally associated with an intention to breach? The difficulty lies in distinguishing apprehended, imminent or anticipatory breaches from existing ones, and it is closely linked to questions about when a wrongful act – defined in all cases by reference to the primary rule – can be said to have occurred.

In some domestic legal systems, the concept of 'anticipatory breach' is used to cover the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance; it includes steps taken to make performance impossible. Confronted with an anticipatory breach, the affected party is entitled to terminate the contract and sue for damages.[80] The notion of anticipatory breach is particularly well established in common law jurisdictions; it was born in 1853 in the English case of *Hochster* v. *de la Tour*.[81] More recently the doctrine has been framed in the English courts as follows:

> The basis of the doctrine is that where a party to a contract before the date for performance has arrived evinces an intention not to perform his part of the contract, he has committed no breach until the date for performance arrives. Nevertheless the innocent party will be relieved of his obligations under the contract, if he so chooses, so as to render him free to arrange his affairs unhampered by the continued existence of those obligations.[82]

Other systems achieve similar results without using this concept, for example by construing a refusal to perform in advance of the time for performance as a 'positive breach of contract'.[83] There appears to be no equivalent in international law, but VCLT Article 60(3)(a) defines a material breach as including 'a repudiation ... not sanctioned by the present

[79] Crawford, Second Report, 28.
[80] See e.g. Ballantine, (1924) 22 Mich. LR 329; Gulotta, (1976) 50 Tulane LR 927, 927–33; Kötz (1998), 508.
[81] *Hochster* v. *de la Tour*, (1853) 2 El and Bl 678, 118 ER 922. See also *Frost* v. *Knight*, (1872) LR 7 Ex 111.
[82] *Gunton* v. *Richmond Borough Council*, [1980] 3 WLR 714, 729A-B (Buckley LJ), cited in *Tullett Prebon Plc & Ors* v. *BGC Brokers LP & Ors*, [2011] EWCA Civ 131, §46.
[83] Zweigert and Kötz (1998), 494 (German law).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:16 Page Number: 234

Convention', and it is clear that such a repudiation could occur in advance of the time for performance.

The issue of anticipatory breach arose in the *Gabčíkovo-Nagymaros* case.[84] Following Hungary's refusal to continue with the project, as provided for in a bilateral treaty of 1977, Czechoslovakia began actively planning for, and subsequently building, a unilateral substitute scheme (the so-called 'Variant C'), using installations jointly constructed for the original project and some additional elements constructed on Czechoslovak territory. Variant C was actually implemented when the Danube was diverted by means of the new installations, in October 1992. The Court held that Variant C was unlawful for various reasons, notwithstanding the prior Hungarian breach of the 1977 treaty. But the question was, at what point had the Czechoslovak breach occurred?

The Court held (by a majority of nine to six) that the breach had not occurred until the actual diversion of the Danube in October 1992. 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.[85]

Considerations of sovereignty clearly played a part in the Court's decision; a state may construct whatever installations it wishes on its own territory, and may for its own reasons invest whatever resources it chooses into executing works such as those required for the implementation of Variant C, even though actually putting the plan into operation would amount to a breach of its obligations. As the Court observed,

> 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' . . .[86]

Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Such conduct does

[84] ICJ Rep. 1997 p. 7. [85] Ibid., 54.
[86] Ibid., citing Draft Articles Commentary, Art. 41. On this point six judges (President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek) dissented.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:16 Page Number: 235

not itself amount to a breach if it does not 'predetermine the final decision to be taken'. But whether that is so in any given case will depend on the precise facts and on the content of the primary rule. The ARSIWA does not include specific provision for anticipatory breach.[87]

7.5.2 *Illusory obligations*

Another aspect of domestic contract law that could have implications for the question of determining breach in the context of state responsibility is the doctrine of illusory obligations or illusory promises. In domestic law it is a ground for invalidating a contract where one party remains free not to perform.[88]

Illusory obligations in international law are those undertakings of states that may appear to be obligations but which are in fact non-binding, such as voluntary aid programmes or other acts that are motivated by political interests and comity instead of legal obligation. To 'breach' such understandings could not amount to breach in terms of ARSIWA Article 12; at most it could be categorized as 'unfriendly conduct' along the lines of measures of retorsion,[89] but it would not engage the state's responsibility.

The point may be illuminated by a comparison of the decisions of the High Court of Australia in the *Tasmanian Dam* case[90] and of the International Court in *Oil Platforms*.[91] Both cases concerned treaties which contained arguably illusory 'obligations'. In the former, the High Court considered the Convention for the Protection of the World Cultural and Natural Heritage,[92] Article 4 of which makes provision for each state party, *inter alia*, to identify, protect and conserve their natural and cultural heritage for future generations, 'to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain'. Article 5(d) provides that, in order to ensure that adequate measures of preservation and conservation are undertaken, states 'take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage'.

[87] See ARSIWA Commentary, Art. 14, §13. [88] See Lowe, (2007) 6 WUGSLR 703, 710.
[89] See ARSIWA Commentary, Pt III, Ch. II, §3.
[90] *Commonwealth* v. *Tasmania*, (1983) 68 ILR 266. Generally: Zines, in Lee and Winterton (eds.), *Australian Constitutional Landmarks* (2003) 262.
[91] *Oil Platforms (Iran v. US)*, ICJ Rep. 2003 p. 161. [92] 16 November 1972, 1037 UNTS 151.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:16 Page Number: 236

On the basis of these provisions, the Commonwealth government enacted measures to prevent the construction of a large hydroelectric dam on the Franklin River in Tasmania.[93] Under the terms of the Australian Constitution, such measures could only be passed if they fell within a recognized head of Commonwealth power. To this end, the Commonwealth relied *inter alia* on section 51(xxix),[94] which gives the power to legislate with respect to 'external affairs', an area which includes legislation giving effect to treaty obligations.[95] The question, then, was whether Articles 4 and 5 gave rise to 'obligations'. With respect to this, Gibbs CJ (dissenting) said:

> It is . . . impossible to conclude that arts. 4 and 5 were intended to impose a legal duty of that kind on the States Parties to the Convention. If the conduct which those articles purport to prescribe was intended to be legally enforceable, the obligations thereby created would be of the most onerous and far reaching kind. The obligations would extend to any property which might reasonably be regarded as cultural or natural heritage within the meaning of arts. 1 and 2 of the Convention, whether or not it was included on the World Heritage List, and would require a State Party to the Convention to take all legal measures within its constitutional power that might reasonably be regarded as appropriate for the identification and protection of such property, and to apply all of its financial resources that it could possibly make available for the same purpose . . . The very nature of these obligations is such as to indicate that the States Parties to the Convention did not intend to assume a legal obligation to perform them.[96]

This assessment of Articles 4 and 5, however, was contradicted by the majority of the court. Mason J held that 'Article 5 imposes a series of obligations on parties to the Convention, one of which is the obligation dealt with in [paragraph] (d) which includes the taking of legal measures',[97] and, further, that the provisions '[impose] binding obligations on Australia'.[98] Brennan J expressed a qualified agreement to this, holding that '[t]here is a clear obligation upon Australia to act under [Articles] 4 and 5, though the extent of that obligation may be affected by decisions taken by Australia in good faith'.[99] Deane J commented that '[h]owever loosely such obligations may be defined, it is apparent that Australia, by

[93] See the World Heritage Properties Conservation Act 1983 (Cth).
[94] Further: Zines, *The High Court and the Constitution* (5th edn, 2008), Ch. 13.
[95] Ibid., 377–91; de Jonge, in Shelton (ed.), *International Law and Domestic Legal Systems* (2011) 23, 28–42.
[96] *Tasmanian Dam*, (1983) 68 ILR 266, 301. See also ibid., 390–2 (Wilson J, dissenting). Dawson J (dissenting) accepted that the relevant provisions constituted obligations only for the sake of argument: ibid., 495.
[97] Ibid., 340. [98] Ibid., 341. [99] Ibid., 423.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:17 Page Number: 237

depositing its instrument of ratification, bound itself to observe the terms of the Convention and assumed real and substantive obligations under them.'[100]

Oil Platforms concerned claims under the US–Iran Treaty of Amity, Economic Relations and Consular Rights.[101] Iran accused the United States of breaching Article X(1) of the Treaty (guaranteeing '[b]etween the territories of the two High Contracting Parties ... freedom of commerce and navigation') by virtue of the latter's destruction of three Iranian oil platforms in the Persian Gulf, supposedly in self-defence. But Iran also claimed that by its actions, the United States had breached Article I of the Treaty, which provides that '[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran.' The United States contended that Article I could not be used to found the jurisdiction of the Court, an argument which was accepted.[102] The Court noted that the form of words used in the clause was common to a number of other treaties of friendship and commerce or economic relations which the United States had concluded with a variety of countries after the end of the Second World War. Article I appeared to be purely preambular in nature, and was entirely without substantive weight.[103] In the light of this, the Court concluded that

> the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.[104]

The Court found that it possessed jurisdiction only under Article X.[105]

As this contrast suggests, the determination of whether or not a treaty provision is 'illusory' is a matter of treaty interpretation. In *Tasmanian Dam*, the Convention – notwithstanding the reservations of Gibbs

[100] Ibid., 454–5. Murphy J took an ever broader view of the power, not confined to the implementation of international obligations: ibid., 373.

[101] 15 August 1955, 284 UNTS 93.

[102] *Oil Platforms*, Preliminary Objections, ICJ Rep. 1996 p. 803, 814–15.

[103] Ibid., 815. This impression was reinforced by a message from the Secretary of State to the Senate concerning the equivalent provision in the United States–Ethiopia Treaty of Amity and Economic Relations, 7 September 1951, 206 UNTS 41:

> Such provisions, though not included in recent treaties of friendship, commerce and navigation, are in keeping with the character of such instruments and serve to emphasize the essentially friendly character of the treaty.

[104] Ibid.

[105] Ibid., 820.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:17 Page Number: 238

CJ – clearly levelled some form of obligation on the parties, with the relatively open-ended discretion granted to Australia reminiscent not of an illusory obligation but of an obligation of result. In contrast, the hortatory statement reflected in Article I of the Treaty in *Oil Platforms* was revealed in context to be little more than an interpretive tool.

7.5.3 'Non-violation complaints'

It is not uncommon for states to complain that another state is causing them some sort of loss or injury in circumstances where the latter state is not actually in breach of its international obligations in the sense of ARSIWA Article 12. Notably, a procedure for 'non-violation complaints' is specifically provided for in the WTO.[106] General Agreement on Tariffs and Trade 1994 (GATT) Article XXIII:1[107] provides for dispute resolution processes

> [i]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, *whether or not it conflicts with the provisions of this Agreement*, or
> (c) the existence of any other situation.[108]

Thus the Dispute Settlement Body can be called on to consider nullification or impairment of benefits independently of any question of breach of a covered agreement.

Non-violation complaints such as those envisaged by Article XXIII:1(b) have been described as a 'legal fantasy'.[109] But through the development of the case law three basic conditions for a successful non-violation

[106] See generally F. Spitzer, *The Non-violation Complaint in WTO Law* (Berlin: Tenea Verlag, 2004).

[107] Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Annex 1A: General Agreement on Tariffs and Trade 1994.

[108] Emphasis added. See also Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Annex 2: Understanding on the Rules and Procedures Governing the Settlement of Disputes, Art. 26; Annex 1B: General Agreement on Trade in Services, Art. XXIII:3; Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 64. Outside the WTO context see e.g. North American Free Trade Agreement, Ch. 20, Annex 2004, which also permits complaints based on proposed measures that have not yet been applied.

[109] Pescatore, (1993) 27 JWT 5, 19.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 7 Title Name: CRAWFORD
Date:14/3/13 Time:21:16:18 Page Number: 239

complaint under GATT have emerged:[110] first, that a reciprocal concession was negotiated; second, that a governmental measure not inconsistent with GATT was subsequently introduced, which upset the competitive relationship between the bound product and directly competitive products from other origins; and, third, that the measure could not have been reasonably anticipated by the party to whom the binding was made at the time of the negotiation of the tariff concession. As Petersmann observes, these conditions suggest that non-violation complaints are based on broad legal principles of effectiveness of treaty obligations (*effet utile*), reciprocity and *bona fide* protection of 'reasonable expectations'.[111] As for the secondary consequences of a finding of non-violation nullification or impairment, however, the respondent state is not under any obligation to withdraw the measure in question.[112] In any case, non-violation complaints remain very rare, and in the WTO system no non-violation complaint has yet succeeded in isolation from a violation complaint.[113] Non-violation complaints are seen as exceptional and to be approached with caution.[114]

Another context in which disputes may arise over harm caused without a breach of an international obligation is in the area of transboundary harm from activities that are hazardous but not unlawful.[115] The scope of transboundary damage is not restricted to environmental damage, although it is likely to be the most significant category covered.

To summarize, no breach does not necessarily mean there is no harm, or no remedy. But the secondary legal consequences of state conduct that has injurious effects for other states without breaching the former state's obligations fall outside the scope of the state responsibility regime in ARSIWA. Rather, the consequences of lawful activity with injurious effects will be prescribed by the primary rules and obligations applicable in the circumstances.

[110] For a detailed analysis see Spitzer (2004), 32–68.

[111] Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997), 172. For a discussion of the relevant GATT case law see ibid., 150–70; for cases considered by panels see the first Appellate Body report on GATT, Art. XXIII:1(b), *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, 12 March 2001, WT/DS135/AB/R, §§185–9, esp. n. 188.

[112] Dispute Settlement Understanding, Art. 26:1(b)).

[113] Van den Bossche, *The Law and Policy of the World Trade Organization* (2nd edn, 2008), 185. See also Petersmann (1997), 136.

[114] *Japan – Measures Affecting Consumer Photographic Film and Paper*, 22 April 1998, WT/DS44/R, §§10.36–10.37; *EC – Asbestos*, 12 March 2001, WT/DS135/AB/R, §186.

[115] See generally Xue, *Transboundary Damage in International Law* (2003). See further Chapter 2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:15:59 Page Number: 240

8 Breach: the temporal element

8.1 Introduction

The breach of an international obligation is an act occurring in time. As seen in Chapter 7, the material aspect of breach is dealt with in ARSIWA Article 12. The corresponding questions of 'what' happened 'when' are addressed in ARSIWA Articles 13–15. While these provisions, in the abstract, were relatively uncontroversial when adopted, they have proved problematic in their application – a situation not helped by the fact that many preliminary challenges before international courts and tribunals concern temporal jurisdiction (jurisdiction *ratione temporis*).[1]

The temporal element of breach involves two interrelated issues, to be considered in turn. The first is the so-called intertemporal law – in essence, the question of the law applicable to the relevant state at the time of the alleged breach (ARSIWA Article 13). The second question relates to the character of the breach itself, and whether it is resolved immediately (an instantaneous breach), results in a continuing illegal situation (a continuing breach) or is itself composed of multiple acts which are considered unlawful by reason of their systematic relation to each other (a composite breach). This is not just an analytical distinction: the temporal character of a breach is taken into account in a number of areas of international law that may be dispositive for the resolution of a claim, including the temporal jurisdiction of an international court or

[1] See e.g. Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355, Arts. 36 (2), (3). Also *Mavrommatis Palestine Concessions*, (1924) PCIJ Ser. A No. 2, 35; *Phosphates in Morocco*, (1938) PCIJ Ser. A/B No. 74, 26–8; *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Rep. 1960 p. 6, 33–6; *Northern Cameroons (Cameroon v. UK)*, Preliminary Objections, ICJ Rep. 1963 p. 15, 128–9 (Judge Fitzmaurice). Further: Pauwelyn, (1995) 66 BYIL 415, 435–40.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:15:59 Page Number: 241

tribunal, the time at which diplomatic protection may be exercised, the admissibility of a claim, and the remedies available.[2]

8.2 The intertemporal law[3]

8.2.1 Applications of the principle

8.2.1.1 *Island of Palmas* and Huber's restatement

When discussing the intertemporal law, the standard initial reference is to the dictum of Max Huber as arbitrator in the *Island of Palmas* case:

> a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or fails to be settled.[4]

This statement reflects the maxim '*tempus regit actum*' ('time rules the act'), already a principle of international law when it was restated by Huber. The immediate context there was territorial acquisition, not state responsibility. In applying the principle to the effect of 'discovery' in the sixteenth century, Huber held that

> [t]he effect of discovery [of the contested territory] by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century – or (to take the earliest date) in the first quarter of it, that is, at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.[5]

He then moved to introduce an additional aspect of the rule, noting that

> [a]s regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of a right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[6]

This second proposition does not *prima facie* sit easily with Huber's earlier statement: it appears to envisage that a right (or, conversely, an obligation) which has been duly created under international law is not necessarily stable but may evolve materially over time, increasing or

[2] Pauwelyn (1995), 429–50; Salmon, in Crawford, Pellet and Olleson (2010) 383, 383.
[3] Elias, (1980) 74 AJIL 285; Karl, in Spinedi and Simma (eds.), *United Nations Codification of State Responsibility* (1987) 95, 106–14; Higgins, (1997) 46 ICLQ 501; Buyse, (2006) 75 Nordic JIL 63; Gardiner, *Treaty Interpretation* (2008), 252–3; Kotzur, 'Intertemporal law', (2008) MPEPIL; Tavernier, in Crawford, Pellet and Olleson (2010) 397; *Brownlie's Principles*, 218–19.
[4] *Island of Palmas (Netherlands/US)*, (1928) 2 RIAA 829, 845. Further: Jessup, (1928) 22 AJIL 735.
[5] (1928) 2 RIAA 829, 845. [6] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:00 Page Number: 242

decreasing in scope according to circumstance. Unlike the basic rule of the intertemporal law, this appears to have been a novel contribution by Huber[7] and has been criticized, principally on the basis that its application may lead to instability of title.[8] That is not to say, however, that it is incapable of being sensibly applied in other contexts.[9]

8.2.1.2 The intertemporal law and the law of treaties

The intertemporal law has important implications for the application and interpretation of treaties, as several provisions of the Vienna Convention on the Law of Treaties (VCLT) demonstrate.[10] Thus VCLT Article 28 provides:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[11]

In *Ambatielos*, the International Court rejected a Greek argument that the treaty under consideration could be given retroactive application. The Court observed:

> To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.[12]

An important corollary of the intertemporal law in the context of treaties is the requirement that treaties and other international

[7] See Jessup (1928), 739–40, referring to the proposition as Huber's 'theory'.

[8] Lauterpacht, *The Function of Law in the International Community* (1933, repr. 2011), 283–5; Jennings, (1967) 121 Hague *Recueil* 320, 422; *Brownlie's Principles*, 218. Cf. Kotzur (2008), §6: However, the two elements of the *Island of Palmas* case are less antithetical than they may seem; stability due to the creation, and flexibility due to evolution in the existence of rights, should be conceived as complementary principles.

[9] See e.g. *Minquiers and Ecrehos (France/UK)*, ICJ Rep. 1953 p. 47, 56; *Western Sahara*, ICJ Rep. 1975 p. 12, 38; ibid., 168 (Judge de Castro).

[10] See e.g. Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Arts. 4, 28, 64, 71. Further: Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 379; Dopagne, in Corten and Klein (eds.), 1 *The Vienna Convention on the Law of Treaties: A Commentary* (2011) 718.

[11] Further: Villiger (2009), 379; Dopagne (2011).

[12] *Ambatielos (Greece* v. *UK)*, Preliminary Objection, ICJ Rep. 1952 p. 27, 40.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:00 Page Number: 243

instruments be interpreted in light of the conditions which subsided at their time of conclusion.[13] This was described by Fitzmaurice as the 'principle of contemporaneity', according to which

> the terms of a treaty must be interpreted according to the meaning which they possess, or which would have been attributed to them, and in light of the current linguistic usage, at the time when the treaty was originally concluded.[14]

Contemporaneity was acknowledged by Waldock as ILC Special Rapporteur on the Law of Treaties as the counterpart to Huber's restatement in *Island of Palmas*.[15] Although provisionally adopted by the ILC as a facet of the unitary rule of interpretation in VCLT Article 31,[16] it was not incorporated expressly in the final text. But the ILC accepted Waldock's observation that it was an aspect of 'common sense and good faith, and ... also implicit in the rule that the meaning of terms is to be determined by reference to the context of the treaty and to its objects and purposes'.[17] It has been consistently adopted as an interpretative rubric by international courts and tribunals.[18] In its *Namibia* Advisory Opinion the Court affirmed 'the primary necessity of interpreting an instrument in accordance with the intention of the parties at the time of its conclusion'.[19] In *Cameroon* v. *Nigeria*, the International Court held that its role was to 'ascertain the intention of the parties at the time' that the

[13] Elias (1980), 296–305; Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), 76–80; Jennings and Watts (eds.), 1 *Oppenheim's International Law* (9th edn, 1992), 1281–2; Gardiner (2008), 64; Dawidowicz, (2011) 24 LJIL 201, 205–11.

[14] Fitzmaurice, (1957) 33 BYIL 203, 212, 225–7.

[15] Waldock, Third Report on the Law of Treaties, ILC Ybk 1964/II, 55.

[16] Ibid., 56, and Draft Art. 69(1)(b) and commentary, ibid., 199.

[17] Waldock, Sixth Report on the Law of Treaties, ILC Ybk 1966/II, 96, and Draft Art. 31 and commentary, ibid., 222.

[18] *Rights of Nationals of the United States in Morocco (France v. US)*, ICJ Rep. 1952 p. 176, 189; *Right of Passage*, ICJ Rep. 1960 p. 6, 37; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 124 (President Bedjaoui); *Eritrea and Yemen (Territorial Sovereignty)*, (1998) 114 ILR 1, 46, 115; *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Rep. 1999 p. 1045, 1062; ibid., 1112 (Judge Higgins); *Eritrea–Ethiopia Boundary Delimitation Decision*, (2002) 130 ILR 1, 34. Most emphatically, see *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, ICJ Rep. 1978 p. 3, 63 (Judge de Castro, diss.):

> The meaning of words may change with time. In order to interpret any statement, to ascertain its real meaning, we must first of all concentrate on the meaning which it could have had at the time when it was made. Words have no intrinsic value in themselves ... Their semantic value depends on the time and circumstances in which they were uttered.

[19] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971 p. 16, 31.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:00 Page Number: 244

relevant treaty was entered into.[20] This approach was supported by Judge Skotnikov and Judge ad hoc Guillaume in the *Navigational and Related Rights* case.[21] Whether it was adopted by the Court in that case is discussed below.

8.2.1.3 The intertemporal law and the ILC's work on responsibility

From the beginning of its work on responsibility the ILC embraced the intertemporal principle. Thus it stressed that an act of state will only be considered to be a breach for the purposes of the Articles where it is in violation of a rule of international law binding on the state at the time of the act.[22]

The importance attached by the ILC to the intertemporal law in the context of state responsibility was first evidenced by the adoption of Draft Article 18 on first reading.[23] Draft Article 18 consisted of five lengthy paragraphs, the first two of which functioned as a restatement of the intertemporal law. These read:

> (1) An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for the State.
> (2) However, an act of the State which, at the time it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of international law.

[20] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equatorial Guinea intervening)*, ICJ Rep. 2002 p. 303, 346; cf. the Separate Opinion of Judge Al-Khasawneh, ibid., 500 (the role of the interpreter is to 'enquire into the quality of the juridical act in the light not only of the alleged practice, but in light of the totality of the law').

[21] *Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Rep. 2009 p. 213, 283–4 (Judge Skotnikov); ibid., 297–9 (Judge ad hoc Guillaume).

[22] See further the definition provided by the Institut de Droit International's 1975 Resolution I on The Intertemporal Problem in International Law (Weisbaden, 11 August 1975), Art. 1:

> Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in light of the rules which are contemporaneous with it.

[23] The provision was provisionally adopted in 1976, well before the development of the temporal elements of a wrongful act (Draft Articles, Arts. 24–6) on which it depended: Karl (1987), 107 n. 74.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:01 Page Number: 245

The basic position of Draft Article 18(1) was considered relatively uncontroversial and was quickly slated for retention.[24] The deletion of Draft Article 18(2), on the other hand, was broadly supported, as it catered for a purely hypothetical situation.[25] The provision was eventually reformulated after a fashion as ARSIWA Article 26, to be returned to presently.

Following minor amendment of the Special Rapporteur's proposed wording by the Drafting Committee,[26] Draft Article 18(1) was retained as ARSIWA Article 13:

> 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.

This is merely an application of Huber's basic restatement of the intertemporal law in the *Island of Palmas* case,[27] but it functions as an important guarantee for states in terms of claims of responsibility. It has, however, been criticized on the basis that it does not give sufficient scope to the second part of Huber's remarks and to the capacity of international law to evolve over time.[28]

8.2.2 Some qualifications

8.2.2.1 Retrospective acceptance of responsibility

The intertemporal law is subject to qualification. Perhaps the most straightforward caveat is that a state may expressly agree to have a later law apply to its past acts, or for a treaty to evolve in meaning over time. The former situation, though extremely rare,[29] occurred in the *Alabama* arbitration.[30] Article VI of the 1871 Treaty of Washington[31] defined the applicable law of the dispute. In the course of the negotiations preceding the treaty, the parties had been unable to achieve a common position, and the provision itself recorded the inability of the British government to agree that rules set down in Article VI were in force at the time of the contested acts. Nonetheless, the arbitrators took it that the British government had agreed to be so bound.[32]

[24] Crawford, Second Report, 17; ILC Ybk 1999/II(2), 56–7.
[25] Ibid. Also Crawford, Second Report, 21–3; Tavernier (2010), 401.
[26] ILC Ybk 1999/I, 277; ILC Ybk 2001/I, 95. [27] ARSIWA Commentary, Art. 13, §1.
[28] Tavernier (2010), 396–400. [29] ARSIWA Commentary, Art. 13, §6.
[30] *Alabama Arbitration (Great Britain v. US)* (1872), in Moore, 1 *Int. Arb*. 495. Further: Cook, *The 'Alabama' Claims* (1975); Bingham (2005); Bingham (2006).
[31] Treaty between Great Britain and the United States for the Amicable Settlement of all Causes of Difference between the Two Countries, 8 May 1871, 143 CTS 145.
[32] Moore, 1 *Int. Arb*. 495, 654, 657.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:01 Page Number: 246

An example of the latter situation may be seen in *Mavrommatis Palestine Concessions*, where the Permanent Court permitted a treaty to be given retroactive effect on the basis of a special provision contained in that treaty:

> An essential characteristic of Protocol XII [is] that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses or in the Protocol for the protection of rights recognized therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection.[33]

Situations such as these are described in VCLT Article 28 as 'a different intention [of the parties appearing] from the treaty or … otherwise established'. While its application in the case of treaties is sound, the ILC was more circumspect in extending the scope of the principle more generally to the context of state responsibility.[34] Nonetheless, the commentary makes reference to this qualification in the following terms:

> [I]t 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 obligation in force for that State.[35]

The commentary notes that the *lex specialis* rule contained in ARSIWA Article 55 can be used to deal with those rare cases where responsibility is accepted retroactively.[36]

8.2.2.2 Evolutive interpretation of treaties[37]

As stated, the basic position regarding the temporal interpretation of treaties is that of contemporaneity. But the meaning of a treaty is not frozen in time, and in particular international courts and tribunals have sometimes seen fit to depart from the intentions of the parties at the time of conclusion of a treaty. This process is known as the 'progressive', 'dynamic' or 'evolutive' interpretation of treaties, and may be seen as

[33] (1924) PCIJ Ser. A No. 2, 34. [34] Tavernier (2010), 399–400.
[35] ARSIWA Commentary, Art. 13, §6. Further: Tavernier (2010), 396–400.
[36] ARSIWA Commentary, Art. 13, §6.
[37] Bernhardt, (1999) 42 GYIL 12; Gardiner (2008), 253–6; Fitzmaurice, (2008) 21 Hague YIL 101; M. Fitzmaurice, 'Dynamic (evolutive) interpretation of treaties', (2009) 22 Hague YIL 3; Fitzmaurice, in Orakhelashvili and Williams (eds.), *Forty Years of the Vienna Convention on the Law of Treaties* (2010) 55; Dawidowicz (2011).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:01 Page Number: 247

motivated by the second aspect of Huber's dictum in *Island of Palmas* concerning the 'the conditions required by the evolution of law'.[38]

The technique was first identified by the International Court in *Namibia*.[39] As we have seen, the Court began its discussion by identifying as cardinal the principle of contemporaneity,[40] but then moved to introduce an evolutionary interpretation of the League of Nations mandate system. More particularly, one of the contested issues of that case related to the argument that the 'C' mandate for South West Africa could be distinguished in a qualitative sense from class 'A' and 'B' mandates of other nations. South Africa emphasized the contemporaneous intentions of the parties, namely their intention that 'C' mandates should be effectively assimilated to colonies.[41] The Court rejected this argument on the basis that

> the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also therefore was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such.[42]

A concise statement of the position was provided by the Court in *Navigational and Related Rights*:

> [T]here are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances, it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[43]

The case concerned the interpretation of the 1858 Treaty of Limits[44] between Costa Rica and Nicaragua, which gave Nicaragua sovereignty over the San Juan river as a border between the two countries, but reserved for Costa Rica navigational rights '*con articulos de comercio*'

[38] (1928) 2 RIAA 829, 845. Cf. Dupuy, in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011) 123, who divides instances of evolutive interpretation into those supported by 'memory' and those tending towards 'prophecy'.
[39] Further: Dupuy (2011), 128–9; Dawidowicz (2011), 215–16.
[40] ICJ Rep. 1971 p. 16, 31. [41] Ibid., 28. [42] Ibid., 31.
[43] ICJ Rep. 2009 p. 213, 242. [44] 15 April 1858, 118 CTS 439.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:02 Page Number: 248

(the meaning of which was disputed) along a 141-km stretch of the river. The question for the Court was whether this expression encompassed Costa Rican tourist traffic along the river, or was by its terms limited to freight transport only. The Court concluded that the phrase called for an evolutionary interpretation:

> [W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning. This is so in the present case in respect of the term '*comercio*' as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal regime characterized by its perpetuity.[45]

In this light, the Court held that '*comercio*' had to be understood as possessing a meaning contemporary to each application of the treaty, rather than that which it might have borne at the time the treaty was concluded, finding in favour of Costa Rica on the issue.[46]

Evolutionary interpretation does not contradict the basic premise of the intertemporal law. In *Mavrommatis Palestine Concessions*, it was held that the intertemporal law may be qualified where the express consent of the parties is given – and similar qualifications may arise in the presence of implicit agreement, for example where the parties employ 'generic' terminology as part of establishing a treaty regime of perpetual (or at the least extensive) duration. While arguments made be made that these indicia cut across the grain of legitimate treaty interpretation,[47] from the point of view of the intertemporal law and ARSIWA Article 13 the wider process of evolutive interpretation may be legitimate.

Evolutive interpretation has been notably present in the jurisprudence of human rights courts and tribunals. As Bernhardt has said:

> If it is the purpose of a treaty to create longer and lasting and solid relations between the parties, or to guarantee personal freedoms to citizens as well as foreigners, it is hardly compatible with the purpose to eliminate new developments in the process of treaty interpretation. Multilateral treaties creating

[45] ICJ Rep. 2009 p. 213, 243. [46] Ibid., 244.

[47] See e.g. *Namibia*, ICJ Rep. 1971 p. 16, 277 (Judge Fitzmaurice, diss.); *Aegean Sea*, ICJ Rep. 1978 p. 3, 62–3 (Judge de Castro, diss.); *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 121–2 (Judge Bedjaoui); *Navigational and Related Rights*, ICJ Rep. 2009 p. 213, 284 (Judge Skotnikov).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:02 Page Number: 249

international organizations and human rights conventions are outstanding examples of the need for evolutive treaty interpretation.[48]

For example, in *Tyrer* the European Court of Human Rights stressed that the ECHR constituted

> a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.[49]

This position taken by the Court in *Tyrer* has served as a leitmotif for the interpretation of the ECHR.[50] It has been applied, *inter alia*, to the patrimonial rights of children,[51] conceptions of marriage,[52] extradition and the death penalty,[53] and, in the case of *Loizidou*, to the right to property.[54] The conception of the ECHR as 'special' in such a context may be seen in *Ireland* v. *United Kingdom*, where it was held that

> [u]nlike other treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from 'collective enforcement'.[55]

From the point of view of state responsibility, no further discussion of the matter is required. The question is essentially one of the correct application of VCLT Article 31. It was for this reason that the ILC did not consider the European Court of Human Rights to be any different from the International Court insofar as the effect of evolutionary interpretation on the intertemporal law was concerned.[56] The commentary to ARSIWA Article 13 states:

> The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations ... But the

[48] Bernhardt (1999), 16–17. Further: Fitzmaurice (2010), 55–9.

[49] *Tyrer* v. *United Kingdom*, [1978] ECtHR 5856/72, § 31. This statement is reminiscent of the International Court's declaration in *Namibia* that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation': *Namibia*, ICJ Rep. 1971 p. 16, 31.

[50] Dupuy (2011), 135.

[51] *Marckx* v. *Belgium*, (1979) 58 ILR 561, 589–90.

[52] *Johnson and Ors* v. *Ireland*, [1986] ECtHR 9697/82, §53.

[53] *Soering* v. *UK*, (1989) 98 ILR 270, 308–9.

[54] *Loizidou* v. *Turkey*, Preliminary Objections, (1995) 103 ILR 622, 645–6.

[55] *Ireland* v. *UK*, (1978) 58 ILR 188, 291.

[56] Crawford, Second Report, 17–18. But cf. Higgins (1997), 517: 'the inter-temporal principle of international law, as it is commonly understood, does not apply in the interpretation of human rights obligations'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:03 Page Number: 250

intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permitted in certain cases 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.[57]

8.2.2.3 New peremptory norms

With respect to the intertemporal application of peremptory rules of international law, the general position remains the same. As the commentary makes clear, the rules of 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 [VCLT Article 64], this does not entail any retrospective assumption of responsibility.[58]

Thus peremptory rules of international law cannot be retrospectively applied absent the agreement of the state alleged to have 'breached' the norm at some point in the past to have the later law applied to the question of its responsibility.

What ARSIWA Article 13(1) fails to address is the interaction between a new peremptory rule of international law and a pre-existing legal *obligation* (as opposed to a simple act). Originally contained in Draft Article 18(2), a paragraph considering the operation of new peremptory norms on the intertemporal law in such a context was deleted on second reading.[59] The remnants of Draft Article 18(2) were folded into what eventually became ARSIWA Article 26. This provision acts as a saving clause to ARSIWA Chapter V, which considers circumstances precluding wrongfulness, and provides materially that none of the excuses contained therein will 'preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of international law'. The commentary to the provision states:

> 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

[57] ARSIWA Commentary, Art. 13, §9.
[58] Ibid., §5. Cf. Tavernier (2010), 400–1: '[the] statement is not explicit and would certainly merit further development'.
[59] P. Tavernier, 'Relevance of the Intertemporal Law', in Crawford, Pellet and Olleson (2010) 397, 400–1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:03 Page Number: 251

and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory one might imagine 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. Even if they were to arise, peremptory norms of international law generate strong interpretive principles which will resolve all or most apparent conflicts.[60]

This position would tend to indicate that while an international obligation will not be automatically voided by virtue of its inconsistency with a peremptory norm subsequently crystallized, a breach will not occur where the earlier norm is breached by a party which observes the later, peremptory, obligation at the expense of the former – even where responsibility for breach of the earlier norm is already on foot. Thus the emergence of a new peremptory norm is considered to be a circumstance precluding wrongfulness that has retrospective application. This broadly replicates the terms of Draft Article 18(2), although the commentary reiterates one of the reasons that this provision was deleted on second reading. As was noted by the Special Rapporteur,

> Article 18, paragraph 2, contemplates nothing less than an act, specifically *prohibited* by international law on day one, should itself have become *compulsory* by virtue of a new norm of *ius cogens* on day two, or at least within such a period of time as to allow issues of responsibility on day one to remain live but unresolved. Not even the slavery cases provide an example of this situation.[61]

8.2.3 *Termination of the primary obligation*

The final question on the interaction of the intertemporal law with state responsibility concerns the effect of the termination of the norm on which a claim of responsibility is based.[62] While a terminated norm evidently cannot be used as a new basis of claim, responsibility once accrued is not erased by the subsequent termination of the obligation in question. Thus, as the commentary notes, the intertemporal law 'is not only a necessary but a sufficient basis of responsibility'.[63] The principle expressed is similar to that of VCLT Article 70(1)(b), which provides that

[60] ARSIWA Commentary, Art. 26, §3.
[61] Crawford, Second Report, 19.
[62] Tavernier (2010), 396, 399.
[63] ARSIWA Commentary, Art. 13, §7:

> 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,

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:03 Page Number: 252

the termination of a treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'. As Lord McNair remarked, 'such claims acquire an existence independent of the treaty whose breach gave rise to them'.[64] This applies equally to situations of state responsibility not based on a treaty.

This rule is supported by the dictum of the International Court in *Northern Cameroons*, where it said that

> if 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.[65]

A similar situation arose in the *Rainbow Warrior* arbitration between New Zealand and France.[66] There, a term of the 1986 exchange of letters[67] under which two French security agents were repatriated, provided that the French government was obliged to detain its agents on the Pacific island of Hao 'for a period of not less than three years'. In December 1987, one of the agents, Major Marfart, was removed from the island without New Zealand's consent, ostensibly for medical reasons. In May 1988, the second agent, Captain Prieur, was also evacuated to Paris for medical and other compassionate reasons, again without New Zealand's consent. New Zealand protested, and in 1989 France agreed to refer the matter to arbitration.[68]

The arbitral tribunal found that as France's obligation to detain the agents on Hao was only ever intended to run for 'a period of . . . three years' it was exhausted by 1990, when the award was handed down. But that did not mean that France's breach was excused. The tribunal remarked:

> If the breach was a continuous one . . . that means that the violated obligation also had to be running continuously and without interruption. The 'time of commission of the breach' constituted an uninterrupted period, which was not

whether as a result of the termination of the treaty which has been breached or of a change in international law.

64 *Ambatelios*, Preliminary Objections, ICJ Rep. 1952 p. 28, 63.

65 *Northern Cameroons*, Preliminary Objections, ICJ Rep. 1963 p. 15, 35.

66 *Rainbow Warrior (New Zealand/France)*, (1990) 20 RIAA 215. Further: Wexler (1987); Hoss and Morgan-Foster (2010).

67 As adjudicated by the UN Secretary-General: *Rainbow Warrior (New Zealand/France)*, (1986) 74 ILR 256, 271–2.

68 Supplementary Agreement between the Government of the French Republic and the Government of New Zealand relating to an Arbitral Tribunal, 14 February 1989, 1559 UNTS 249.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:03 Page Number: 253

and could not be intermittent, divided into fractions or subject to intervals. Since it had begun on 22 July 1986, it had to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is now in breach of its international obligations.

This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force ... Consequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches.[69]

Again, in *Phosphate Lands* Australia's administration of the Trust Territory of Nauru expired in 1968; Nauru brought its claim relating to the administration in 1989. The International Court, applying a relatively liberal standard of *laches*, declined to hold the claim inadmissible on account of delay, but said that

it will be for the Court, in due time, to ensure that Nauru's delay in seising 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.[70]

The Court indicated that, according to the intertemporal law, it was required to apply the Trustee Agreement for Nauru, which had terminated on Nauru's independence in 1968. The case settled before the merits phase could be completed.[71]

8.3 Duration of the breach[72]

The second question which arises in considering the temporal element of breach is the duration of the breach itself. The ILC envisaged several categories of breach, each of which has different implications for the law of state responsibility. The ARSIWA, relevantly, conceive of instantaneous breaches (ARSIWA Article 14(1)), continuing breaches (ARSIWA Articles 14(2) and (3)) and composite breaches (ARSIWA Article 15).

[69] (1990) 20 RIAA 215, 266.

[70] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Rep. 1992 p. 240, 235–5.

[71] See the Settlement Agreement between Australia and Nauru, 10 August 1993, 1770 UNTS 379.

[72] Brownlie (1983), Ch. XII; Karl (1987), 98–106; Pauwelyn (1995); Salmon (2010); van Pachtenbeke and Haeck, [2010] 1 EHRLR 47.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:04 Page Number: 254

A fourth category – a complex breach – was introduced by Ago into the Draft Articles on the first reading, but it was deleted during the second.[73]

As conceived of in ARSIWA Articles 14 and 15, no *a priori* distinction is drawn between obligations of conduct, result and prevention. State responsibility in this sense is concerned only with the existence of an internationally unlawful situation as defined by a relevant primary norm. Once the situation is identified, it is possible to determine whether the breach in question is instantaneous, continuing or composite – but beyond this, the basic contours of the law remain unaffected.

8.3.1 Instantaneous breaches

The first category of act conceived under the ARSIWA is ordinarily called, for the sake of convenience, an 'instantaneous breach'.[74] This connotes that the act and its consequences are fixed at a particular point in time.[75]

The concept is reflected in ARSIWA Article 14(1) as follows:

> 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.

The commentary itself gives no examples as to what may constitute an instantaneous or non-continuing breach. However, the commentary to its predecessor, Draft Article 24,[76] includes a number of examples,[77] such as the military forces of one state shooting down an aircraft from another state lawfully flying over the territory of the former, the latter, a third state, or a *res communis* area (e.g. the shooting down of Iran Air

[73] Further: Crawford, Second Report, 20–9.

[74] Karl (1987), 99–100; Pauwelyn (1995), 418. The term emerges from the Draft Articles Commentary, Art. 24, §5 n. 417, which links the adjective 'instantaneous' to the general theory of internal law, and to domestic crimes such as murder, the infliction of injury, and arson. The term has also been employed by the International Court: *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 54. Salmon suggests that ARSIWA, Art. 14(1) neglects to take into account the preparation time inherent in any internationally wrongful act, however short it may be: Salmon (2010), 384–5.

[75] Salmon (2010), 384:

> The instantaneous act occurs when its conditions for existence are fulfilled and at that moment it constitutes a wrongful act. By definition, it ceases to exist at the expiration of the relatively brief time period that is necessary for its accomplishment.

[76] The wording of which was substantially similar to ARSIWA, Art. 14(1):

> 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.

[77] Draft Articles Commentary, Art. 24, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:04 Page Number: 255

Flight 655 over the Strait of Hormuz by surface-to-air missiles fired by the USS *Vincennes* on 3 July 1988[78]); the torpedo boat or submarine of a belligerent state sinking a neutral or unarmed non-combatant ship on the high seas (e.g. the sinking of the US-flagged SS *Robin Moor* by the German U-Boat *U-69* on 21 May 1941[79]); the police of one state (or its agents) killing or wounding the representative of another state; or organs of a state confiscating or destroying the building in which a foreign diplomatic mission has its headquarters (e.g. the destruction by US forces of the Chinese embassy in Belgrade on 7 May 1999 during Operation Allied Force, the NATO bombing of Yugoslavia[80]). What all these situations have in common is that the wrongful act itself can be narrowed down to a single date – virtually a single moment in time – and anything that continues afterwards represents the *effects* of the breach, rather than a continuation of the act itself.[81]

It is not always easy to separate the continuation of the illegal act from its effects. For example, in *Phosphates in Morocco*,[82] the French government accepted the jurisdiction of the Court by way of a declaration dated 25 April 1931, which provided that jurisdiction was accepted with respect to 'any disputes which may arise after ratification . . . with regard to situations or facts subsequent to such ratifications'.[83] Accordingly, one of the key tasks of the Court was to fix the date of the wrongful act relative to the declaration. The contested acts were a decision of the Moroccan Department of Mines dated 8 January 1925 depriving M. Tassara, an Italian citizen, of his property, and decrees of 1920 establishing a monopoly on the exploitation of phosphate reserves – both *prima facie* in breach of France's international obligations.

Italy attempted to bridge the temporal gulf between the France's acts and its ratification of the Court's jurisdiction by claiming that the Department's decision and the legislative monopoly were continuing acts, that 'extend[ed] over a period of time, so that when they [became]

[78] Gray (2008), 162.

[79] The incident was the subject of one of President F. D. Roosevelt's famous fireside chats, in which he declared the sinking to be 'under circumstances violating long-established international law and violating every principle of humanity': Roosevelt, *The Fireside Chats of Franklin Delano Roosevelt* (2007), 84.

[80] Murphy, 1 (2002), 99–1c02.

[81] See Karl (1987), 99: 'Such acts may be preceded by long preparations and have durable effects (such as the lasting physical disability of passengers); this does not, however, stop them from being instantaneous acts.'

[82] *Phosphates in Morocco*, Preliminary Objections, (1938) PCIJ Ser. A/B No. 74.

[83] Ibid., 10.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:04 Page Number: 256

complete, in the sense that all their constituent elements [were] present, they [did] not thereby cease to exist but continue[d] remaining identical with a permanent character'.[84] The Permanent Court disagreed, holding that the decision of the Department was an instantaneous act with lasting effects – a

> definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.[85]

The Court adopted a similar approach towards the phosphate monopoly, as it could not 'be considered separately from the legislation of which it is the result'.[86] The Court continued:

> If, by establishing the monopoly, Morocco and France violated [France's international obligations], that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are 'facts' which, by reason of their date, fall outside the Court's jurisdiction.[87]

This position was the subject of dissent by Judges van Eysinga and Cheng Tien-Hsi. The latter remarked:

> The monopoly, although instituted by the legislation of 1920, is still existing today. If it is wrongful, it is wrongful not merely in its creation but in its continuance ... This prejudice does not merely continue from an old existence but assumed a new existence every day, so long as the legislation that first created it remains in force.[88]

The view of the dissenters is reflected in modern commentaries on the subject.[89] But the question was not whether there was wrongful conduct subsisting in 1931 when the French declaration was ratified: it is whether Italy's claim was one 'with regard to situations or facts subsequent to' that date. Any breach had its immediate and direct source in

[84] *Phosphates in Morocco*, Observations and Submissions submitted by the Italian Government, (1938) PCIJ Ser. C No. 84, 494.

[85] (1938) PCIJ Ser. A/B No. 74, 28. This view was confirmed in both dissenting opinions: 33 (Judge van Eysinga); 36 (Judge Cheng Tien-Hsi). As the latter put it,

> If [the declaration] was wrongful, it was a wrong done in 1925. If it subsists, it subsists simply as an injury unredressed; but it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation. Considered as a wrong, it is not an existing fact, but entirely a thing of the past.

[86] Ibid., 26. [87] Ibid. [88] Ibid., 36. [89] See e.g. Pauwelyn (1995), 419–20.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:05 Page Number: 257

the decisions made by Moroccan authorities prior to that date; these decisions were the very subject matter of the claim and the conditions laid down in France's own declaration were thus not met.

A further area which is the cause of disagreement is that of expropriation of property. It may be considered that the taking of the property itself is an instantaneous act, with the situation of deprivation that follows reflective only of its consequences, as opposed to the act itself.[90] This may be seen in the decision of the General Claims Commission in *Mariposa Development Company*.[91] The Commission was established by way of a 1926 convention,[92] ratified by way of exchange of instruments on 3 October 1931. The Commission's jurisdiction *ratio temporis* did not extend to acts occurring after the date of ratification.[93]

The case concerned an order of the Supreme Court of Panama dated 20 October 1931 (i.e. after the date of ratification) depriving the claimant of its title. The order was in turn based on a law dated 27 December 1928 which permitted the recovery of public goods in the possession of individuals. The Commission considered that simple enactment of a law making expropriation possible was not in breach of international law – rather, the breach only crystallized with the decision of the Court, and was completed in that moment. It said:

> It was not until the rendition of the Supreme Court's opinion that the possession of the Mariposa Development Company was interfered with and its titles canceled. The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy the marketability of private property, render it valueless and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for the expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible.[94]

[90] This was the view that was held by the ILC during Ago's tenure: ILC Ybk 1976/II(2), 93; Draft Articles Commentary, Art. 24, §7.

[91] *Mariposa Development Company* v. *Panama (US/Panama)*, (1933) 6 RIAA 338.

[92] US–Panama Claims Convention, 28 July 1926, 138 LNTS 120.

[93] (1933) 6 RIAA 338, 338–9.

[94] Ibid., 940. See also ibid., 941:

> Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a *locus penitentiae* for diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:05 Page Number: 258

Accordingly, the Commission dismissed the case for want of jurisdiction *ratione temporis*.

Such questions depend very much on the facts of each case and the precise basis of claim. An outright, acknowledged expropriation (e.g. by decree or judicial decision) may well occur and be completed on a given day, whereas a 'creeping' expropriation consisting of a series of acts together amounting to virtual deprivation is in a different category – even though the source of obligation may be the same. *A fortiori* if what is complained about is not expropriation but refusal of access to property, such as with a freezing order, the consequences may differ.[95] This was the basis of the decision of the European Court of Human Rights in *Loizidou*.[96] Turkey's declaration accepting jurisdiction with respect to the Court was valid only with respect to disputes arising after 22 June 1990. Turkey asserted that the property in the northern part of Cyprus which was the subject of the dispute, although initially the subject only of occupation, had turned into a full expropriation with the passage of the Constitution of the Turkish Republic of Northern Cyprus (TRNC) in 1985. Thus, it argued, the Court lacked jurisdiction *ratione temporis*. The Court treated the matter as a denial of access to property rather than an expropriation.[97] This allowed it to rule that every day that the claimant was prevented from accessing her property continued the breach, carrying it past the date of Turkey's declaration and bringing in within the Court's jurisdiction.[98] The case is distinguishable from *Phosphates in Morocco*: the French declaration in the latter case was limited to claims having their origin after the critical date, whereas Turkey's reservation to the European Convention was not so limited; it was sufficient that the claim continued to arise after that date.

8.3.2 Continuing breaches

8.3.2.1 The concept of continuing breach

The counterpart of the 'instantaneous act' is the continuing act. In the context of the ARSIWA,[99] this is expressed in Article 14(2) as follows:

[95] Pauwelyn (1995), 420–1. [96] *Loizidou* v. *Turkey*, (1996) 108 ILR 443.

[97] A conclusion motivated, in part, by the fact that any expropriation would have been caused by the TRNC, an entity whose acts could not be recognized by the Court as a matter of international law: ibid., 461–2.

[98] Ibid., 462. Cf. the dissent of Judge Jambrek, 275–9.

[99] The concept emerged early in the work of the ILC, being reflected in Draft Art. 25(1), which declared that in the event of a continuing violation

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:05 Page Number: 259

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.

In essence, a continuing wrongful act is characterized by a course of conduct which extends over a period of time, remaining in breach of international law throughout.[100] The commentary states that the continuing act '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 obligation during that period'.[101] The concept of the continuing act is also relevant in cases of succession as between states, as the continuation of an unlawful state of events by a successor state is one of the exceptional situations in which there may be succession to responsibility.[102] Where the continuing act concerns an obligation to prevent a given event, such as the obligation contained in Article 22(2) of the Vienna Convention on Diplomatic Relations[103] (VCDR) as breached by Iran in the *Tehran Hostages* case,[104] or the obligation to prevent transboundary harm established in the *Trail Smelter*

> the breach . . . occurs at the moment when the 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.

[100] Further: Karl (1987), 100; Salmon (2010), 386–7. Pauwelyn links this definition to the concept in Belgian and French law of 'infractions continus ou successives/voortdurende misdrijven', referred to also in common law jurisdictions as 'continuing wrongs': Pauwelyn (1995), 417.

[101] ARSIWA Commentary, Art. 14, §3.

[102] See e.g. the case of Greece in the *Lighthouses Arbitration*, in which the continuation of an unlawful situation initiated by Cretan authorities while under Turkish suzerainty (namely Claim No. 4, the maintenance of a discriminatory concession) by Greece resulted in succession to responsibility with respect to the entirety of the continuing act: *Lighthouses Arbitration between France and Greece (Claims No. 11 & 4)*, (1956) 23 ILR 81, 89–90. Further: Chapter 13.

[103] 16 April 1961, 500 UNTS 95, Art. 22(2):

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or the impairment of its dignity.

[104] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 31–2:

> [T]he Iranian government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or stop it before it reached its completion . . . [I]n the opinion of the Court . . . the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means . . . This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under [VCDR Article 22].

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:06 Page Number: 260

arbitration,[105] ARSIWA Article 14(3) provides that '[t]he breach of [such] an international obligation . . . occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.'[106] Thus the focus of the inquiry is on the situation contrary to international law on foot, and its duration.

Examples of this species of breach abound in the case law of the International Court.[107] Perhaps the most obvious example is *Tehran Hostages*,[108] where the continued detention of US diplomatic personnel by the Iranian state – following the latter's adoption of the actions of non-state actors as its own within the meaning of ARSIWA Article 11 – was in continuing violation of Iran's responsibilities towards the United States under the VCDR. Another example is *Gabčíkovo-Nagymaros*, in which the Hungarian non-performance of its agreement[109] with Slovakia regarding the damming of the Danube river constituted a continuing breach for as long as the performance was not renewed.[110] Conversely, the Slovakian implementation of the so-called 'Variant C', which diverted the Danube further onto Slovakian territory, was held to be in breach of the same agreement vis-à-vis Hungary until such time as its original course was restored.[111] Most recently, the Court in *Questions Relating to the Obligation to Prosecute or Extradite*[112] held that Senegal's failure to try or extradite the former president of Chad, Hissène Habré, for acts of torture and crimes against humanity constituted a continuing breach of multiple provisions of the Convention Against Torture.[113]

[105] *Trail Smelter (Canada/United States)*, (1941) 1 IELR 278, 301:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

[106] Further: Salmon (2010), 390–1.

[107] The Commentary gives a variety of examples, such as the maintenance of legislative provisions incompatible with the treaty obligations of the enacting state, the unlawful detention of an embassy official or unlawful occupation of embassy premises, maintenance of force by colonial domination, unlawful occupation of part of the territory of another state or stationing armed forces in another state without its consent: ARSIWA Commentary, Art. 14, §3. Also Salmon (2010), 386.

[108] ICJ Rep. 1980 p. 3, 35–7.

[109] Treaty concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, 16 September 1977, 1109 UNTS 211.

[110] [1997] ICJ Rep. 17, 46.

[111] Ibid., 54, 57.

[112] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ, 20 July 2012, §§71–117.

[113] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Arts. 5(2), 6(2), 7(1).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:06 Page Number: 261

Two bodies which have continuously sought (not always successfully) to advance understanding of continuing breaches are the European Commission of Human Rights and the European Court of Human Rights.[114] The Commission made one of the earliest identifications of the concept in *De Becker* v. *Belgium*.[115] In that case, a newspaper editor was found guilty by the Belgian courts of collaborating with the German occupation forces from 1940 to 1943. The final sentence – following an appeal from the death penalty – was for life imprisonment accompanied by the forfeiture of certain civil and political rights.[116] This forfeiture stood even after the claimant's conditional release and emigration to France in 1951. He subsequently brought a claim before the Commission, alleging breach of ECHR Article 10, with the Commission concluding that the case was admissible on the basis that although the legislation under which the claimant was convicted entered into force before the ECHR, it was of continuing effect:

> It should be recalled, in this connection, that, in accordance with the general principles of international law, borne out by the spirit of the Convention as well as by the preliminary work, the Contracting Parties have undertaken, without prejudice to the provisions of Article 64 of the Convention, to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end, since the Convention is binding on all the authorities of the Contracting Parties, including the legislative authority. It follows that the Commission is competent to consider whether the domestic legislation of the Contracting Parties is compatible with the Convention, and that this competence exists likewise in respect of Laws promulgated before the date on which the Convention came into force, if, like Article 123 *sexies* of the Belgian Penal Code, they remain in force after that date.[117]

However, although *De Becker* represents a relatively clear-cut example of a continuing situation (at least from the perspective of the ECHR), the jurisprudence surrounding the ECHR reflects a marked inconsistency. In the similar case of *X* v. *Belgium*,[118] the Commission reached the opposite

[114] Generally: van Pachtenbeke and Haeck (2010).

[115] (1958) 25 ILR 172. For the case as it progressed before the European Court of Human Rights, see *De Becker* v. *Belgium*, (1962) 33 ILR 205.

[116] Including, *inter alia*, surrendering the right to hold a proprietary interest in, or take part in the participation of, the administration, editing or distribution of a newspaper or other publication: (1958) 25 ILR 172, 173.

[117] Ibid., 180. Also *Dudgeon* v. *UK*, [1981] ECtHR 7525/76, §41: 'the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect of his private life'. Pauwelyn (1995), 422.

[118] [1968] ECommHR 2568/65.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:06 Page Number: 262

conclusion as to the continuing nature of the act – and hence the admissibility of the claim – on the basis that the act of state at which the application was directed was a judicial decision.[119] But legislative decisions may create illegal situations which resolve instantaneously (e.g. outright expropriation).[120] The source of the act in terms of the separation of powers within the state is irrelevant – what matters is the character of the act itself.

Subsequent decisions of the European Court of Human Rights have been less than helpful in clarifying the Court's methodology. In *Xheraj* v. *Albania*, the Court considered whether the quashing by the Albanian Supreme Court of a previous acquittal could be considered a continuing situation, and concluded that 'the applicant continues to be subject to the consequences of the quashing of the decision',[121] rendering the case admissible. But the Court reversed itself again in *Kravchenko* v. *Russia*, noting that 'the quashing of a final judgment is an instantaneous act, which does not create a continuing situation'.[122] The Court's confusion continued into decisions relating to expropriation,[123] with the jurisprudence indicating that cases of de facto expropriation – as in *Loizidou* – may be considered continuing situations,[124] while clear cases of *de jure* expropriation are classified as instantaneous.[125] The differentiating factor would appear to be the retention of legal title over the property by the claimant (present in the de facto case, but not in the *de jure*),[126] though this might be criticized as an excessively technical way of dealing with the issue. At the end of the day, the individual does not have enjoyment of the property.

8.3.2.2 The distinction between instantaneous and continuing breach

Thus it is necessary to reconsider the ways in which an instantaneous and a continuing breach might be distinguished. As stated in the commentary,

[119] Van Pachtenbeke and Haeck (2010), 50. [120] Ibid. Also Pauwelyn (1995), 423.
[121] [2008] ECtHR 37959/02, §82. The decision was described by some commentators as 'an unfortunate lapse on the part of the Court': van Pachtenbeke and Haeck (2010), 51.
[122] [2009] ECtHR 34615/02, §34.
[123] Van Pachtenbeke and Haeck (2010), 51. Also ARSIWA Commentary, Art. 14, §§9, 10.
[124] See e.g. *Papamichalopoulos* v. *Greece*, [1993] ECtHR 14556/89, §40; *Vasilescu* v. *Romania*, [1998] ECtHR 27053/95, §49; *Malama* v. *Greece*, [2001] ECtHR 43622/98, §35.
[125] See e.g. *Malhous* v. *Czech Republic*, [2000] ECtHR 33071/96; *Kopecky* v. *Slovakia*, [2004] ECtHR 44912/98, §35; *Von Maltzan* v. *Germany*, [2005] ECtHR 71916/01 et al., §74; *Blecic* v. *Croatia*, [2006] ECtHR 59532/00, §86; *Beshiri* v. *Albania*, [2006] ECtHR 7352/03, §76.
[126] Altiparmak, (1999) 21 Turkish YHR 3, 14; van Pachtenbeke and Haeck (2010), 51.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:07 Page Number: 263

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 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 is a continuing one.[127]

Pauwelyn[128] has developed three criteria of identification between instantaneous and continuing acts. In the first place, 'the focus should be on the definition of the international obligation, rather than the act breaching it and its effects'.[129] Put another way, the inquiry should examine the broad arc of the *situation* in question, rather than the existence or non-existence of a particular *fact*. To a certain extent, this inquiry will be directed by the norm in question, and its susceptibility to instantaneous resolution (e.g. a discrete use of unlawful force) or continuation (e.g. a forced or involuntary disappearance, defined as a continuing wrongful act which continues for as long as the person in question is unaccounted for[130]).

Pauwelyn notes that an inquiry as to whether the state in question intended that the act continue, whilst relevant in a domestic context concerning a private individual, is irrelevant when considering state responsibility, as an assessment of the internal decision-making process of the state and associated corporate *zeitgeist* is an inappropriate task for an international tribunal.[131]

Pauwelyn's first factor is useful but is open to the criticism that it adds little to the analysis.[132] His second factor is a useful supplement, addressing the question of cessation under ARSIWA Article 30(a) and using that as a device to determine whether a breach is to be classed as continuing.[133] Put simply, if cessation remains a useful remedy, then the breach is clearly still *en train*.[134] This was highlighted obliquely by the International Court in the *Tehran Hostages* case:

[127] ARSIWA Commentary, Art. 14, §6. [128] Pauwelyn (1995), 420–1.
[129] Ibid., 420. Further: Buyse (2006), 76–8.
[130] *Blake* v. *Guatemala*, [1998] IACtHR Ser. C No. 36, §67. [131] Pauwelyn (1995), 420.
[132] Buyse (2006), 76.
[133] Also Salmon (2010), 388; ARSIWA Commentary, Art. 14, §12.
[134] Conversely, if the only appropriate remedy is restitution in kind or compensation, then the breach has concluded: Pauwelyn (1995), 420–1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:07 Page Number: 264

[VCDR Articles 22(1) and (3)] have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of the mission without consent . . . [T]hey constitute continuing breaches of [VCDR] Article 29 . . . which forbids any arrest or detention of a diplomatic agent . . . [T]he Iranian authorities are without doubt in continuing breach of the provisions of [VCDR] Articles 25, 26 and 27 . . .[135]

To this end, the Court ordered cessation on the part of Iran.[136]

Thus, in the case of a continuing breach perpetrated by legislation, cessation entails the repeal of the law in question, thereby ending the breach.[137] Similarly, in the case of an involuntary disappearance, the return of the individual will end the breach. In the case of a discriminatory trade regime, the lifting of illegal tariffs or the ending of unfair trade practices is considered dispositive. As Buyse notes, however, this second tool does not always stand on its own, and in difficult cases – particularly when considering a continuing omission under an obligation of prevention – it may need to be supplemented by the overall analysis of the first tool.[138]

Third, Pauwelyn requires that one assess whether the act complained of can be plausibly thought of as continually renewed or repeated for each day the breach 'continues', or whether only its effects can be detected.[139] As with his first factor, this effectively restates the problem,[140] although Pauwelyn does usefully reframe the question as it concerns the legal status of a person – if it is affected more or less consistently for a given period of time, the act is a continuing one.[141]

8.3.2.3 Completion of the act

Whatever its status while on foot, a continuing act once completed – by way of cessation or otherwise – is no longer considered a breach of international law and falls, to all intents and purposes, within the meaning of ARSIWA Article 14(1). The commentary notes that

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

[135] ICJ Rep. 1980 p. 3, 37. [136] Ibid., 44–5.

[137] Pauwelyn points out that this may end only one element of the breach. If expropriation is to be considered a continuing breach, the repeal of an expropriation law will not cure it – only the return of the property will suffice: Pauwelyn (1995), 421. Further: Buyse (2006), 76.

[138] Buyse (2006), 77. [139] Pauwelyn (1995), 421. [140] Buyse (2006), 77.

[141] Pauwelyn (1995), 421.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:07 Page Number: 265

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 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.[142]

The conclusion that completion results in the equation of a continuing act with an instantaneous act within the meaning of ARSIWA 14(1) has led some commentators to call for the abandonment of the instantaneous/continuing distinction and a focus simply on incomplete/complete acts, with instantaneous acts being there described as acts which are 'complete' from their inception.[143] But as a method of characterization the former distinction remains useful, and in any event it is entrenched in the literature.

Alternatively, the wrongful act may 'cease' in the sense that it is no longer to be considered as such, that is, because of the termination of the obligation or a change in the law (although this is subject to the intertemporal law insofar as the bringing of the claim is concerned). In *Rainbow Warrior* the tribunal held (somewhat controversially) that France's obligation to maintain its two agents on Hao ended after three years had passed, including times when they had not been on the island in breach of the treaty. It followed from this (less controversially) that the breach complained of was no longer continuing. The tribunal said:

> Obviously a breach ceases to have continuing character as soon as the violated rule ceases to be in force. The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. If, on the contrary, the violated primary obligation is no longer in force, naturally an order for cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued.[144]

8.3.3 Composite breaches

8.3.3.1 The character of the composite breach

The third class of breach covered by the ARSIWA is that of the composite breach, expressed in ARSIWA Article 15 as follows:

[142] ARSIWA Commentary, Art. 14, §5. [143] Salmon (2010), 389.
[144] (1990) 82 ILR 499, 573.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:08 Page Number: 266

(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.

As Salmon notes, the composite act of state is one which 'although not consisting of a single conduct, continues in time: it is constituted of a series of individual acts of the State which follow each other, and which all contribute to the realization of the global act in question'.[145]

The concept of the composite act was introduced by Ago and passed through the first reading as Draft Article 25(2).[146] During the second reading, efforts were made to particularize the provision so as to apply only to 'systematic'[147] obligations – that is, primary norms which define acts as wrongful in terms of their inherently wrongful or systematic character.[148] The European Court has defined the concept in terms of a practice contrary to the ECHR, being 'an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system'.[149] Thus a composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts. The composite act may itself be made up of a series of individually unlawful acts.[150]

It is useful to take examples of both the systematic and non-systematic primary rules in order to test the idea of the composite wrongful act. The

[145] Salmon (2010), 391.
[146] See also Draft Art. 18(4), providing that 'there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that state'.
[147] Referred to by some commentators as the requirement of 'globality': Salmon (2010), 391–3.
[148] Crawford, Second Report, 35–7. Also Salmon (2010), 391.
[149] *Ireland* v. *UK*, (1978) 58 ILR 188, 197.
[150] ARSIWA Commentary, Art. 15, §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.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:08 Page Number: 267

prohibition against genocide,[151] formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide[152] and later instruments[153] is a good example of a 'systematic' primary rule, in the sense that it implies, if it does not actually require,[154] that the responsible entity (including a government) will have adopted a systematic policy or practice, and that the individual acts in question which together constitute genocide would not or might not do so taken individually. According to Article II(a) of the Genocide Convention, the prime case of 'genocide' is '[k]illing members of [a national, ethnical, racial or religious] group' with the intent to destroy that group, in whole or in part. Killing one person within the meaning of Article II(a), whatever the motive, is not genocide: the killing has to be multiple,[155] and carried out with the relevant intention, that is, the elimination of the relevant group as such.

In this context, the idea of a composite wrongful act elaborated in ARSIWA Article 15 is entirely appropriate. Genocide is not committed until there has been an accumulation of acts of killing, causing harm and so forth, committed with the relevant intent, so as to satisfy the definition contained in Article II of the Genocide Convention. But once the threshold is crossed, it is reasonable to say that the time of commission extends over the whole period during which any of the acts was committed. Assuming that the intertemporal law applies to genocide, it is also reasonable to say that genocide is committed if the acts committed during the period when the Convention was in force (and latterly, as reflecting certain peremptory norms of international law) were sufficient to constitute genocide.[156]

[151] Ibid., §3. [152] 9 December 1948, 78 UNTS 277.

[153] See e.g. Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, 23 May 1993, Art. 4; Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, 8 November 1994, Art. 2; Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, Art. 6.

[154] Cf. the case of crimes against humanity, which in some formulations will require 'a widespread or systematic attack directed against any civilian population': ICC Statute, Art. 7(1). For further examples see ARSIWA Commentary, Art. 15, §2.

[155] As Judge ad hoc Lauterpacht acknowledged in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order on Counter-Claims, 17 December 1997, ICJ Rep. 1997 p. 243, 282. This does not mean that a camp guard who participated in genocidal acts but was personally responsible for killing only one member of the group would necessarily be innocent: such conduct committed with the necessary intent would clearly involve complicity with genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Art. III(e).

[156] It is, however, doubtful that the intertemporal law applies to the Genocide Convention *as such*, since according to Article I thereof it is declaratory in character, and it is

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:08 Page Number: 268

The 'systematic' example of genocide may be contrasted with an example based on the situation in *Gabčíkovo-Nagymaros*. Two parties to a boundary waters agreement are under a simple obligation to ensure that each takes no more than a specified volume of water from a boundary river in a calendar year. If it is assumed that one of the parties authorizes different users to take each month volumes of water which (while themselves not unlawful under the agreement) make it likely that over the year the total taken will exceed the quota, then can the entire series of takings constitute a composite act within the meaning of ARSIWA Article 15? The approach of the majority in *Gabčíkovo-Nagymaros* suggests that at least until the act occurs which predetermines the final decision to exceed the quota, no wrongful act will have been committed[157] – indeed, no wrongful act will be committed until the quota itself is exceeded. Perhaps if the state set out with the deliberate intention to violate the treaty and gave monthly permits accordingly, it might be said that the breach began in January. But it cannot be said that the primary norm in question exhibits a 'systematic' character whereby individual acts are translated in a legal sense into something else. Rather, the state in question has simply breached a binary obligation (*n* mega litres versus not-*n* mega litres) not to take more than a certain amount of water from the river.

Accordingly, just because a simple obligation is breached by a composite act there is no reason to treat the breach as different in kind. No doubt composite acts are likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well (e.g. the detention of a diplomat). The position is different, however, when the obligation itself (and thus the primary underlying rule) fixes on the cumulative character of the conduct as constituting the essence of the wrongful act. Apartheid was qualitatively different from other acts of racial discrimination, and genocide may be distinguished from individual acts of ethnically motivated killing.[158]

8.3.3.2 Determining the scope of the composite breach

As noted in the commentary to ARSIWA Article 15, the character of a composite act is such that the original act of state which inaugurated the

therefore probable that the obligation of *aut dedere aut iudicare* in relation to genocide relates to genocide whenever committed. The International Court clearly acted on this basis in the *Bosnian Genocide* case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Rep. 1996 p. 595, 616.

[157] ICJ Rep. 1997 p. 7, 54. [158] ARSIWA Commentary, Art. 15, §4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:09 Page Number: 269

series of actions leading to the breach cannot be the same as the time at which the act is deemed to have matured or been accomplished.[159] The role of the first link in the chain can only be appreciated once the whole chain – or at least a significant part of it – is visible.

ARSIWA Article 15(1) accordingly defines the time at which the composite act occurs as when 'the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act'. It is not a requirement that the breach also be the last in the series (i.e. completing the breach), and the composite act in this sense may be seen as taking on the proportions of a continuing act.

The existence of a composite act is dependent on the primary norm in question. As the commentary states,

> 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 [ARSIWA Article 15] 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 wrongful 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 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 as being classified as a composite wrongful act if, taken together, they are sufficient to constitute a breach.[160]

ARSIWA Article 15(2) deals with the extension of time of the composite act. Once a sufficient number of actions or omissions have occurred to produce the composite act, the breach is in effect backdated to the first of the acts in the series.[161] In this way, an act of ethnically motivated murder may in retrospect be considered to be the first act of a genocidal campaign, or a single instance of racial discrimination the beginning of a regime of apartheid.

8.3.4 Complex breaches

Mention may be made in passing of a category of breach reflected in the first reading of the ARSIWA but which was eliminated in the course of the second.[162] The concept of the 'complex' breach was introduced by Ago as counsel for Italy in *Phosphates in Morocco*. As an alternative

[159] Ibid., §7. [160] Ibid., §8. [161] Ibid., §9.
[162] Generally: Pauwelyn (1995), 428–9; Salmon (2010), 393–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:09 Page Number: 270

argument before the Permanent Court, Italy contended that all acts occurring *prior* to the critical date of the Court's jurisdiction *ratione temporis* should be deemed a single entity by virtue of a connection with facts arising *subsequent* to the critical date:

> This 'cornering of Moroccan phosphates' is a complex wrongful act, that is at the same time composed of several but different breaches of international law, but that have a more extended scope as a whole, distinct from that of its constituent elements . . . Every one of these single wrongful acts thus pursues the progressive attack of the same treaty rules . . . The whole of these acts, that are closely linked by a necessary connection, arising from the same resolution, aiming at the same purpose, represents, from a logical and teleological point of view, only one continuing and progressive internationally wrongful act as far as the practical and legal effects are concerned.[163]

Ago's views were straightforwardly rejected by the Permanent Court,[164] but in his capacity as ILC Special Rapporteur he prevailed on the ILC to endorse them, thus gaining a retrospective 'win' in the first case of his career. Draft Article 25(2) provided:

> The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Thus a complex breach was considered by Ago to be constituted by a succession of acts emanating from state organs which related to some common situation (i.e. the monopolization of phosphate production in Morocco). Taken as a whole, it was said, these could be considered a single act.[165] Examples included in the Draft Articles Commentary included acquittal at all the successive jurisdictional levels of the perpetrators of a crime against a representative of a foreign government and denial of justice in the case of a foreign investor.[166] The complex act may

[163] *Phosphates in Morocco*, (1938) PCIJ Ser. C No. 85, 1234.

[164] *Phosphates in Morocco*, (1938) PCIJ Ser. A/B No. 74, 26, 28–9:

> In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.

[165] Salmon (2010), 393.

[166] Draft Articles Commentary, Art. 25, §15. Also Salmon (2010), 394.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:09 Page Number: 271

be distinguished from the composite act by reference to the primary norm under consideration. In the case of a composite act such as apartheid, there is a systematic policy which elevates the situation as a whole above that of a series of individual acts of discrimination. Such individual acts, however, may on their own constitute complex acts because of the collusion between different organs or conduct against the individual concerned over a period of time but in any event involving the same case throughout.[167]

The notion of a 'complex act' was the subject of considerable controversy following the first reading.[168] If Ago's position was correct, as Pauwelyn notes, a continuing violation could be established which existed during the entire period required by a state to take a final decision on a specific case, even where the obligation in question was breached only at the end of that period.[169] This is markedly inconsistent with later cases such as *Gabčíkovo-Nagymaros*. There, the Court held that Czechoslovakia was entitled to build the necessary components of the so-called 'Variant C' on its territory so long as the project was not put into effect. When Variant C was activated so as to divert the waters of the Danube, the Court held that the breach by Czechoslovakia (and later, Slovakia) began and continued from the time of diversion in October 1992, rather than the point at which preparations for the alternative commenced in November 1991.[170] This was despite the fact that, by Ago's reckoning, the entire process of planning would have represented a complex act within the meaning of Draft Article 25(3), and thus susceptible to consideration as a whole.[171]

The ILC did not treat the category of complex acts kindly on second reading, with the Special Rapporteur noting its inconsistency with the approach of the Court in *Gabčíkovo-Nagymaros*.[172] Further problems with

[167] Crawford, Second Report, 35.

[168] See e.g. Perrin, in Diez et al., *Festschrift für Rudolf Bindschedler* (1980) 271; Salmon, (1982) 28 AFDI 709; Pauwelyn (1995), 427–8; Salmon (2010), 393–5. See also Crawford, Second Report, 30–1.

[169] Pauwelyn (1995), 428

[170] ICJ Rep. 1997 p. 7, 54.

[171] Counsel for Hungary argued the contrary but not on grounds of the 'complex act': instead, the decision to proceed with Variant C was to be seen as a repudiation of the 1977 treaty or alternatively an 'anticipatory breach' of the treaty: ICJ Doc. CR 1997/6, 25–35 (Crawford). The Court held that as Variant C was in significant part a response to Hungary's prior breach, Hungary was precluded from relying on it as a ground for termination under VCLT, Art. 60: ICJ Rep. 1997 p. 7, 55–6, 60–2, 66–7. Thus a treaty 'more honour'd in the breach than in the observance' became in effect interminable (cf. *Hamlet*, I.iv.16).

[172] Crawford, Second Report, 37.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:10 Page Number: 272

the position were also identified. Ago's formulation drew a sharp distinction between composite and complex acts. In the case of composite acts, the observer was required to address the first act in the series which, taken alongside the earlier events in the chain, was sufficient to constitute the breach (i.e. the culminating act). In contrast, the observer in the case of a complex act was required to look at the last act. Why such a difference should exist was not explained. At the time the culminating act is performed, it may not be clear that further acts are to follow and that the series is not yet complete. Yet if up to that point the injured state is justified in holding that a wrong has been committed, why should it not be able to act on that basis at that time?

A similar complaint was identified by the ILC with respect to the interaction between a complex act and the intertemporal law. Until the series of acts is complete, one may not know precisely how to characterize the wrongful act, for example, in *Foremost Tehran Inc* v. *Islamic Republic of Iran* whether the appropriate action is for discrimination against foreign shareholders or de facto expropriation.[173] Yet if analysed through the lens of the complex act, the application of the law in force at the time the first act in the series occurs may depend on how the whole series is to be characterized. The issue of the intertemporal law is thus made uncertain and to some extent subjective. This is exacerbated in that the distinction between complex and composite acts depends on what is identified as the relevant 'case', yet this can be done in different ways. As seen in *Ireland* v. *United Kingdom*,[174] for example, the applicant may focus on the 'practice' of which individual incidents are merely examples. Is the practice the 'case' or is it the individual incidents which are induced, non-exhaustively, to prove the practice?

The distinction between the composite and complex act is thus dependent on the unspecified notion of a 'case', yet important questions of the intertemporal law may be seen to turn on the difference between the two. Issues of such importance ought not to be dependent on the manner in which the applicant formulates the claim. In any event, it is far from clear why, in principle, the law in force at the time of the first act in the series should apply throughout the chain. Either the individual

[173] The Iran–US Claims Tribunal held that the acts in question did not constitute expropriation by the terminal date of the Tribunal's jurisdiction: (1986) 10 Iran–US CTR 228.

[174] (1978) 58 ILR 188, 197. See also the US counterclaim in *Oil Platforms (Iran v. US)*, Order on Counter-Claim, 10 March 1998, ICJ Rep. 1998 p. 190, which likewise focused on a general situation rather than specific instances.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 8 Title Name: CRAWFORD
Date:18/3/13 Time:10:16:10 Page Number: 273

acts are to be assessed individually, in which case the law in force at the time that each act was committed should be applied, or they should be assessed as a series, in which case the rule as applied to the composite act appears to be equally appropriate. On neither formulation is there any reason to freeze the applicable law as it was on the date when the complex act began. For these reasons, the notion of 'complex act' was abandoned by the ILC on second reading,[175] to the general endorsement of the Sixth Committee.[176]

[175] Crawford, Second Report, 38; ILC Ybk 1999/I, 49–54.
[176] 13 January 2000, UN Doc. A/C.6/54/SR.21, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:57 Page Number: 274

9 Circumstances precluding wrongfulness[1]

9.1 Justifications and excuses in international law

The philosopher J. L. Austin, who considered excuses to form 'a whole branch, even a ramiculated branch, of philosophy', warned that 'we do not use the terms justification and excuse as carefully as we might' and 'a miscellany of even less clear terms ... hovers uneasily between partial justification and partial excuse'.[2] This is certainly true of justifications and excuses in international law. ARSIWA Part I, Chapter V attempts to clarify the variegated customary rules on that 'miscellany of even less clear terms'.[3] This chapter first discusses the category of 'circumstances precluding wrongfulness' and how it differs from the termination or suspension of an obligation. It then considers each such circumstance in turn: consent (Article 20), self-defence (Article 21), countermeasures in respect of an internationally wrongful act (Article 22), *force majeure* (Article 23), distress (Article 24) and – the most controversial – necessity (Article 25). Lastly it considers three further matters: acts that do not conform to obligations under peremptory norms (Article 26); compensation for material loss caused by an act whose wrongfulness is precluded (Article 27); and the burden of proof.

9.1.1 The category of 'circumstances precluding wrongfulness'

The six circumstances in Part I, Chapter V do not self-evidently fall into a single category. It is true that each 'provides a shield against

[1] Generally: *Brownlie's Principles*, 563–5; Christakis, in Angelet et al. (eds.), *Droit du pouvoir, Pouvoir du droit – Mélanges offerts à Jean Salmon* (2007) 223; Crawford, Pellet and Olleson (2010), 427–501; Jagota, (1985) 16 NYIL 249; Lowe, (1999) 10 EJIL 405; Spinedi and Simma (eds.), *United Nations Codification of State Responsibility* (1987), 143–285; Thirlway, (1995) 66 BYIL 1, 70–80.

[2] Austin, (1956–7) 57 PAriS 1, 1–3. [3] ILC Ybk 1999/I, 137.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:58 Page Number: 275

an otherwise well-founded claim for the breach of an international obligation'.[4] But that could be true of an armoury of other defensive arguments. The category might be defined negatively; it does not extend to requirements necessary for a primary obligation to arise in the first place and it excludes principles of admissibility and jurisdiction.[5] There is, however, something the six arguments share (with the arguable exception of consent) that those others lack. Like analogous defences in domestic law, they preclude the *wrongfulness* of an act.[6] They accord with the premise, underlying the ARSIWA, that fault is objective rather than subjective.[7] Any act or omission attributable to a state under international law that breaches an international obligation of that state is internationally wrongful (Article 2) and entails its international responsibility (Article 1). Nothing – neither a lack of subjective fault nor anything else – can absolve a state of that responsibility.[8] So circumstances can have the effect of precluding wrongfulness and therefore responsibility only if they mean that there is no breach.

Most of the omissions from the category that have aroused discussion can be explained as primary rules or as concerned with admissibility or jurisdiction. Although an analysis of those omissions illustrates the essential coherence of the category, it also reveals the fuzziness of its boundaries. Some of them can be understood historically.[9] The Preparatory Committee of the Hague Conference 1930 identified the 'immediate necessity of self-defence against the danger with which the foreigner threatened the State or other persons' and 'circumstances justifying the exercise of reprisals' (countermeasures).[10] Two ILC projects later

[4] ARSIWA Commentary, Pt I, Ch. V, §1. [5] Ibid., §7.

[6] Crawford, Second Report, 58–9; Draft Articles Commentary, Ch. V, §2.

[7] On subjective and objective fault in this context see Szurek, in Crawford, Pellet and Olleson (2010) 427, 433–5. On the position taken by the ARSIWA generally see Chapter 2.

[8] The Draft Articles Commentary, Ch. V, §4 postulates that although any circumstance precluding wrongfulness 'necessarily' also precludes responsibility,

> [t]here is no reason why, from a purely theoretical standpoint, there should not be some circumstances that, while precluding responsibility, would not at the same time preclude the wrongfulness of an act which, by way of exception, would not give rise to responsibility.
>
> But characterizing an act as wrongful without attaching any adverse legal consequences to it would have no obvious point and would 'be in flagrant contradiction with one of the dominant characteristics of a system of law so imbued with effectiveness as the international legal order': §5.

[9] On this history see further Jagota (1985).

[10] The Committee listed them in its Bases of Discussion along with two other circumstances – concerning the invocation of domestic law and the Calvo clause – that are not relevant for present purposes. It also considered, though the points were not

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:58 Page Number: 276

expanded the category. In his work on international responsibility for injuries to aliens, García Amador listed *force majeure*, necessity and fault on the part of the alien, but not self-defence or three circumstances that he considered 'inadmissible': reprisals, non-recognition of a state or government and severance or suspension of diplomatic relations.[11] In his work on the law of treaties (which ultimately left aside excuses for the non-performance of treaties as it did state responsibility in general[12]), Fizmaurice listed some of the circumstances now included in the ARSIWA (Articles 21–23) plus three others: incompatibility with a new rule in the nature of *jus cogens*; acceptance of non-performance by the other party, now perhaps subsumed by consent (Article 20); and previous non-performance by another party (*exceptio inadimplenti non est adimplendum*).[13]

The ARSIWA's list of six survived, however, slightly modified but essentially intact, from Ago's initial work.[14] The list was inspired by Fitzmaurice[15] but dropped his provision on peremptory norms and the two proposals on non-performance. The ILC subsequently considered the restoration of the former[16] and the addition of a narrow *exceptio* 'to the effect that the wrongfulness of an act of a State is precluded if it has been prevented from acting in conformity with the obligation in question as a direct result of a prior breach of the same or a related international obligation by another State'.[17] Reference to peremptory norms did find its way in, albeit in a negative form (Article 26). But, following a mixed reception,[18] the *exceptio* did not, for two reasons. The

carried to any conclusion, that in diplomatic protection the 'provocative attitude' of an injured person could affect state responsibility and that a state could decline responsibility for damage by its armed forces in quelling 'an insurrection, riot or other disturbance': ILC Ybk 1956/II, 224–5. Also ARSIWA Commentary, Pt I, Ch. V, §5; Crawford, Second Report, 57.

[11] García Amador, Third Report, ILC Ybk 1958/II, 50–5, 72.

[12] 22 May 1969, 1155 UNTS 331, Art. 73.

[13] Fitzmaurice, Fourth Report on the Law of Treaties, ILC Ybk 1959/II, 43–7, 63–74; Crawford, Second Report, 58.

[14] Except perhaps the removal of 'fortuitous event' from the *force majeure* provision. But that was because in international law those two terms denote the same thing and because not all cases of fortuitous event in French law ('cas fortuit', whence the term comes) amount to *force majeure* under Art. 23: Crawford, Second Report, 67. See further Szurek, in Crawford, Pellet and Olleson (2010) 475, 476–7.

[15] ILC Ybk 1999/I, 137.

[16] Crawford, Second Report, 78, 87.

[17] Crawford, Second Report, 82, 87–8. This narrow formulation was recognized in *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9, 21.

[18] Crawford, Third Report, 95–6. For a summary of the debate on the proposal see ILC Ybk 1999/II(2), 78–80. For a summary of states' responses see UN Doc. A/CN.4/504, 15–17.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:58 Page Number: 277

first was that in its broad form the *exceptio* is based on interpretation: the treaty or contract treats performance of the same or related obligations (synallagmatic obligations[19]) as conditional. So it can properly be classified as a primary rule and not a circumstance precluding wrongfulness.[20] By contrast the six circumstances that were retained are all of general application – meaning that they apply to breaches of obligations arising from general international law, treaties, unilateral acts, membership of international organizations or anything else – unless a treaty or other *lex specialis* (Article 55) otherwise provides.[21] A practical reason for omitting a broad formulation of the *exceptio* is that it might produce escalating non-compliance by the two states involved, which would in effect negate the underlying obligation. The justification of the non-performance of synallagmatic obligations is better left to countermeasures or to the applicable law dealing with the termination or suspension of those obligations.[22]

But this explanation does not dispose of the proposed narrow *exceptio*. It is an application of the general principle that a party cannot rely on the consequences of its own unlawful conduct. Whether to include an aspect of that general principle in Part I, Chapter V was a matter of judgement in that it would be preserved by what is now Article 56 anyway.[23] The fact that the ILC declined to include it, even though it was capable of generating new consequences in the field of state responsibility, raises the prospect that the six circumstances that *are* included form a non-exhaustive list. Certainly on first reading the ILC did not want 'to be construed as closing the door' on the possibility that a circumstance that was not at that time held to preclude wrongfulness might have that effect in future.[24] But, as Szurek notes, 'one cannot envisage that such

[19] Including in the ARSIWA Commentary, Pt I, Ch. V, §9: '[the *exceptio*] is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness'.

[20] Crawford, Third Report, 95.

[21] ARSIWA Commentary, Pt I, Ch. V, §2; Crawford, Second Report, 57.

[22] Crawford, Second Report, 82. On the *exceptio* generally see Chapter 21. On the relationship of the broad form with countermeasures, which are juridically distinct, see Crawford, Third Report, 95.

[23] Crawford, Third Report, 95. There were also difficulties in formulating it (95–6 n734):

> If . . . it is still technically possible for State B to perform (e.g. by using its own resources rather than those which State A should have provided), it cannot be said that State A has actually prevented performance: State B's excuse rests on equity, not impossibility.

This suggested a need for flexibility and reinforced the case for leaving it to what is now Art. 56.

[24] Draft Articles Commentary, Art. 34, §29.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:59 Page Number: 278

a situation would occur easily'. Two further unresolved matters she identifies are 'the recourse to the use of force in cases of humanitarian intervention and the old, but always topical, question of the non-performance of economic obligations of States for reasons that they argue are independent of their will'.[25] Despite such possibilities, the six circumstances included can be considered the main ones applicable in general international law.[26]

A candidate more readily dismissed was the putative 'clean hands' doctrine.[27] This was for two reasons. First, whether it exists at all is debated: according to Jean Salmon, 'La jurisprudence citée par les auteurs ... est assez ancienne et partagée.'[28] Second, where it has been relied on, such as by Judge Schwebel in his dissent in *Nicaragua*,[29] it appears to operate not as a circumstance precluding wrongfulness but as a ground for the inadmissibility of a claim.[30]

The intentional omission of circumstances on the basis that they concern the requirements for primary obligations or admissibility does not entirely answer Austin's warning that the language of excuses and justifications is 'a miscellany'. The monolith[31] that is Part I, Chapter V welds together components of diverse origins and morphology. It is not obvious that they apply in the same way or to the same extent. Instead, at least two subcategories might be distinguished: circumstances that seemingly render an act lawful (including at least consent and self-defence, which is an 'inherent right'[32]) and a residual one with less easily discernible consequences, in which the other state's interests must still be taken into account to determine whether the circumstances

[25] Szurek (2010) 427, 431–2.

[26] Crawford, Second Report, 76. As Szurek (2010) 427, 430–1 notes, Ago's initial list can be found, albeit in different terms, in Sereni, 3 *Diritto internazionale* (1962), 1523ff.

[27] The 'clean hands' doctrine (if it exists) overlaps with García Amador's concept of fault on the part of the alien in diplomatic protection, which is now subsumed by ARSIWA, Art. 39 insofar as it affects reparation, discussed in Chapter 15. Other candidates considered for inclusion in Pt I, Ch. V but quickly dismissed were due diligence, which 'was considered logically connected to the distinction between breaches of the obligation of result, conduct and prevention' rather than a circumstance precluding wrongfulness, and duress, which was considered to be covered by *force majeure*: UN Doc. A/CN.4/504, 17.

[28] Salmon, (1964) 10 AFDI 225, 249 and see also 259. Translation: 'The jurisprudence cited by the authors ... is somewhat old and divided.' Further: Crawford, Second Report, 83.

[29] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 392–4. Cases on diplomatic protection are discussed in Salmon (1964).

[30] Crawford, Second Report, 83.

[31] 'Le bloc monolithique proposé par la CDI dans le chapitre V peut-il être affiné ?': Christakis (2007), 225.

[32] UN Charter, Art. 51.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:59 Page Number: 279

justify the act (including distress and necessity).[33] Several states agreed that consent, self-defence and countermeasures differ from distress, necessity and perhaps *force majeure* in that the state was, 'because its action is not unlawful, under no duty to pay compensation'.[34] The two groups might be called, respectively, 'justifications' and 'excuses'. This is analogous to the distinction – a lexical rather than a legal one – drawn by Austin:

> In the one defence, briefly, we accept responsibility but deny that it was bad [justification]: in the other, we admit that it was bad but don't accept full, or even any, responsibility [excuse] ... You dropped the tea-tray: Certainly, but an emotional storm was about to break out: or, Yes, but there was a wasp. In each case the defence, very soundly, insists on a fuller description of the event in its context; but the first is a justification, the second an excuse.[35]

Scholars have proposed comparable distinctions.[36] Christakis wonders: 'si, en fin de compte, le comportement de l'État a été licite, pourquoi parle-t-on d'"illicéité"?'.[37] In proposing not two but three categories to dispel this '*sophisme*', he concurs with the view (expressed below) that consent does not belong in Part I, Chapter V at all:

> [1] Il nous semble, tout d'abord, que certaines 'circonstances' – et surtout le consentement – doivent être extraites de ce Chapitre, comme d'ailleurs du projet dans son ensemble, car elles n'ont rien à voir avec les règles 'secondaires' de la responsabilité et ne concernent, en réalité, que les règles primaires ...
> [2] Pour d'autres circonstances, on pourrait peut-être accepter leur maintien dans la catégorie existante d''exclusion d'illicéité', soit parce que l'État qui les invoque a agi de manière complètement involontaire (force majeure), soit parce que la pratique semble les avoir profondément enracinées dans cette catégorie (cas éventuel des représailles) ...
> [3] Mais pour une dernière série de circonstances, incluant surtout l'état de nécessité (mais aussi la détresse), il est sans doute préférable

[33] Crawford, Second Report, 60.
[34] This quotation is from the United Kingdom, which commented that in cases of necessity and distress the state has a choice whether to comply: ILC Ybk 1998/II(1), 130. France suggested the same division: ibid. Japan added *force majeure* to necessity and distress and queried whether any of those three circumstances 'would not preclude wrongfulness but render it non-existent': ILC Ybk 1999/II(1), 107. See further below on compensation for material loss caused by acts whose wrongfulness is precluded.
[35] Austin (1956–7), 2. Naturally the meaning of the word 'responsibility' is looser here than when used as a legal term in the ARSIWA.
[36] E.g. Dupuy (1984), 41.
[37] Christakis (2007), 223. Translation: 'if, in the final analysis, the state's conduct was lawful, why does one speak of "wrongfulness"?'

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:39:59 Page Number: 280

> de parler de circonstances 'excluant ou atténuant la responsabilité' et la pratique semble, derrière le paravent des mots, confirmer cette analyse . . .[38]

A more dramatic critique is Lowe's. He argues that the ARSIWA should have left out Part I, Chapter V entirely and instead provided that they were without prejudice to the rules on the six circumstances, without detailing what those rules were:

> I am not suggesting that the 'exculpation' approach proposed by the ILC [justification: in which the act is not wrongful] is wrong in law. It is defensible and coherent. It does, however, have its drawbacks . . . My plea is to restore the flexibility of response to states, allowing them to decide on a case-by-case basis whether to follow the exculpation or the excuse approach [in which the act is wrongful but excused], rather than imposing one blanket solution.[39]

Lowe's concern that the ILC's justification approach neglects the effect of an act on third states is pursued further below in discussing compensation under Article 27(b), as is the distinction between excuses and justifications generally. Lowe otherwise frames his argument as one of policy rather than as a deduction from the jurisprudence. It can partly be answered by observing that to have left this topic out of the ARSIWA would have left states without the clear guidance they were intended to provide. Indeed, states did not question the need for it on second reading.[40] The result is that no categorical distinction between justifications and excuses appears in the ARSIWA. But in the sense that the six circumstances are recognized as having a single consequence – namely, precluding wrongfulness – they do cohere.

[38] Christakis (2007), 244. Translation:

> [1] It seems to us, first of all, that certain 'circumstances' – and above all consent – should be removed from the Chapter, and indeed from the project altogether, for they have nothing to do with 'secondary' rules and concern, in reality, only primary rules . . .
>
> [2] As for some other circumstances, one might accept their retention in the existing category of 'precluding wrongfulness', either because the State that invokes them has acted in a completely involuntary manner (*force majeure*) or because practice seems to have deeply entrenched them in that category (potentially reprisals) . . .
>
> [3] But as for a final set of circumstances, including above all necessity (but also distress), it is surely preferable to speak of circumstances 'precluding or mitigating responsibility', and practice seems, behind the veneer of the terms used, to confirm this analysis.

Further: ibid., 244–5, 251ff.

[39] Lowe (1999), 411. Further: Christakis (2007), 225ff.

[40] ILC Ybk 1998/II(1) 81.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:00 Page Number: 281

9.1.2 Termination and suspension of obligations

Precluding the wrongfulness of a particular act does not necessarily mean terminating or suspending the obligation. It is in this sense that the six circumstances act less as a sword than as a shield: they cut down neither the obligation nor the primary rule underlying it; they merely defend against them.[41] Each of the circumstances justifies a state's non-performance only so long as it subsists. As Fitzmaurice put it: 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'.[42] The consequences of this are illustrated by two cases. In *Gabčíkovo-Nagymaros*, Hungary pleaded necessity to terminate a treaty with Czechoslovakia (succeeded to by Slovakia) requiring it to complete a dam project. It had already invoked the same circumstance – a threat to the environment – to preclude the wrongfulness of its discontinuance of work on the project some years earlier. The International Court rebuffed it:

> [E]ven if a state of necessity is found to exist, it is not 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 . . . [T]he Treaty may be ineffective as long as the condition of necessity continues to exist, 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.[43]

In *Rainbow Warrior*, France had failed to detain two agents on a Polynesian island for the three years required by a treaty with New Zealand. The tribunal held that 'both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable'. It fell to the law of treaties to determine whether the treaty was still in force. But so long as it remained in force, such matters as

> the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.[44]

It is a similar situation with non-treaty obligations; thus a unilateral obligation can be terminated only under the law on the termination of

[41] Crawford, Second Report, 59. See also ARSIWA Commentary, Pt I, Ch. V, §§2–3.
[42] Fitzmaurice, Fourth Report on the Law of Treaties, ILC Ybk 1959/II, 41.
[43] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 63. See also 38–9.
[44] *Rainbow Warrior (New Zealand/France)*, (1990) 20 RIAA 217, 251.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:00 Page Number: 282

unilateral obligations, and an obligation under general international law only in accordance with the applicable rules on customary obligations. What matters is that in none of these cases is termination within the remit of state responsibility. Since the obligation may remain in force even though a circumstance precludes wrongfulness, it is misleading to say that the circumstance renders the obligation 'definitively or temporarily inoperative' (a phrase that appears in the Draft Articles Commentary[45]). That might imply – incorrectly – that the act is 'in conformity' with the obligation. It is not in conformity.[46] It is merely that insofar as the circumstance precludes the wrongfulness of the act, it is also not in breach.[47] It was on this ground that in *Gabčíkovo-Nagymaros* the Court observed that 'necessity ... could not permit the conclusion that [Hungary] had acted in accordance with its obligations under [the treaty] or that those obligations had ceased to be binding upon it'.[48]

Article 27(a) confirms one consequence of this distinction between the preclusion of wrongfulness and the termination or suspension of an obligation: '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'. The phrase 'compliance with the obligation in question' includes ceasing the act whose wrongfulness the circumstance precluded. The phrase 'to the extent' suggests that the circumstance may lessen gradually and allow for partial performance of the obligation. The provision does not answer questions about *how* to resume performance of an obligation (except by providing that invocation of the circumstance is without prejudice to compliance with it).[49]

All of this is not to suggest that the same facts cannot justify *both* the preclusion of wrongfulness *and* the termination of an obligation. This is why Article 27(a) is framed as a 'without prejudice' provision. For example, a breach of a treaty might both justify countermeasures and constitute 'a material breach' justifying the termination of the treaty

[45] Draft Articles Commentary, Pt I, Ch. V, §9.

[46] But contra Christakis (2007), 223: 'Les "circonstances excluant l'illicéité" ... transforment par leur touche magique un acte illicite en un acte conforme au droit international'. Translation: 'The "circumstances precluding wrongfulness" ... transform with their magic touch a wrongful act into an act conforming to international law'.

[47] Crawford, Second Report, 60.

[48] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 39. One reason that consent may not belong in Pt I, Ch. V is that it *could* render an obligation inoperative: Crawford, Second Report, 61–2.

[49] ARSIWA Commentary, Art. 27, §§2, 3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:00 Page Number: 283

under VCLT Article 60.[50] Or facts might amount to both *force majeure* and a supervening impossibility of performing the treaty from which that obligation arises, justifying its suspension or termination under VCLT Article 61. The principles in this example differ in three ways: they are grounded in different fields of law; *force majeure* affects the particular obligation, whereas the impossibility affects the treaty itself; and *force majeure* justifies non-performance only so long as the circumstance subsists. Another aspect of the operation of a supervening impossibility of performing a treaty is that it terminates the treaty not automatically but only if one of the parties so decides.[51] In contrast, even on facts such as those justifying *force majeure*, a state's unilateral act does not normally terminate an obligation arising from general international law.[52]

9.2 General justifications and excuses

9.2.1 Consent

Consent highlights the distinction between the termination or suspension of an obligation and the mere preclusion of wrongfulness. States may, of course, terminate or suspend a treaty by consent and thereby terminate or suspend obligations arising from it.[53] But that is not the situation dealt with here. Rather, Article 20 provides: '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.' As the reference to 'limits' implies, the primary obligation continues to govern relations between the two states; they dispense with it only for the particular occasion or purpose consented to.[54] This is most obvious where an obligation is owed to multiple states, in that the consent of one will not preclude wrongfulness to others: it concerns only the bilateral relations between the acting state and the consenting state.[55] For instance, Austria's consent to a customs union with Germany in 1931 (though in the event disallowed by the Treaty of Saint-Germain-en-Laye[56]) could not preclude the wrongfulness of Germany's conduct insofar as it breached

[50] Ibid., §3.
[51] Ibid., Pt I, Ch. V, §4. Further: Crawford, Second Report, 59; Paddeu, (2011) 82 BYIL (forthcoming).
[52] Crawford, Second Report, 59. [53] VCLT, Art. 54(b).
[54] ARSIWA Commentary, Art. 20, §2; Crawford, Second Report, 60.
[55] Crawford, Second Report, 60–1. [56] 10 September 1919, (1920) 14 AJIL Supp. 30.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:01 Page Number: 284

its obligation to the parties to the Treaty of Versailles[57] to respect Austrian independence.[58]

An example of the operation of consent is *Armed Activities on the Territory of the Congo*. There the International Court appeared to proceed on the assumption that insofar as the Democratic Republic of the Congo had consented, that precluded the wrongfulness of Uganda's conduct in sending troops on to its territory.[59] Other cases that might fall under Article 20 include a state's consent to transit through its airspace or waters, to a facility built on its territory, to the conduct of an official investigation there or to humanitarian relief or rescue operations.[60] As the Court affirmed in *Armed Activities*, no particular formalities are required for its withdrawal.[61]

One difficulty with including consent in Part I, Chapter V is that whereas the other five circumstances are defined in the ARSIWA (countermeasures, *force majeure*, distress and necessity) or by the UN Charter and the well-developed rules of general international law connected to it (self-defence), consent is qualified only by that elliptical term 'valid'.[62] The meaning of 'valid' is a vexed question, reaching beyond the law of state responsibility into other realms about which little can be said here.[63] First, consent must be 'clearly established' and 'actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked'.[64] But this does not prevent consent from being tacit or implicit rather than communicated in some formal way. In *Savarkar*, a tribunal held that France had impliedly consented to an arrest made on its territory by British agents – otherwise a breach of its sovereignty – through the conduct of a French

[57] 28 June 1919, 225 CTS 188.

[58] *Customs Régime between Germany and Austria*, (1931) 41 PCIJ Ser. A/B No. 41, 37, 46, 49; ARSIWA Commentary, Art. 20, §9 n. 346. One state – Austria – queried the phrase 'in relation to that State' in a draft of Art. 20 (which survived essentially intact) 'since consent may render conduct lawful generally': Crawford, Second Report, 61. But even if that 'may' be so, it is not so in all cases.

[59] *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 212–13 (various treaties, with a limited exception, did not 'constitute consent by the DRC to the presence of Ugandan troops on its territory for the period after July 1999, in the sense of validating that presence in law'), 215, 224 ('Uganda engaged in the use of force for purposes and in locations for which it had no consent whatsoever'). See ben Mansour, in Crawford, Pellet and Olleson (2010) 439, 440–1.

[60] ARSIWA Commentary, Art. 20, §1.

[61] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 198.

[62] Crawford, Second Report, 61.

[63] See Abass, (2004) 53 ICLQ 211.

[64] ARSIWA Commentary, Art. 20, §6; *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 211.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:01 Page Number: 285

brigadier who assisted them, even though he had no authority to enter into international agreements on its behalf.[65] And in *Russian Indemnity*, its ambassador having accepting repayments from Turkey of only the capital of an indemnity over many years without reservation, Russia had waived any interest payable for delay.[66] Ben Mansour suggests that one difference between these cases of tacit or implicit consent established from conduct and those of presumed and hence invalid 'consent' is the perception of the acting state: whether it believes in good faith, as the British police did in *Savarkar*, that the other state has consented.[67]

Second, the person who consents must be authorized to do so on the state's behalf. This is not the same as attributing the act to the state – although that is also required for consent to be valid.[68] For example, in 1960 a province of the Congo[69] ostensibly consented to a military intervention by Belgian forces on Congolese territory. Simply attributing that act to the Congo (which would nowadays occur under ARSIWA Article 4) could not resolve whether a subnational entity such as a province could give consent, as opposed to the national government alone.[70] The same would be true of an ostensible consent by an insurrectional movement.[71] Of the possibility that the *contras* might have asked the United States to intervene in Nicaragua, the International Court said: 'it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition'.[72] Thirlway comments that apart from this 'pragmatic justification', an opposition group simply does not have status to consent 'to what would otherwise be an unlawful act against the State'.[73] In fact, who can consent to acts that would otherwise breach different primary rules – entering the premises of a diplomatic mission, establishing a

[65] *Savarkar (Great Britain/France)*, (1911) 11 RIAA 243, 252–5; ARSIWA Commentary, Art. 20, §8.
[66] *Russian Indemnity (Russia/Turkey)*, (1912) 11 RIAA 421, 446.
[67] Ben Mansour (2010), 442.
[68] Draft Articles Commentary, Art. 29, §11; ben Mansour (2010), 443.
[69] Then the Republic of the Congo or Congo-Léopoldville and now the Democratic Republic of the Congo.
[70] Belgium made little attempt to justify its intervention to the Security Council except to ensure safety (UN Doc. S/PV.873, §§186–8): 'in the state of anarchy at present existing in the Congo, is it possible to refuse assistance to the lawful, constitutional head of a provincial government constituted in accordance with the fundamental law of the Congolese State?' See further ARSIWA Commentary, Art. 20, §5.
[71] Crawford, Second Report, 61, citing comments by the United Kingdom.
[72] ICJ Rep. 1986 p. 14, 126. [73] Thirlway (1995), 73.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:02 Page Number: 286

foreign military base or intervention by Belgian or US troops – might differ depending on those rules.[74] In the case of the diplomatic mission, only its head could consent.[75] Factors relevant to authorization might include whether the legitimacy of an authority ostensibly consenting has been called into question; the state's domestic law, which might authorize different persons or authorities to consent in different situations; the international law rules on the will of the state; and, if a person or authority who ostensibly consented was *not* authorized to do so, whether the state whose act they ostensibly consented to knew or ought to have known that.[76]

Third, consent must be freely given. Thus the Nuremberg Tribunal implied that any consent by Austria to the *Anschluss* with Germany in 1938 would have been coerced: matters such as 'the strong desire expressed in many quarters for the union of Austria and Germany', about which the Tribunal expressed scepticism, were in any case immaterial, because the 'ultimate factor was the armed might of Germany ready to be used if any resistance was encountered'.[77] Consent must likewise not be vitiated by error, fraud or corruption. The commentary suggests that the rules on the validity of consent to treaties provide guidance on these matters.[78] There are also cases where consent can never be validly given (discussed below under Article 26 on peremptory norms).

Also illustrated by the *Anschluss* is the *scope* of consent. Consent by Austria to the customs union in 1931 would not have gone far enough to preclude the wrongfulness of Germany's conduct in annexing it. Equally, consent to overflight by civilian aircraft is not consent to overflight by aircraft transporting troops or arms, and consent to stationing foreign troops for a fixed period cannot extend beyond that period. This much is clear from Article 20: consent is to 'a given act' within 'the limits' of that consent.[79] In *Armed Activities* the Court emphasized that the Congo's consent to Uganda's military presence was further limited by place and

[74] ARSIWA Commentary, Art. 20, §6.
[75] Vienna Convention on Diplomatic Relations, 16 April 1961, 500 UNTS 95, Art. 22(1).
[76] ARSIWA Commentary, Art. 20, §§4–6.
[77] International Military Tribunal (Nuremburg), Judgment and Sentences, 1 October 1946, (1947) 41 AJIL 172, 194; ARSIWA Commentary, Art. 20, §4 n. 341.
[78] ARSIWA Commentary, Art. 20, §6. But France and the United Kingdom pointed out that analogies with other areas of law 'provide uncertain guidance as to whether a particular official had authority to "preclude the wrongfulness" of conduct by consenting to it': Crawford, Second Report, 61.
[79] ARSIWA Commentary, Art. 20, §9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:02 Page Number: 287

objective: to action 'against rebels in the eastern border and in particular to stop them operating across the common border'.[80] If, however, consent is conditional – say, if a foreign military presence is conditional on paying rent for use of the host state's facilities – a breach of the condition will be wrongful but 'will not necessarily take conduct outside of the limits of consent'.[81]

Article 20 excludes cases where consent is ostensibly given after the act has occurred, which are more properly treated as a form of waiver or acquiescence (Article 45).[82] Consent must instead be given in advance or at the time the act is occurring.[83] But Abass rightly observes that '[w]hilst it is desirable that consent to an internationally wrongful act precedes the commission of that act, States rarely consent in advance to unlawful acts against themselves.' He adds that the principle of *volenti non fit iniuria* – which Article 20 embodies – is limited even in domestic law, in that the consenting party may not have full knowledge of the extent or nature of the risk; the principle will not excuse unforeseeable acts.[84] This problem of unforeseeability in cases of consent per se (as distinct from cases of waiver) is, as with the scope of consent more generally, partly dealt with by the limitations imposed on Article 20 by its terms: consent to 'a given act' precludes the wrongfulness only of 'that act'.

Article 20 refers to 'consent by a State' rather than by individuals, companies or other non-states. But particular primary rules may still take consent by those parties into account. For instance, consent by an investor to arbitration under the ICSID Convention Article 27(1)[85] suspends the right of diplomatic protection by that investor's state. In contrast, at least some human rights conferred (or 'recognized') by the International Covenant on Civil and Political Rights (ICCPR) or other treaties cannot be waived, although an individual's freely given consent may be relevant to their application.[86]

Questions about the meaning of 'valid' and the scope of consent reflect a more fundamental anomaly – one related to the argument that, unlike certain other circumstances, consent in advance simply renders an act

[80] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 198–9.
[81] ARSIWA Commentary, Art. 20, §9 n. 347.
[82] On waiver see Chapter 2. [83] ARSIWA Commentary, Art. 20, §3.
[84] Abass (2004), 216–17, citing *Wooldrige* v. *Summer*, [1963] 2 QB 43, 69.
[85] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.
[86] E.g. International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Arts. 7, 8(3), 14(1)(g), 23(3); see ARSIWA Commentary Art. 20, §10.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:02 Page Number: 288

lawful. If it is true that consent can be given only in advance, and if it is also true that its validity varies so drastically from case to case, depending in part on the applicable rules about authority to consent, it is difficult to distinguish between consent as an element of the *definition* of a primary obligation and consent as a circumstance precluding the wrongfulness of the non-performance of that obligation. Abass writes:

> Although it is true that consent is a well-established principle of international law, its pedigree ... may very well be misleading in reality, at least insofar as its application to daily intercourse amongst States is concerned. There are no given rules of international law governing consent and international tribunals always treat the matter on the basis of facts and materials of cases appearing before them. The [ARSIWA] contain no provisions for these issues.[87]

Consent can be seen as being incorporated into particular primary rules, perhaps in different ways in different cases. It could thus have been deleted from the ARSIWA altogether.[88] Against this, Pellet supported a comment by Addo that 'experience should prevail over logic', adding that 'the relevant experience and practice' supported retaining consent: there were both primary rules that could exclude it as a possibility and a general one that when a state consented not to apply a rule of positive law, 'the wrongfulness itself was expunged'.[89] It is indeed possible to envisage cases where an obligation is properly formulated in absolute terms – without a qualification for consent – but where consent nonetheless precludes the wrongfulness of an act. But it is hard to find any in practice. The examples of consent in the Draft Articles Commentary all relate to primary rules that are *not* formulated in absolute terms but instead allow the target state to validly consent to conduct that would otherwise constitute a breach: prohibitions on the exercise of jurisdiction on another state's territory, on the use of force against it, on intervention in its internal affairs and so on.[90]

That most states ultimately preferred to retain consent, despite the objection that it does not so much preclude the wrongfulness of an otherwise wrongful act as render the obligation inapplicable in the first place, reflects their understandable anxiety that 'too many abuses had been committed in the name of prior consent validly given', including 'blatant acts of intervention', and that deleting it 'could be interpreted as the abrogation of an important principle' and leave states in 'want of

[87] Abass (2004), 213. [88] Crawford, Second Report, 61–2.
[89] ILC Ybk 1999/I, 150. See further ben Mansour (2010), 444.
[90] Crawford, Second Report, 62 and n. 455.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:03 Page Number: 289

clearly stated limits'.[91] Examples such as the *Anschluss* and *Armed Activities* bolster this anxiety. The retention of consent is hence best explained as a pragmatic widening of the boundary that insulates secondary from primary rules. Ben Mansour writes:

> [C]onsent was retained ... more because of a desire to avoid discarding a rule already recognized by States than because of its content. Its link with Chapter V and the regime of circumstances precluding wrongfulness remains tenuous.[92]

9.2.2 Self-defence

Another provision whose presence in Part I, Chapter V might at first seem incongruous is Article 21: '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.' This echoes the reservation by UN Charter Article 51 of the 'inherent right of individual or collective self-defence' despite the ban on 'the threat or use of force' in Article 2(4).[93] As the term 'lawful' implies, Article 21 imports wholesale the primary rules applicable under the UN Charter (including the requirements of proportionality and necessity[94]) on when and to what extent self-defence operates.[95] The ILC baulked at expressing a view on 'any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence' on the ground that it was enough to be faithful to the Charter.[96] Recent state practice bears this out, in that states seem to assume self-defence as recognized in the Charter is the sole justification available for uses of force other than authorization by the Security Council under UN Charter Chapter VII. In 2008, for instance, Turkey proffered it to justify pursuing Partiya Karkerên Kurdistanê (PKK) guerrillas into northern Iraq.[97]

[91] ILC Ybk 1999/II(2), 74–5; ben Mansour (2010), 442. [92] Ben Mansour (2010), 447.
[93] See *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 p. 226, 244, 263.
[94] See *Brownlie's Principles*, 747–57; Thouvenin, in Crawford, Pellet and Olleson (2010) 455.
[95] ARSIWA Commentary, Art. 21, §6. See further Thirlway (1995), 73–9.
[96] Draft Articles Commentary, Art. 34, §20. For a discussion of some of those controversies, see Thouvenin (2010), 456–9.
[97] 'La Turquie, en lançant une opération militaire dans le nord de l'Irak, a fait usage de son "droit légitime à l'autodéfense" contre les rebelles kurdes, a déclaré mardi le Premier ministre turc Recep Tayyip Erdogan': 'Rebelles kurdes : l'Irak condamne l'incursion turque dans le nord du pays', Agence France-Presse, 26 February 2008, available at www.ladepeche.fr/article/2008/02/26/437366-rebelles-kurdes-l-irak-condamne-l-incursion-turque-dans-le-nord-du-pays.html, cited in Thouvenin (2010), 458. Translation: 'Turkey, in launching a military operation in northern Iraq, exercised its "lawful right to self-defence" against the Kurdish rebels, declared Turkish Prime Minister Recep Tayyip Erdoğan on Tuesday.'

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:03 Page Number: 290

The seeming incongruity of Article 21 is because – as, arguably, with consent – states that are acting in self-defence are not even potentially in breach of UN Charter Article 2(4); the 'inherent right' so to act is part of the primary obligation itself.[98] Such a right does not belong among circumstances precluding wrongfulness.[99] The ILC accepted this.[100] Self-defence, however, may justify not only action taken despite UN Charter Article 2(4) but also the non-performance of other obligations if it is *related to* that action.[101] It can be seen as both a right and a circumstance precluding wrongfulness.[102] A state acting in self-defence may trespass on to the aggressor state's territory, interfere in its internal affairs or disrupt its external trade contrary to the provisions of a treaty.[103] The separate legal regime that, historically, resolved this problem by simply suspending most treaties between warring states is nowadays of little use. So is the VCLT in this respect: Article 73 simply states that it does not 'prejudge any question that may arise in regard to a treaty ... from the outbreak of hostilities between States'. Since the inception of the UN Charter, declarations of war have been rare. Instead, states mostly invoke self-defence against other states with which they are notionally at peace.[104] For instance, in *Oil Platforms*, even while a treaty for 'firm and enduring peace and sincere friendship' between Iran and the United States[105] remained in force, the United States claimed that attacks it made against Iranian oil platforms could be 'justified as acts of self-defence, in response to what it regarded as armed attacks by Iran', and the International Court considered this claim in the light of 'the prohibition in international law on the use of force, and the qualification to it constituted by the right of self-defence'.[106]

[98] ARSIWA Commentary, Art. 21, §1.

[99] Thouvenin (2010), 459. Ago argued that self-defence connotes 'a situation or *de facto* conditions, not a subjective right': Ago, Eighth Report, ILC Ybk 1980/II(1), 53.

[100] Crawford, Second Report, 74.

[101] ARSIWA Commentary, Art. 21, §2.

[102] Thouvenin (2010), 459–61.

[103] Crawford, Second Report, 74–5.

[104] ARSIWA Commentary, Art. 21, §2.

[105] Treaty of Amity, Economic Relations and Consular Rights, Treaty of Amity, Economic Relations and Consular Rights, 15 August 1955, 284 UNTS 93, Art. I.

[106] *Oil Platforms (Iran v. US)*, ICJ Rep. 2003 p. 61, 181, 183. The Court's jurisdiction under the Treaty of Amity, Economic Relations and Consular Rights to decide questions of the interpretation or application of Art. XX(1)(d) (quoted above) extended to 'the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force', by reference to the applicable international law, including the UN Charter and customary law: ibid., 182–3. Since the United States' actions constituted a use of force not qualifying as self-defence, they could not constitute measures permitted by that provision: ibid., 199.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:03 Page Number: 291

So it falls to the principle codified in Article 21 to preclude the wrongfulness of the non-performance of obligations related to action under UN Charter Article 51. But it does not apply to *all* such related obligations. First, human rights treaties distinguish between rights from which states can and cannot derogate in times of public emergency, including action in self-defence.[107] For instance, the ICCPR provides that the rights to life and not to be subjected to torture or slavery, among others, are non-derogable even in times of public emergency.[108] Second, rules of international humanitarian law such as those codified in the Geneva Conventions 1949 and their 1st Protocol 1977[109] are 'intransgressible principles of international customary law'.[110] So why can self-defence not preclude the wrongfulness of not performing such obligations? The International Court suggested the answer in *Legality of the Threat or Use of Nuclear Weapons*. In considering whether environmental damage caused by a nuclear weapon would breach certain environmental protection treaties, it said:

> [T]he issue is not whether the treaties ... 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 ... 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.[111]

On first reading, the word 'lawful' in what is now Article 21 was related only to the requirements of proportionality, necessity and an armed attack.[112] It could have been amended to refer to the requirement that

[107] See Gross and Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), ch. 5; *Oráa, Human Rights in States of Emergency in International Law* (1992), chs. 4, 9.
[108] ICCPR, Art. 4(2).
[109] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (1st Protocol).
[110] *Nuclear Weapons*, ICJ Rep. 1996 p. 226, 257.
[111] Ibid., 242. See ARSIWA Commentary, Art. 21, §4.
[112] Draft Articles Commentary, Art. 34.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:04 Page Number: 292

an obligation not be 'expressed or intended' to be one of 'total restraint, even for States engaged in armed conflict or acting in self-defence'.[113] But ultimately it was agreed that 'lawful' would be understood to cover such matters of *jus in bello* as intransgressible rules of international humanitarian law.[114] According to Thouvenin, such rules are *lex specialis*: they explicitly or implicitly reject the self-defence principle.[115] But *lex specialis* operates where there is a conflict of norms, and since Article 21 permits only 'lawful' self-defence, arguably there is no such conflict.

Also left to the primary rules is the effect of self-defence on other – neutral[116] – states. The position is somewhat different from that in cases of consent. Whereas consent by one state unquestionably does *not* preclude the wrongfulness of acts to non-consenting states, the ARSIWA leaves unanswered the question whether self-defence can preclude the wrongfulness of acts vis-à-vis neutral states. It may be that a state of war affects them in that a state acting in self-defence has certain belligerent rights, even against neutrals. But the ILC chose not to enter into the debate about the extent to which the law of neutrality has survived the UN Charter unchanged.[117] Thouvenin speculates that the text of Article 21 implies an answer of a sort 'by not specifying' that self-defence may be only against an aggressor state: '[u]nder Charter law the "option of third States" remains open.'[118] But this just begs the question, since the option 'remains open' primarily in the sense of remaining controversial. So the better view is that the effect of Article 21 is what the ILC intended it to be and what the commentary says it is: that it 'leaves open all issues of the effect of action in self-defence vis-à-vis third States'.[119]

9.2.3 *Countermeasures*

When countermeasures (the term now preferred to 'sanctions', 'reactions', 'legitimate reprisals', 'self-protection' and 'self-help'[120]) will be lawful is dealt with elsewhere.[121] Two things matter here. First, they *can* be lawful against a state responsible for an internationally wrongful act

[113] Crawford, Second Report, 75, 87. [114] ILC Ybk 1999/II(2), 77–8.
[115] Thouvenin (2010), 465.
[116] The law of neutrality distinguishes between acts against belligerents and neutrals. It is fundamental and applies to all international armed conflict: *Nuclear Weapons*, ICJ Rep. 1996 p. 226, 261.
[117] Crawford, Second Report, 76. [118] Thouvenin (2010), 464.
[119] ARSIWA Commentary, Art. 21, §5. [120] Ibid., Art. 22, §3.
[121] ARSIWA and Commentary, Pt III, Ch. II. Further: Chapter 21.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:04 Page Number: 293

on certain conditions (Articles 49–54).[122] Second – like all circumstances precluding wrongfulness – they do not suspend or terminate an injured state's obligations to the responsible state but 'are limited to the non-performance for the time being' of those obligations (Article 49(2)). Article 22 covers any measure meeting those conditions.[123] It is confined to providing:

> 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.[124]

Although controversy about the bifurcated approach to countermeasures in the ARSIWA and about the *conditions* for countermeasures articulated in Part III, Chapter II was evident during drafting and in some respects continues, there can be no doubting the essence of Article 22. The International Court acknowledged the principle in *Gabčíkovo-Nagymaros*. Having found that Czechoslovakia committed an (otherwise) internationally wrongful act by putting a certain variant of the dam into operation, it considered whether that act constituted a countermeasure. The question was 'whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law'.[125] The tribunal in *Corn Products International Inc* v. *Mexico*, one of several cases where Mexico defended a tax on high-fructose corn syrup as a countermeasure in response to breaches of the North American Free Trade Agreement (NAFTA) by the United States, adopted this view:

> That a countermeasure which complied with certain conditions could preclude the wrongfulness of an act which would otherwise be contrary to international law was expressly recognized [in *Gabčíkovo-Nagymaros*] ... It is generally agreed

[122] See ARSIWA Commentary, Art. 22, §2, citing as examples confirming the lawfulness of countermeasures *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 55; *Naulilaa (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa) (Portugal/Germany)*, (1928) 2 RIAA 1011, 1025–6; *Cyne (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered the war) (Portugal/Germany)*, (1930) 2 RIAA 1035, 1052; *Air Services Agreement of 27 March 1946 between the US and France (US/France)*, (1979) 18 RIAA 417.

[123] ARSIWA Commentary, Art. 22, §6.

[124] The ILC rejected an approach similar to the one it took in the case of self-defence of referring only to 'lawful' countermeasures and thereby obviating the need for Pt III, Ch. II: ILC Ybk 1999/II(2), 87.

[125] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 55.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:05 Page Number: 294

that the conditions which a countermeasure is required to meet are set out in the ILC Articles on State Responsibility (notably Articles 22 and 49–53).[126]

The NAFTA tribunal in *Archer Daniels* v. *Mexico*, another of those cases, took 'as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice, as confirmed by the ILC Articles'.[127]

Here the position of third states (other than the injured state and the responsible state) is different again from those in cases of consent and self-defence. There are two questions to consider. First, as the phrase 'against the latter [responsible] state' indicates, by definition the injured state cannot take countermeasures against a third state; they must be bilateral. But this does not preclude the possibility of indirect or consequential effects on a third state provided that they do not arise from a breach of an obligation to that third state.[128] In *Cysne*, which concerned Germany's responsibility for damage to certain Portuguese interests before Portugal entered the First World War, the tribunal said of belligerent reprisals (which, although distinct from countermeasures, operate on a similar principle):

> [L]es représailles, consistant en un acte en principe contraire, ne peuvent se justifier qu'autant qu'elles ont été *provoquées* par un autre acte également contraire à ce droit. *Les représailles ne sont admissible que contre l'État provocateur*. Il se peut, il est vrai, que des représailles légitimes, exercées contre un État offenseur, atteignent des ressortissants d'un État innocent. Mais il s'agira là d'une conséquence indirecte, involontaire, que l'État offensé s'efforcera, en pratique, toujours d'éviter ou de limiter autant que possible.[129]

[126] *Corn Products International Inc*. v. *Mexico*, Decision on Responsibility, ICSID Case No. ARB (AF)/04/01, 15 January 2008, 146 ILR 581, 624 (§145).

[127] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc*. v. *Mexico*, ICSID Case No. ARB(AF)/04/05, 21 November 2007, 146 ILR 445, 488 (§125). Cf. also *Cargill Inc*. v. *Mexico*, ICSID Case No. ARB(AF)/05/02, 18 September 2009, 146 ILR 642, 763 (§420):

> Under customary international law, a countermeasure may constitute a circumstance precluding the wrongfulness of an act. The ILC articles regarding countermeasures provide an important point of departure in ascertaining more precisely the content of that custom.

Further: Lesaffre, in Crawford, Pellet and Olleson (2010) 469, 473.

[128] ARSIWA Commentary, Art. 22, §§4–5.

[129] *Cyne (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered the war) (Portugal/Germany)*, (1930) 2 RIAA 1035, 1056–7 (emphasis in original). Translation from ARSIWA Commentary, Art. 22, §5:

> [R]eprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far 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

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:05 Page Number: 295

In *Gabčíkovo-Nagymaros*, the International Court affirmed that a countermeasure must be taken only against the target state: it 'must be taken in response to a previous internationally wrongful act of another State and must be directed against that State'.[130]

Article 22 does not answer the second question concerning third states, namely, whether a third state to which the responsible state owes the relevant obligation but that is not *itself* injured by that state's act can take countermeasures against that state. This turns partly on the notion of *erga omnes* obligations and is discussed in Chapter 11.

9.2.4 Force majeure[131]

The remaining three circumstances precluding wrongfulness – *force majeure*, distress and necessity – all denote cases where, at least in some sense, a state is compelled to commit an act that does not conform with an international obligation. But as the term *force majeure* (literally, 'superior force') implies, it differs from those other two circumstances in that the state's act is due to something beyond its control. That is to say: it is essentially involuntary.[132] States often invoke it in interstate cases as a principle of customary international law, and analogous doctrines exist in domestic legal systems.[133] It also operates in international commercial arbitration and may amount to a general principle of law.[134] Article 23 (1), which has been described as 'narrow and strict' compared with past formulations of *force majeure*,[135] requires three elements to be satisfied:

> 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

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 limit as far as possible.

[130] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 55. [131] Generally: Paddeu (2011).

[132] ARSIWA Commentary, Art. 23, §1. This is a different matter from intention (or subjective fault). 'An involuntary act is one outside the control of the will, such as a sneeze; an unintentional act is one not aimed at or desired, such as a person's death resulting from a misdirected shot': 'Unintentional; involuntary', in Garner, *A Dictionary of Modern Legal Usage* (2nd edn, 1995) 900.

[133] Paddeu (2011).

[134] ARSIWA Commentary, Art. 23, §§1, 9; Crawford, Second Report, 66. See also ILC Ybk 1978/II(1) 61. For *force majeure* in the Iran–US Claims Tribunal see G. H. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (Oxford University Press, 1996), 306–20.

[135] Paddeu (2011).

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:05 Page Number: 296

control of the State, making it materially impossible in the circumstances to perform the obligation.

As for the first element, an irresistible force or unforeseen event:

> 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 or 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'.[136]

In *Lighthouses*, France sought restitution of a lighthouse that Greece had requisitioned from a French company in the First World War and that had then been bombarded by enemy attacks. That event was causally linked to the situation: the damage constituted by the impossibility of restoring the lighthouse in the same state 'a été causé non par la main-mise de la Grèce, mais par le bombardement qui l'a fortement endommagé, bombardement constituant un cas de force majeure'.[137] In *Wipperman*, the United States claimed an indemnity from Venezuela for the loss of a boat carrying a consul and other property that indigenous people had pillaged in 1862. But a tribunal held:

> [T]here is nothing in the record to show that the Government [of Venezuela] had any notice of the incursion or any cause to expect that such a raid was threatened, and while it may be true that Governments are *prima facie* responsible for the acts of their subjects and aliens commorant [i.e. resident] within their jurisdiction, this is a presumption which is always rebuttable by any facts which will afford a reasonable excuse for the dereliction against which the complaint is aimed.

Instead, it 'was one of those occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide'.[138]

[136] ARSIWA Commentary, Art. 23, §2 (ellipsis in original).

[137] *Ottoman Empire Lighthouses Concession (France/Greece)*, (1956) 12 RIAA 155, 219–20. Translation: 'was caused not by the seizure by Greece, but by the bombardment that badly damaged it, bombardment constituting a case of *force majeure*'.

[138] *Wipperman (US/Venezuela)*, (1889) 3 Moore, *Int. Arb*. 3039, 3042–3, discussed in ILC Ybk 1978/II(1) 61, 156. The tribunal contrasted this situation with that of a consul in a city whose house is destroyed by acts of violence 'aimed at him in his official capacity' that the military or police presumably ought to have been able to prevent. But it added (3041):

> The case would present more points of comparison if some savage tribe of Indians on the warpath had unexpectedly stumbled upon a consul, we will say of Venezuela, travelling for his health in some of the secluded byways of Arizona or

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:06 Page Number: 297

The commentary interprets this and a series of comparable cases before US–British, US–Venezuelan and British–Mexican mixed claims tribunals involving rebel attacks as relying on the 'unforeseeability' of events to preclude state responsibility for resulting injury to foreigners.[139]

More fraught is what 'materially impossible' means. It might result from a natural event: a flood, earthquake or drought or weather that forces aircraft into foreign airspace.[140] In 1946, Yugoslavia indicated by diplomatic note that it expected US aircraft not to enter its airspace unauthorized 'except in the case of emergency or bad weather, for which arrangements could be made by agreement', and the United States replied that it presumed that Yugoslavia recognized an exception in 'circumstances over which there is no control, such as bad weather, loss of direction, and mechanical trouble'. Although this exchange also concerned distress, the phrase 'no control' places the situations just mentioned in the category of *force majeure*.[141] Or the impossibility might result from human intervention. *Lighthouses* is one example involving acts of war or duress by another state; others include *American Electric & Manufacturing Co.*,[142] *Kelley* v. *Mexico*[143] and *Chevreau (France v. UK)*.[144] Cases involving insurrections include the mixed claims tribunal cases and *Spanish Zone of Morocco*.[145] In *Gould Marketing*, the Iran–US Claims Tribunal said that by *force majeure* it meant 'social and economic forces beyond the power of the state to control through the exercise of due diligence'.[146] And in *Anaconda-Iran* it confirmed that 'strikes, riots and other civil strife in the course of [the Iranian] Revolution had created classic *force majeure* conditions'.[147]

> New Mexico, and then and there, without respect to the dignity of the consular office and the law of nations, had divested him of all his valuables and then proceeded *suo more* to take his scalp . . . [O]utrages of this kind on the western frontier of the United States are more or less frequent, and . . . the whole military force of that country out of garrison has not been sufficient to prevent the occasional robbery or murder of innocent persons.

This shows that the tribunal also took account of the material impossibility of preventing the raid.

139 ARSIWA Commentary, Art. 23, §7 n. 376, citing *Saint Albans Raid (UK/US)*, (1873) 4 Moore, *Int. Arb*. 4042; *De Brissot and ors (US/Venezuela)*, (1889) 3 Moore, *Int. Arb*. 2967; *Gill* (1931) 5 RIAA 157; all discussed in ILC Ybk 1978/II(1) 61, 152–3, 157, 182.

140 For cases of aircraft diverted during the First World War, including due to fog or losing their way in the clouds, see ILC Ybk 1978/II(1) 61, 124–5.

141 ILC Ybk 1978/II(1) 61, 103. 142 (1905) 9 RIAA 145. 143 (1930) 4 RIAA 608.

144 (1931) 2 RIAA 1113, 1123. 145 (1925) 2 RIAA 615, 642.

146 *Gould Marketing, Inc*. v. *Ministry of National Defence of Iran*, Interlocutory Award No. ITL 24-49-2, 27 July 1983, 3 Iran–US CTR 147, 153.

147 *Anaconda-Iran, Inc*. v. *Iran et al.,* Interlocutory Award No. ITL 65-167-3, 10 December 1986, 13 Iran–US CTR 199, 213.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:06 Page Number: 298

Finally, a material impossibility might also result from both natural and human factors combined, such as where the presence of rebels in an area of natural disaster prevents a state from assisting foreigners affected by the disaster.[148]

One thing it certainly does not cover is mere negligence. In 1906, a bullet fired during rifle practice on a French warship mortally wounded an American sailor while his ship was entering a harbour. The United States claimed that although it was an accident, it suggested 'a lack of proper precaution' and 'cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed'. France subsequently made reparation to the sailor's family.[149] States on both sides of the First World War – France and Germany – likewise undertook to make reparation for damage and to punish airmen who negligently bombed towns in neutral Switzerland.[150]

It is equally certain that 'materially impossible' means more than just materially *difficult*.[151] This is clear from *Russian Indemnity*. There it did not suffice that Turkey had found itself 'aux prises avec des difficultés financières de la plus extrême gravité, cumulées avec des événements intérieurs et extérieurs (insurrections, guerres)'.[152] The relatively negligible sum it owed Russia would not imperil its existence or seriously compromise its internal or external position. Likewise, the Permanent Court said of *force majeure* in *Serbian Loans*: 'It cannot be maintained that the [First World War] itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders'.[153] The *Sempra Energy* tribunal accepted that *force majeure* does not cover political or economic crises that merely render performance of an obligation more difficult.[154] Equally clear was the *Rainbow Warrior* tribunal. It quoted a comment in the Draft Articles Commentary that the 'adverb "materially" preceding

[148] Szurek (2010) 475, 477; ARSIWA Commentary, Art. 23, §3.
[149] ILC Ybk 1978/II(1) 61, 101. [150] Ibid., 125. [151] ARSIWA Commentary, Art. 23, §3.
[152] *Russian Indemnity (Russia/Turkey)*, (1912) 11 RIAA 421, 443. Translation: 'in the grip of financial difficulties of the most extreme seriousness, combined with internal and external events (uprisings, wars)'. Although phrases such as 'mis en péril l'existence de l'Empire Ottoman' ('imperil the Ottoman Empire's existence') might equally evoke necessity, the tribunal was specifically addressing *force majeure*.
[153] *Serbian Loans*, (1929) PCIJ Ser. A No. 20, 39–40. The PCIJ rejected a similar plea, relying on the 'economic dislocation caused by the Great War' in *Brazilian Loans*, (1929) PCIJ Ser. A No. 21, 120.
[154] *Sempra Energy International* v. *Argentina*, ICSID Case No. ARB/02/16, 28 September 2007, §246. Further: Szurek (2010) 475, 480.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:07 Page Number: 299

the word "impossible" is intended to show that ... 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'. It then held that *force majeure* did not apply '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*'.[155]

But this equating of material impossibility with 'absolute' impossibility is perhaps misleading. In emphasizing the negligible amount of Turkey's debt, the *Russian Indemnity* tribunal seemed to leave open whether, say, Greece could claim that the financial crisis triggered in 2010 by its high sovereign debt renders the performance of international obligations materially impossible (provided, of course, that it could establish the other elements of *force majeure*). The Vienna Conference had such economic circumstances in mind when it fixed on a narrow formulation for VCLT Article 61. It requires 'the permanent disappearance or destruction of an object indispensable for the execution of the treaty' before a treaty can be terminated or suspended. Although (as discussed above) the same facts might amount to both *force majeure* and a supervening impossibility of performing a treaty under that provision, that will not necessarily be so. As the International Court explained in *Gabčíkovo-Nagymaros*,

> 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 ...[156]

In other words, the bar for material impossibility under ARSIWA Article 23 is lower than that for terminating or suspending a treaty.[157] It falls short of what – *Rainbow Warrior* notwithstanding – might be called complete or absolute impossibility.

There are also instances where *force majeure* operates not as a circumstance generally precluding the wrongfulness of an otherwise wrongful

[155] *Rainbow Warrior*, (1990) 20 RIAA 217, 253, quoting Draft Articles Commentary, Art. 31, §40.

[156] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 63. On the 'economic impossibility' of performance see further Szurek (2010) 475, 479–80.

[157] ARSIWA Commentary, Art. 23, §4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:07 Page Number: 300

act but as a component of a specific primary obligation itself. These include the Convention on the Territorial Sea and the Contiguous Zone Article 14(3);[158] the United Nations Convention on the Law of the Sea (UNCLOS) Article 18(2);[159] and the Convention on Transit Trade of Land-locked States Article 7(1).[160] The existence of such primary rules to the same effect as the secondary rule codified in Article 23 does not prevent them coexisting.[161] Different again is where *force majeure* operates under a contract between a state and an individual. There it might be able to terminate the contract *per se*, whereas a circumstance precluding wrongfulness does not terminate the obligation in question but merely blocks its application for the time being.[162]

Article 23(2) contains two provisos. The first is that Article 23(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'. In *Libyan Arab Foreign Investment Company* v. *Burundi* the 'alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi' but rather 'the result of a unilateral decision of that State'.[163] This implies that the proviso simply spells out an aspect of the requirement for a causal link between the elements of *force majeure*. There is a similar exclusion under VCLT Article 61 of cases where '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'. This is stricter than Article 23(2)(a) in that it requires a breach of obligation. But Article 23(2)(a) is not so broad as to encompass *any* contribution by a state to a situation of *force majeure*. In a previous draft it did require only that a state had 'contributed'. But such a formulation would have excluded

[158] 516 UNTS 205: 'Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.'

[159] 1833 UNTS 397. This effectively replicates the former provision but adds 'or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'.

[160] 597 UNTS 42: 'Except in cases of force majeure all measures shall be taken by Contracting States to avoid delays in or restrictions on traffic in transit.'

[161] ARSIWA Commentary, Art. 23, §6.

[162] See Szurek (2010) 475, 479 n. 23, citing among other authorities *Mobil Oil Iran, Inc., et al.,* Partial Award No. 311-74/76/81/150-3, 14 July 1987, 16 *Iran–US CTR* 3. There the tribunal said that it accords with practice in contract law for *force majeure* conditions merely to suspend certain provisions of a contract and that usually they 'will have the effect of terminating a contract only if they make performance definitively impossible or impossible for a long period of time': ibid., 38 (§116).

[163] (1994) 96 ILR 279, 318.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:07 Page Number: 301

cases where a state contributes unwittingly to the situation by an act that does not in itself render the event less foreseen.[164] As it stands that is not enough; for the situation to be 'due' to the state's conduct, its role must be substantial.[165]

The second proviso is that Article 23(1) does not apply if '(b) the State has assumed the risk of that situation occurring'. If a state accepts responsibility for a particular risk, it renounces its right to rely on *force majeure* to evade that responsibility. It may do so expressly, by agreement, or by clear implication.[166]

9.2.5 *Distress*

Distress is distinct from *force majeure* in two ways.[167] First, it precludes the wrongfulness of voluntary acts. Whereas *force majeure* requires material impossibility, in distress the author of the act has no real choice than to breach an obligation. Second, it deals with a specific type of act by individuals. Article 24(1) states: 'The wrongfulness of an act of a State not in conformity with an international obligation 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'. The nationality of such other persons is irrelevant, although they must have a special relationship with the relevant state organ.[168] The reason the requisite relationship was limited to entrustment to the author's care was to exclude situations that depend on moral choice rather than compulsion.[169]

One reason to bear these distinctions in mind is that inclement weather or other facts might result, in different cases, in either *force majeure* or distress. In the diplomatic exchange discussed above, the United States wrote that it presumed that Yugoslavia recognized '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'.[170] Voluntarily changing the course of an aircraft will bring the situation outside the

[164] Crawford, Second Report, 67. [165] ARSIWA Commentary, Art. 23, §9.
[166] Ibid., §10.
[167] On this distinction and that between distress and necessity see Paddeu (2011).
[168] ARSIWA Commentary, Art. 24, §§1, 7. On second reading the United Kingdom criticized this limitation and suggested that the article expressly recognize emergency humanitarian action. But that is more a matter of necessity than of distress: Crawford, Second Report, 67–8.
[169] ILC Ybk 1999/I, 180.
[170] ILC Ybk 1978/II(1) 61, 103; ARSIWA Commentary, Art. 24, §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:08 Page Number: 302

scope of *force majeure* but potentially within that of distress. Similarly, in 1975 the United Kingdom told the UN Security Council that the reason its naval vessels had entered Icelandic territorial waters was 'to seek shelter from severe weather, as they have the right to do under customary international law . . . there was a severe snowstorm in progress, with winds of force 8 gusting to force 9, and very high seas'.[171] Iceland disagreed on the facts (claiming that the United Kingdom intended to provoke an incident) but did not take any legal point. Indeed, cases of distress mostly occur in the seas or skies. Even the example of a land frontier violation cited in the commentary occurred, if not at sea, at least on a river: Italian officials crossed one to rescue a half-drowned soldier whose 'cries of distress' they had heard coming from an Austro-Hungarian island.[172] And the same provisions of maritime treaties that reproduce *force majeure* as a primary rule – the Convention on the Territorial Sea and the Contiguous Zone Article 14(3) and UNCLOS Article 18(2) – also permit ships to stop and anchor while passing through foreign territorial seas if they are in distress. Some treaties on maritime pollution also recognize distress.[173]

Rainbow Warrior illustrates distress against a more colourful background. France claimed that medical considerations had justified its early removal from the island of the two agents whom its treaty with New Zealand required it to detain there. It described those considerations as 'circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the state'. The tribunal accepted this as a possibility. But France had to show, first, the re-establishment of its compliance with the treaty (on the

[171] UN Doc. S/PV.1866, §24; ARSIWA Commentary, Art. 24, §3.

[172] ARSIWA Commentary, Art. 24, §4 n. 390; ILC Ybk 1978/II(1) 61, 99.

[173] An example is the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, 138 UNTS 1046, Art. V(1): the prohibition on dumping wastes

> shall 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 and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur.

Insofar as this applies to threats to 'human life' it is consistent with distress under Art. 24, including the proviso in Art. 24(2)(b), but it is also broader insofar as it applies to threats to 'vessels [etc.]'. It also applies 'in cases of *force majeure* caused by stress of weather' and so to that extent reproduces Art. 23. For other maritime treaties referring to distress see further ARSIWA Commentary, Art. 24, §5 n. 395.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:08 Page Number: 303

principle discussed above that a circumstance precludes wrongfulness only so long as it subsists); second, a good-faith effort to obtain New Zealand's consent in terms of the treaty; and, third,[174]

> [t]he 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.

One agent was pregnant. The tribunal concluded that her consequent need for a medical examination and her desire to see her dying father did not suffice for distress.[175] Nor did the medical danger to the other agent plainly jeopardize his life (though it might have done). Nonetheless, the tribunal held that it *did* suffice for distress.[176]

The tribunal had earlier quoted a statement in the Draft Articles Commentary that distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned'.[177] This approach is also implied by its reference to 'elementary humanitarian considerations' rather than more specifically to threats to life. But if the tribunal intended to take the view that such a lesser situation may suffice, it is inconsistent with the view of the ILC as expressed in the commentary that 'Article 24 is limited to cases where human life is at stake'.[178] A lower limit than this, extending to less-than-life-threatening situations, would inevitably be a blurred one. Such a lower limit is not needed insofar as necessity already covers emergency situations more generally. On first reading this strictness was emphasized by the term 'extreme distress'. But the word 'extreme' was deleted on the ground that it added nothing of substance and that it should not be open to a state to argue that even though life was at stake the situation was not extreme enough.[179]

The strictness of Article 24 is also mitigated by the requirement that there be no other 'reasonable' way to save the life at stake: it gives the author some flexibility in choosing to save it, acknowledging that there may be neither the time nor the personnel to conduct a proper examination before acting, yet still confines distress to urgent cases. Szurek calls this a 'psychological' element (coupled with the 'material' element of peril).[180] But it is not a subjective test; it turns on *reasonable* belief rather

[174] *Rainbow Warrior*, (1990) 20 RIAA 217, 255. [175] Ibid., 259–64.
[176] Ibid., 254, 255–9. [177] Draft Articles Commentary, Art. 32, §10.
[178] ARSIWA Commentary, Art. 24, §6. [179] Ibid., §§6, 7; Crawford, Second Report, 68–9.
[180] Szurek, in Crawford, Pellet and Olleson (2010) 481, 482–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:08 Page Number: 304

than the author's psychological state as such. Thus in *Hoff* the Mexico–US General Claims Commission appeared to apply an objective test. It formulated 'certain reasonably concrete criteria' for when a ship could seek refuge in a foreign port on the ground of distress:

> Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws.[181]

Among other factors justifying distress in that case, the captain's 'apprehension of the loss of the vessel and cargo' was 'well-grounded' (that is to say: reasonable), and he 'had no intent to perpetrate a fraud on Mexican customs laws'.

A corollary of limiting distress to threats to life is that it is also limited to conduct necessary to avoid those threats. So it will not always preclude the wrongfulness of the non-performance of other international obligations or of requirements of another state's domestic law. These may include notifying the relevant authorities of the arrival of a ship or aircraft. But this will depend on the obligation. In *Hoff*, it was unlawful for Mexico to seize merchandise for breach of a customs law, because the entry of the ship into port met the relevant criteria.[182] In *Cashin and Lewis* v. *The King*, in contrast, the Exchequer Court of Canada held that '[i]n entering the port of Halifax, even under constraint or in distress', a ship

[181] *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, Deceased (USA)* v. *Mexico*, (1929) 4 RIAA 444, 447–8. The Commission slips between the terms 'distress' and 'necessity'. Indeed, the references to 'the preservation of the ship' and 'the cargo', as distinct from the references to 'the lives of people on board', are strictly irrelevant to distress as formulated in the ARSIWA. This shows the connection between distress and necessity (Szurek (2010) 481, 485) but also the confusion that can result from a less precise approach to distress than that taken by the ARSIWA.

[182] *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, Deceased (USA)* v. *Mexico*, (1929) 4 RIAA 444. See further ARSIWA Commentary, Art. 24, §8 (in which the case is cited as *The Rebecca*, (1929) 23 AJIL 860) and cases cited in ibid., n. 396.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:09 Page Number: 305

'became subject to the laws of Canada and her master was bound to make a report to the collector of customs' in compliance with a Canadian statute.[183]

Of the two provisos in Article 24(2), the first has substantively the same effect as the first proviso to *force majeure*: Article 24(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'. The second proviso is different. It elaborates on the requirement that there be 'no other reasonable way' to save the life at stake by providing that Article 24(1) does not apply if '(b) the act in question is likely to create a comparable or greater peril'. This is an objective test. Although it refers only to 'peril' – rather than specifically to peril to human lives – it operates on the basis that the overall purpose of Article 24 is to save human lives. So distress might not preclude the wrongfulness of an emergency landing by an aircraft carrying explosives or the entry into port of a damaged nuclear submarine whose radioactivity might contaminate it.[184]

9.2.6 *Necessity*

Necessity (previously 'state of necessity', mirroring the French 'état de necessité'[185]) has been described as 'a material source or extra-legal blueprint of all legal defences at the level of primary rules'.[186] But if it is a blueprint, the lines indicating its foundations and boundaries have often seemed faint. In the nineteenth century, necessity was often premised on an inherent or fundamental right of states to their self-preservation that had priority over other states' subjective rights, although this theory has since been rejected and does not underlie the ARSIWA.[187] A famous example of its abuse is the German occupation of neutral Belgium and Luxembourg at the outbreak of the First World War: the German Chancellor told the Reichstag 'we are in a state of self-defence and necessity knows no law'.[188] Germany invoked it again in the Second World War to justify occupying the same two states as well as

[183] [1935] Ex CR 103, 110–11. [184] ARSIWA Commentary, Art. 24, §10.
[185] See Crawford, Second Report, 73.
[186] Heathcote, in Crawford, Pellet and Olleson (2010) 491, 496.
[187] Draft Articles Commentary, Art. 33, §4; Heathcote (2010), 492–4, 496–7. The ILC treated necessity as a fact and distinguished it from the 'fundamental right of State survival' raised in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 p. 226.
[188] Chancellor von Bethmann-Hollweg, 4 August 1914, 3 *Jahrbuch des Völkerrechts* (1916), 728, cited in ARSIWA Commentary, Art. 25, §2 n. 398. See also Heathcote (2010), 492.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:09 Page Number: 306

Denmark, Norway and the Netherlands, as did Italy regarding Greece. Earlier cases include the annexations of Krakow by Austria (1846), of Rome by Italy (1870), of Bosnia-Herzegovina by Austria-Hungary (1908) and of Ethiopia by Italy (1936), and Japan's occupation of Korea in the Russo-Japanese War (1904–5).[189] Such abuses have led many to doubt that necessity has any place in international law. The *Rainbow Warrior* tribunal described the Draft Article codifying necessity, which it noted 'allegedly authorizes a State to take unlawful action invoking a state of necessity', as being 'controversial'. It contrasted this with the 'general acceptance' of the principle of distress.[190]

Yet it is partly *because* of the danger of abuse that, despite the lack of a consensus on the existence and scope of necessity, the ARSIWA treat it not as a political pretext for conduct 'that knows no law' but as a legal principle narrowly defined by cumulative conditions. On first reading the ILC accepted that opinion was divided, but concluded that necessity was

> too deeply rooted in general legal thinking for silence on the subject to be considered a sufficient reason for regarding the notion as totally inapplicable in international law, and, in any case, there would be no justification for regarding it as totally so. The fact that abuses are feared – abuses which are avoidable if detailed and carefully worded provisions are adopted – is no reason to bar the legitimate operation of a ground for precluding the wrongfulness of conduct by a State in cases in which the utility of this ground is generally acknowledged.[191]

Jagota comments: 'bearing in mind the fact that necessity affects the essential interest of the State itself, big or small, a properly drafted limited provision on necessity ensuring against abuse, may be more useful than no provision on necessity, particularly when the limitations clearly [protect] *jus cogens* and the humanitarian interests'.[192] To emphasize how exceptional the conditions for necessity are, Article 25 – unlike the other circumstances precluding wrongfulness – phrases them in the negative (that is to say, as *restricting* rather than authorizing it):[193]

[189] Salmon, in Makarczyk (ed.), *Essays in Honour of Judge Manfred Lachs* (1984) 235, 241–2; Heathcote (2010), 492.

[190] *Rainbow Warrior*, (1990) 20 RIAA 217, 254. On the disagreement about the existence and scope of necessity see further: Draft Articles Commentary, Art. 33, §29; Heathcote (2010), 492–4; Barboza, in Makarczyk (1984) 27; Salmon (1984); Paddeu (2011).

[191] Draft Articles Commentary, Art. 33, §31.

[192] Jagota (1985), 271.

[193] The ILC adopted this negative formulation (Draft Articles Commentary, Art. 33, §40).

> 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

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:09 Page Number: 307

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 means 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 25(1)(a) in fact contains three requirements: an 'essential interest', a 'grave and imminent peril' and that the act be the 'only means'. The basis for each of these in state practice will be discussed in turn, followed by the other conditions.

Like distress and unlike *force majeure*, necessity involves a choice by a state to act inconsistently with an international obligation to protect some other interest. The nature of the obligation does not matter; it could be customary or conventional.[194] What distinguishes it from distress is the nature of the interest: it is not confined to human life but must be 'essential' – a word whose origin (Greek *ousia*: being) suggests a connection to the 'life' of the state.[195] Threats to the existence of the state are indeed the most obvious cases. On one view of *Russian Indemnity*, Turkey's plea that its financial circumstances constituted *force majeure* would fit more properly into necessity. The tribunal noted: 'Le Gouvernement Impérial Russe admet expressément . . . que l'obligation pour un

exception – and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness.

The International Court referred to the negative formulation of the provision in *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 40. It mirrors VCLT, Art. 62 on fundamental change of circumstances, to which many of the same considerations apply.

[194] ARSIWA Commentary, Art. 25, §14. The predecessor of Art. 25 (Draft Art. 33) also applied regardless of the source of an obligation. But what is now Art. 25(2)(b) previously stated: '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'. That is to say, it applied only to treaty obligations. But since the ARSIWA proceed on the basis that non-treaty obligations have similar consequences, this was amended: Crawford, Second Report, 73.

[195] Distress has been referred to as being a specific instance of necessity: see Paddeu (2011). Other authors have criticized the distinction between the two principles: Salmon (1984). See also Szurek (2010) 481, 483.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:10 Page Number: 308

État d'exécuter les traités peut fléchir "si l'existence même de l'État vient à être en danger, si l'observation du devoir international est ... self destructive".'[196] This can be taken as a statement that what the ARSIWA now defines as necessity can apply in principle in such cases (although Turkey's plea failed on the facts).[197] But they are not the only possible cases. Sloane suggests that if Article 25 had been applicable in *Russian Indemnity*, 'Turkey's severe lack of economic health could quite plausibly have been characterized as an "essential interest"', even in the absence of a threat to its existence as a state.[198] Indeed on first reading the ILC found 'that the cases in which a state of necessity has been invoked in order to safeguard an interest of the State other than the preservation of its very existence have ultimately proved more frequent and less controversial'.[199] This is partly because the positive law of self-defence already operates to safeguard the state's existence.[200]

The extent to which an interest is 'essential' depends on all the circumstances.[201] Necessity has thus been invoked – and accepted as applicable in principle, or at least not rejected – to protect not only the existence of the state but also the environment and the safety of civilians. Environmental cases are among the most prominent. In 1893, the Russian Minister for Foreign Affairs justified a decree prohibiting sealing in an area of the high seas, outside its own territory and not subject to any international regulation, in view of the 'absolute necessity of immediate provisional measures'.[202] The essential interest here was the protection of the fur seal population from extermination. A similar issue arose in *Fisheries Jurisdiction*, although the International Court held that it lacked jurisdiction: Canada's Coastal Fisheries Protection Act 1994 declared that the straddling stocks of the Grand Bank were 'threatened with extinction' and enabled it 'to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding'.

[196] *Russian Indemnity (Russia/Turkey)*, (1912) 11 RIAA 421, 443. Translation from ARSIWA Commentary, Art. 25, §7: '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".'

[197] Greece likewise sought to rely on its serious financial situation to justify not paying a debt in *Société Commerciale de Belgique*, (1939) PCIJ Ser. A/B No. 78, 160. See also *Serbian Loans*, (1929) PCIJ Ser. A No. 20; *French Company of Venezuela Railroads*, (1902) 10 RIAA 285, 353 (referring to *force majeure*).

[198] Sloane, (2012) 106 AJIL 447, 461.

[199] Draft Articles Commentary, Art. 33, §32.

[200] Crawford, Second Report, 70.

[201] ARSIWA Commentary, Art. 25, §15.

[202] Letter to the British Ambassador, 12/24 February 1893, 86 BFSP 220; ILC Ybk 1978/II(1) 105.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:10 Page Number: 309

Its officials subsequently seized a Spanish fishing ship on the high seas and argued that its conduct was 'necessary' to prevent overfishing of Greenland halibut.[203] What might be considered a case of necessity to protect a different environmental interest occurred in 1967. After a Liberian oil tanker ran aground off the Cornish coast, outside UK territorial waters, the United Kingdom bombed it to burn off the remaining oil. Although the United Kingdom did not refer expressly to necessity, it emphasized the danger that the oil spilt from the ship posed to its coastline and that it had decided to bomb the ship only after other remedial attempts had failed, and other states did not object to its conduct.[204] Sloane argues that these cases are inapposite because the states involved may not have believed either that they were invoking necessity or that it precluded wrongfulness (a lack of *opinio juris*) or may not have had in mind the exact conditions in Article 25.[205] In view of the imprecision of the terms used at that time to distinguish different justifications and excuses and of the widespread invocation of necessity by states then and since, this seems an inappropriately strict view of state practice. A more clearly progressive development of the law, however – and a notable one, given the application of necessity in environmental cases – is the extension of 'essential interest' beyond the particular interests of the state and its people to those of the international community as a whole.[206]

The second requirement in Article 25(1)(a), for a 'grave and imminent peril', is a long-standing one. In 1832, the UK government was advised that Portugal might well be able to use 'those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State' but that the 'extent of the necessity, which will justify ... an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent'.[207] The *Caroline* incident of five years later sheds further light on this requirement of imminence or urgency.[208] The

[203] *Fisheries Jurisdiction (Spain* v. *Canada)*, ICJ Rep. 1998 p. 431, 443. See further ARSIWA Commentary, Art. 25, §12 and n. 419.

[204] UK Home Office, '*Torrey Canyon*', Command Paper No. 3246 (1967), cited in ARSIWA Commentary, Art. 25, §9. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, 970 UNTS 211, now covers such situations.

[205] Sloane (2012), 466–9.

[206] ARSIWA Commentary, Art. 25, §15; Heathcote (2010), 497.

[207] McNair, 2 *Opinions* 232.

[208] This is often cited as a case of self-defence rather than necessity. But though it may have influenced self-defence, it is anachronous: 1837 was long before UN Charter, Art. 2(4)

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:11 Page Number: 310

Caroline was a vessel owned by Americans that was carrying recruits and military and other materials to insurgents in (British) Canada. British armed forces entered US territory and destroyed it. The United States argued that 'nothing less than a clear and absolute necessity can afford ground of justification' for 'hostile acts within the territory of a Power at Peace' and that what the United Kingdom had to demonstrate was 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[209] Since the United States expected an apology, Heathcote doubts whether it can be concluded that any necessity that did exist had the effect of precluding the wrongfulness of the United Kingdom's conduct.[210] But such a conclusion accords with their final exchanges in 1842, in which the United Kingdom's envoy accepted the principle asserted by the United States and added:

> [I]t is admitted by all writers, by all Jurists, by the occasional practice of all nations, including your own, that a strong overpowering necessity may arise, when this great principle [the obligation of respect for the independent territory of another state] may and must be suspended. It must be so for the shortest possible period, during the continuance of an admitted over-ruling necessity, and strictly confined within the narrowest limits imposed by that necessity . . . Agreeing therefore on the general principle and on the possible exception to which it is liable, the only question between us is whether this occurrence came within the limits fairly to be assigned to such exception . . .[211]

This answers the criticism that the early cases are inapposite insofar as they do not clearly embody an *opinio juris* that necessity precludes wrongfulness.

The word 'imminent' in Article 25 may not have the same connotations as some of the formulations used by the United States in the *Caroline* incident, such as 'instant' and 'leaving . . . no moment for deliberation', might appear to have. In *Gabčíkovo-Nagymaros*, the International Court considered the predecessor of Article 25 in the Draft Articles, which also used the term 'imminent'. It said that 'the mere apprehension of a possible "peril" could not suffice' and that '"[i]mminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility"'. Nonetheless, '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

prohibited 'the threat or use of force' and Art. 51 preserved the 'inherent right of individual or collective self-defence'.

[209] McNair, 2 *Opinions* 222. [210] Heathcote (2010), 493. [211] McNair, 2 *Opinions* 222–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:11 Page Number: 311

might be, is not thereby any less certain and inevitable'.[212] As this implies, a grave and imminent peril must still be objectively established. The state itself is not the sole judge of whether the conditions for necessity are met.[213] But complete certainty is not required, especially since the relevant essential interests, such as the conservation of the environment and the safety of large structures, may be subject to divergent scientific or expert views.[214] This is in harmony with the precautionary principle. In order to keep necessity within tight bounds, however, Article 25 was not amended to reflect this expressly.[215]

The requirement that an act must be 'the only means' for the state to safeguard an essential interest against such a peril is already visible in the *Caroline* incident: the United States suggested that necessity must leave 'no choice of means'. Here 'only' means 'only'; it is not enough if another lawful means is more expensive or less convenient. Nor does it matter if it requires co-operation with other states or international organizations. In *Fisheries Jurisdiction*, for example, Spain might have been able to establish that Canada could instead have taken conservation measures through the Northwest Atlantic Fisheries Organization, although Canada argued that its regulatory measures had previously been ineffective.[216] In his individual opinion in *Oscar Chinn*, Judge Anzilotti noted that he did not believe that Belgium meant to plead necessity, merely that the measures in question 'were taken for grave reasons of public interest in order to save the colony [the Congo] from the disastrous consequences of the collapse in prices'. But:

> The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations . . . [T]here are certain undisputed facts which appear inconsistent with a plea of necessity. To begin with, there is the fact that . . . it chose, from among several possible measures . . . that which it regarded as the most appropriate in the circumstances. No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those

[212] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 42. [213] Ibid., 40.
[214] ARSIWA Commentary, Art. 25, §§15–16.
[215] An alternative to the eventual Art. 25(1)(a) was considered, that stated: 'The act was the only means of safeguarding an essential interest of the State against a grave and imminent peril, the occurrence of which could not reasonably be excluded on the best information available': Crawford, Second Report, 73.
[216] *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Rep. 1998 p. 431.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:11 Page Number: 312

obligations. On the other hand, the existence of that freedom is incompatible with the plea of necessity which, by definition, implies the impossibility of proceeding by any other method than the one contrary to law.[217]

Recent cases evidence this requirement. In *Libyan Arab Foreign Investment Company* v. *Burundi*, Burundi had broken off diplomatic relations with Libya and expelled all its nationals, including the managers of two companies jointly owned by Burundi and a Libyan shareholder, because 'all Libyan nationals resident in Burundi in general . . . had been participating in activities of destabilization putting the peace and general security of the Republic of Burundi in danger'. The tribunal 'noted that the various measures taken by [Burundi] against the rights of [the Libyan shareholder] do not appear . . . to have been the only means of safeguarding an essential interest of Burundi against a grave and imminent peril, especially since the two Libyan employees in question do not appear to have constituted such a peril'.[218] In *Gabčíkovo-Nagymaros*, given the work and money already put into the dam project and the possibility of remedying any problems with it, 'Hungary had means available to it, other than the suspension and abandonment of the works' of safeguarding its putative essential interest.[219] In *MV Saiga*, ITLOS referred to the predecessor of Article 25 in the Draft Articles and held that 'however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels' – Guinea having produced no evidence that its essential interests were in grave and imminent peril – it could not 'be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone'.[220]

The requirement in Article 25(1)(b), that a state's conduct must not seriously impair an essential interest of another state towards which the obligation exists or of the international community as a whole, is objective: the state's own essential interest must outweigh any such interest based on a reasonable assessment.[221] An illustration may be the *Wall*

[217] *Oscar Chinn*, (1934) PCIJ Ser. A/B No. 63, 65, 112–14.
[218] *Libyan Arab Foreign Investment Company* v. *Burundi*, (1994) 96 ILR 279, 283, 319.
[219] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 42–3.
[220] *MV Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, (1999) 38 ILM 1323, §135.
[221] ARSIWA Commentary, Art. 25, §17–18. In *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 46, the Court did not consider whether Hungary's conduct had impaired an essential interest of Czechoslovakia within the meaning of the Draft Articles, since Hungary could not make the defence out anyway.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:12 Page Number: 313

Advisory Opinion.[222] The International Court found that constructing a wall in the West Bank was not 'the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction' and thus did not consider this further requirement. But arguably it would have impaired an essential interest of the Palestinian people. In both cases, it would be significant that the category of *erga omnes* obligations overlaps with that of peremptory norms. Heathcote notes that since the right of Palestinians to self-determination is peremptory, that alone would have excluded the possibility of necessity anyway under Article 26. Given this overlap, where it is an essential interest of the international community as a whole that is impaired, the need for Article 25(1)(b) may be limited.

Whereas the conditions in Article 25(1) concern the balancing of conflicting interests,[223] the two provisos in Article 25(2) are absolute.[224] Article 25(2)(b) resembles the provisos to distress and *force majeure* but is stronger in that it excludes necessity if a state has merely 'contributed' to a situation rather than only where the situation is 'due to' it.[225] Thus in *Gabčíkovo-Nagymaros*, even if Hungary could have established that there was a state of necessity (which it could not), it 'would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about'.[226] The tribunal in *CMS Gas Transmission* v. *Argentina* rejected a plea of necessity by Argentina, among other reasons because although 'in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions' the question was 'whether the contribution to the crisis by Argentina has or has not been sufficiently substantial', and '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 [Argentina] from its responsibility in the matter'.[227]

[222] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136, 194–5.

[223] Sloane (2012), in arguing that Art. 25 may not reflect customary international law, criticizes this 'choice-of-evils paradigm' as being inconsistent with the classical conception of necessity as evidenced by, for example, the UK–Portuguese dispute in 1832.

[224] Heathcote (2010), 496.

[225] ARSIWA Commentary, Art. 25, §19–20.

[226] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 46.

[227] *CMS Gas Transmission* v. *Argentina*, (2005) 14 ICSID Reports 152, 212–13. This decision later came before the Annulment Committee, which criticized the tribunal for considering an emergency clause in the bilateral investment treaty (a primary rule similar to necessity) in the light of the conditions in ARSIWA, Art. 25 and for treating ARSIWA, Art. 27 (on compensation for material loss: discussed below) as a stipulation rather than a saving clause. But it held that the tribunal had clearly stated reasons for

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:12 Page Number: 314

Reference has already been made to the application in *Gabčíkovo-Nagymaros* of the other conditions imposed on necessity. The International Court was able to apply them without problems of the sort that might be expected from its history of controversy and the often-espoused fear of abuse. This reinforces their basis in state practice. The Court also commented expressly that their codification in the Draft Articles (substantially unchanged in the ARSIWA insofar as they were relevant in that case) reflects customary international law:

> 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 ... 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 set forth in Draft Article 33 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.[228]

This should alleviate the scepticism expressed in *Rainbow Warrior* and elsewhere about whether necessity still has a place in international law. The International Court acknowledged the principle again in *Wall*.[229] Despite this, some still doubt whether Article 25 reflects custom.[230]

its conclusions on Art. 25 and that it therefore had no jurisdiction to consider them: *CMS Gas Transmission* v. *Argentina*, (2007) 14 ICSID Reports 251, 273. Argentina has also pleaded necessity in other cases. In *LG&E Energy Corp et al.* v. *Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, §261, the tribunal apparently *did* accept such a plea but simply treated that as supporting its analysis of the emergency clause: 'the Tribunal considers that [the emergency clause] 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'. Heathcote (2010), 501, comments that this may indicate 'that a primary rule of "financial necessity" is emerging'. See also Sloane (2012), 497ff.

[228] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 40–1.

[229] *Wall*, ICJ Rep. 2004 p. 136, 194–5.

[230] Sloane argues that since '[i]t is not clear that ILC members uniformly regarded Article 25 as codification' the International Court's reliance on it is an instance of 'institutional circularity': Sloane (2012), 453.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:12 Page Number: 315

There are, of course, other controversies the ARSIWA do not put to rest. Omitted from the International Court's summary of the conditions for necessity in *Gabčíkovo-Nagymaros* is any reference to the proviso in Article 25(2)(a): that a particular primary obligation may exclude the possibility of invoking necessity. This leaves open whether forcible 'humanitarian' intervention outside the UN Charter Chapters VII (on collective action through the Security Council) and VIII (on regional arrangements) may be lawful. It also leaves open the question of 'military necessity', which may be excluded by some treaties on human rights or international humanitarian law.[231] But these are questions for the primary rules.[232] They cannot be resolved by the ARSIWA except perhaps insofar as they fall within the next of its provisions to be discussed, on peremptory norms.

9.3 Further questions

9.3.1 Obligations arising under peremptory norms

As well as the provisos to *force majeure*, distress and necessity, ARSIWA Part I, Chapter V includes a general exception for peremptory norms of general international law. It began life not as an exception but as a circumstance that itself precluded wrongfulness. Fitzmaurice had commented in 1959, in the course of the ILC's work on the law of treaties, 'A treaty obligation the observance of which is incompatible with a new

[231] E.g. the ICCPR, Art. 4(2) and the other non-derogable human rights and intransgressible norms of international humanitarian law referred to above in discussing self-defence. The International Court referred to some such provisions in *Wall*, ICJ Rep. 2004 p. 136, 192–3, although it did not conclude expressly that they would exclude necessity. Other primary rules may operate not to exclude military necessity but to authorize it and to govern when it can be invoked. For example, the 1st Protocol to the Geneva Conventions, Art. 54, provides in part:

> 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population... whatever the motive.
> ...
> 5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Cf. other provisions elsewhere in the Geneva Conventions on 'imperative military necessity'.

[232] See Dinstein, 'Military necessity', (2009) MPEPIL; ARSIWA Commentary, Art. 25, §21 and sources cited; Crawford, Second Report, 70, 72; Heathcote (2010), 498–9; McNair, 3 *Opinions* 398. There have been similar suggestions that distress might encompass elementary considerations of humanity: see Szurek (2010) 481, 486–9. But the extension of distress to cover cases of humanitarian intervention was not supported during the drafting of the ARSIWA: Crawford, Second Report, 68; ILC Ybk 1999/I, 179.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:13 Page Number: 316

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, subject to [certain conditions].'[233] What he had in mind was evidently not a treaty on its face conflicting with a *jus cogens* norm, which is simply invalid,[234] but an apparently lawful treaty whose performance might nonetheless cause or substantially assist in a breach of one. For example, if a state agreed under an arms treaty to supply weapons that the recipient state intended to use to commit genocide, there is no reason why the treaty itself should terminate, but its performance would substantially assist in a breach of the peremptory norm against genocide.[235] Originally what is now Article 26 precluded the wrongfulness of an act not in conformity with the treaty in such situations. But the ordinary process of treaty interpretation in accordance with the VCLT should achieve this result anyway: cases such as the example just given seem not to have occurred in practice, and if one were to occur then peremptory norms generate interpretative principles that are strong enough to resolve any apparent conflict without resort to the law of state responsibility.[236] The Drafting Committee also sought to avoid suggesting that a breach of a peremptory norm required an *act*. On the contrary, such norms usually *prohibit* acts.[237]

The result is Article 26: '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.' The norms most commonly accepted as being peremptory are the right to self-determination and the prohibitions of aggression, genocide, systematic racial discrimination, crimes against humanity and torture. The importance of spelling the principle out, bearing in mind the gravity of these matters, is evidenced by *Bosnian Genocide*, where Bosnia claimed against Serbia (at that time with Montenegro the Federal Republic of Yugoslavia) and Serbia then counterclaimed against Bosnia, both for

[233] Fitzmaurice, Fourth Report, ILC Ybk 1959/II, 46. [234] VCLT, Arts. 53, 64.

[235] See further Crawford, Second Report, 76–7. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, ICJ Rep. 1993 p. 325, 439–41 (Judge ad hoc Lauterpacht), discussing the possible consequences of a Security Council resolution prohibiting the supply of arms to parties to the Yugoslav wars if, by limiting Bosnia-Herzegovina's supply of arms and thereby its ability to fight back, it were seen as having called on UN members, 'albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*'.

[236] ARSIWA Commentary, Art. 26, §3. [237] ILC Ybk 2001/I.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:13 Page Number: 317

genocide. The International Court affirmed: 'in no case could one breach of the [Genocide] Convention serve as an excuse for another'.[238]

Article 26 applies to all six circumstances and to all peremptory norms. But its effect on consent, in particular, may vary depending on the norm. One state cannot dispense another from an obligation under a peremptory norm. It follows that a state cannot consent in advance to what would otherwise be breach of an obligation such as the prohibition of torture or genocide: that would be just as inconsistent with the peremptory character of the norm as dispensing with the obligation itself.[239] But what about, say, the prohibition on the use of force under UN Charter Article 2(4) (assuming it constitutes a peremptory norm[240])? Simma noted, at a time when a proviso to a similar effect to what is now Article 26 was attached to the consent provision, that 'everyone recognized that, if a State consented to the military forces of another State marching into its territory, such "authorization" would constitute a derogation from the provisions of [UN Charter Article 2(4)]'.[241] This is plainly correct. What it demonstrates is that, although a state cannot dispense with a peremptory obligation itself, some such obligations incorporate an intrinsic element of consent. In other words: under the applicable primary rules – including the rules on whether consent is 'valid' – there may be no breach of the peremptory norm in the first place and therefore no conflict with Article 26.[242] This is consistent with the critique (discussed above) of the presence of consent in Part I, Chapter V.

The role of self-defence under UN Charter Article 2(4) is comparable. Thouvenin considers a hypothesis that self-defence is itself a peremptory norm on the basis that it might explain how, as a norm of the same character, it can operate as an exception to the prohibition on the use of force.[243] But even apart from the reasons he himself gives for rejecting

[238] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Counter-Claims, ICJ reports 1997 p. 243, 258.

[239] Cf. ARSIWA Commentary, Art. 45, §4.

[240] Ben Mansour (2010), 446–7.

[241] ILC Ybk 1999/I, 147.

[242] ARSIWA Commentary, Art. 26, §6; Crawford, Second Report, 63. On 'invasion pacts' and 'intervention by invitation' see Roth, *Governmental Illegitimacy in International Law* (1999), 185–95. He concludes that it is unclear whether the sovereign equality system can accommodate treaties 'allowing for military intervention to compel compliance with provisions regarding modes of internal governance' – which he calls 'treaties of guarantee' or 'invasion pacts' – but in any event, 'outside that special context, consent in advance to armed intervention in internal affairs cannot be deemed legally effective': 189, 195.

[243] Thouvenin (2010), 465–6. This would also mean, in turn, that self-defence could be limited only by other norms of the same character, presumably the non-derogable

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:13 Page Number: 318

this hypothesis, it mistakes the nature of self-defence. Like consent in this instance, self-defence is not a freestanding norm but an intrinsic part of the primary obligation in UN Charter Article 2(4).

9.3.2 Compensation for material loss

Article 27(b) provides: 'The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to . . . (b) the question of compensation for any material loss caused by the act in question.' In other words, it contemplates that sometimes a state relying on a circumstance to preclude the wrongfulness of an act may nonetheless be expected to make good any material loss suffered by a state affected by that act. It operates separately from the machinery of reparation set in motion under Part II, Chapter II.[244] '[M]aterial loss' is not as wide as the concept of 'damage' employed there, which under Article 31 can also encompass 'moral' damage. Nor does 'compensation' mean compensation under that chapter.[245]

Without a provision to this effect, a state might be tempted to use a circumstance precluding the wrongfulness of its conduct as against another state to shift the burden of defending its own interests on to another state. For instance, in *Gabčíkovo-Nagymaros*, the dam project was discontinued for reasons that were not attributable solely to Czechoslovakia (or Slovakia). It would have been unconscionable for Hungary to seek to shift the whole cost of the discontinuance on to that state.[246] Indeed, in noting that necessity could preclude international responsibility for an act but not terminate the obligation itself, the International Court also observed that 'Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner'.[247] Since Hungary did not establish that necessity applied, the Court did not consider the point further. Similarly, if a leaking ship enters a foreign port in distress and the leakage causes oil pollution, there is no reason why the state relying on distress should not pay the actual clean-up costs.

human rights and intransgressible norms of international humanitarian law discussed above. One of his reasons for rejecting the hypothesis is that although he considers that *as a right* self-defence could at least potentially be peremptory, as a circumstance precluding wrongfulness it could not, since it does not entail the termination of conflicting norms.

244 ARSIWA Commentary, Art. 27, §§4–6. See Chapter 15.

245 Japan suggested using a different term: ILC Ybk 1999/II(1), 107.

246 Crawford, Second Report, 84.

247 *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 39; see also 81.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:14 Page Number: 319

So much is clear in cases of distress and necessity: they are choices voluntarily made by a state that may cause material loss to another innocent state. But whether there are any other circumstances precluding wrongfulness where a state must still make good any material loss is not clear. On second reading states disagreed. Austria suggested that what is now Article 27(b) be limited to where 'international law provides a legal ground for compensation'; France, that it 'envisages no-fault liability' and should be deleted; and Germany, seemingly, that it be limited to necessity.[248] The United Kingdom welcomed it insofar as it applied to distress and necessity on the ground that 'where a State has chosen to take action for its own benefit, there is no reason in principle why that State, rather than the State against which the action was taken, should not bear the cost of doing so' and identified unjust enrichment as a 'conceptual framework'.[249] One reason to treat distress or necessity differently, as the United Kingdom implied, might be that they are mere 'excuses' rather than 'justifications'. Self-defence and countermeasures (on this view justifications, clearly rendering conduct lawful) both depend on a prior wrongful act by the state targeted, and there is no reason to compensate that state for the results of its own wrongful act. Consent (also seen as a justification) appears to differ in that the consenting state might consent only on the basis of compensation, but that is a matter for agreement rather than for state responsibility. So on this view only *force majeure*, distress and necessity seem to leave open compensation for material loss.

Yet even then it is doubtful that *force majeure* (arguably also an excuse in that it does not clearly render conduct lawful; it just compels it) can give rise to an obligation to compensate. By definition, a state relying on *force majeure* has not contributed to the situation and so, unlike in *Gabčíkovo-Nagymaros*, is no more responsible for any material loss than the state suffering it. So it is not a simple matter of distinguishing justifications from excuses.[250] Conversely, the Drafting Committee queried whether there could 'also be cases of innocent third states which incurred damage arising out of self-defence or countermeasures' – as distinct from 'the wrongdoing State which had committed the original wrongful act and for which no compensation was conceivable'.[251] The result is that Article 27(b) is framed in general terms. This indicates that

[248] ILC Ybk 1998/II(1), 135–6. [249] Ibid., 136; Crawford, Second Report, 84.
[250] See further Crawford, Second Report, 85.
[251] ILC Ybk 1999/I, 174 (Economides). See further 174–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:14 Page Number: 320

it may apply to such third states, at least where they are beneficiaries of the obligation, and acknowledges that courts are usually empowered to adjust the financial consequences of situations in which wrongfulness is precluded.[252] The commentary states that it is for the states involved to agree on 'the possibility and extent of compensation payable'.[253]

9.3.3 *The burden of proof*

It was not necessary for Part I, Chapter V to deal expressly with the burden of proof. Whereas in a bilateral dispute the burden of *establishing* state responsibility lies on the claimant state, if an act that does not conform to an international obligation is attributable to a state and that state seeks to rely on a circumstance precluding wrongfulness,[254] the burden shifts to that state. This makes practical sense in that it is often only that state that is cognizant of the facts justifying the act.[255] The WTO Appellate Body has elaborated on this general principle, *inter alia*, in *EC – Tariff Preferences*:

> In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party. However, this distinction may not always be evident or readily applicable.[256]

One complication is that not every international dispute is a straightforward contest between claimant and respondent.[257] If it is submitted

[252] Ibid., 176 (Crawford). [253] ARSIWA Commentary, Art. 27, §6.

[254] On whether a specialized court may be unable to consider a circumstance precluding wrongfulness because the argument is based on a rule outside its domain of competence, see *Brownlie's Principles*, 565.

[255] ARSIWA Commentary, Pt I, Ch. V, §8.

[256] *EC – Tariff Preferences*, 7 April 2004, WT/DS246/AB/R, §88. Further: *Brownlie's Principles*, 564 n. 139.

[257] See Lauterpacht, *The Development of International Law by the International Court* (1958), 362–7, expressing doubt that *Fisheries (UK v. Norway)*, ICJ Rep. 1951 p. 143, is based 'on a technical rule of evidence in the shape of a rigid apportionment of the burden of proof'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:15 Page Number: 321

though a *compromis*, both states may make affirmative claims. And some circumstances precluding wrongfulness may either be treated as matters of admissibility or reserved to the merits. But the general rule is that the party asserting a proposition must prove it: *actori incumbit probatio*.[258]

[258] *Brownlie's Principles*, 564.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 9 Title Name: CRAWFORD
Date:18/3/13 Time:12:40:15 Page Number: 322

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-IV Title Name: CRAWFORD
Date:12/3/13 Time:18:39:59 Page Number: 323

Part IV

Collective or ancillary responsibility

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-IV Title Name: CRAWFORD
Date:12/3/13 Time:18:39:59 Page Number: 324

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:52 Page Number: 325

10 Responsibility in cases of joint or collective conduct

10.1 Introduction

States rarely operate in isolation. There are many situations where they chose to act together to achieve a mutually beneficial outcome, and as many forms which such joint or collective conduct may take. In some cases this collaborative conduct may result in an internationally wrongful act – indeed, that may be its purpose.[1] This raises questions about individual states' responsibility for any injury to third states caused by the joint or collective conduct: what difference does it make to the responsibility of one state, if one or more other states are also responsible for the very same conduct?[2] Given how common interstate co-operation is, it is perhaps surprising that the law of responsibility in this area remains relatively undeveloped.[3]

The question of a plurality of responsible states is separate from the issue of violations of multilateral obligations,[4] nor are we presently concerned with a plurality of injured states[5] or the separate responsibility of international organizations.[6]

[1] At least nine different possibilities can be identified in which the combined actions of more than one state might result in wrongful conduct: joint conduct; action via a common organ; agency; independently wrongful conduct involving another state; voluntary assistance in the commission of a wrongful act; incitement of wrongful conduct; direction, compulsion or coercion; assistance given after the wrongful act; and conduct of several states separately causing aspects of the same harm or injury. See Crawford, Second Report, 45.

[2] Crawford, Third Report, 72.

[3] Nolte and Aust, (2009) 58 ICLQ 1, 2. For an explanation of some of the reasons behind the lack of judicial and arbitral decisions involving multiple state responsibility see e.g. Noyes and Smith, (1988) 13 Yale JIL 225, 231–8; Besson, (2007) 17 RSDIE 13, 15, 17–19.

[4] Ibid., 16–17.

[5] See ARSIWA, Art. 46; ARSIWA Commentary, Art. 46. See also Chapter 20.

[6] See e.g. Hirsch, *The Responsibility of International Organizations towards Third Parties* (1995); Klein, *La Responsabilité des organizations internationales* (1998); David, *Droit des organizations*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:53 Page Number: 326

10.1.1 Historical background: the work of the ILC and the Institut

Historically there has been relatively little interest in the consequences and effects of joint state conduct under the law of international responsibility. Early studies of joint responsibility tended to focus on situations in which a state might be held responsible in connection with acts of individuals or private persons, rather than another state.[7] The notion of states acting together is by no means new[8] – and in modern times the entire multilateral system for collective peace and security is based on the expressions of solidarity underpinning the UN Charter.[9] But there is a noticeable lack of judicial and arbitral authorities concerning wrongful acts arising from such co-operation. It is rare for cases to be brought against multiple respondents, particularly in areas where dispute resolution most frequently raises questions of state responsibility (e.g. treatment of aliens, treaty violations or damage to property by armed forces).[10] This is due in part at least to the frequent jurisdictional or procedural obstacles to bringing a claim against multiple states, whether in national or international fora.[11]

In one or two cases states have chosen to deal expressly by treaty with responsibility for joint conduct. The leading example is the Convention on Liability for Damage Caused by Space Objects, which specifies a regime of joint and several liability where a third state suffers damage caused by a collision between two space objects launched by two states (Article IV) or by a space object jointly launched by two states (Article V).[12] However, instruments directly addressing the situation are unusual.

The text of ARSIWA as adopted on first reading did not address responsibility for wrongful acts co-authored by more than one state. Instead, the ILC originally confined itself to questions of the implication of one state in the wrongful conduct of another, although in that context Special Rapporteur Ago did acknowledge in 1978:

> [I]t is also possible to think of cases in which, on one and the same specific occasion, several States have been found to have engaged in conduct not in conformity with

internationales (6th edn, 2005); Amerasinghe (2005); Klein, in Crawford, Pellet and Olleson (2010) 297.

[7] See e.g. Brierly, (1928) 9 BYIL 42.

[8] See discussion in Wellens, in Wolfrum and Kojima (eds.), *Solidarity: A Structural Principle of International Law* (2010) 3, 5–6.

[9] Ibid., 28.

[10] Noyes and Smith (1988), 232.

[11] Ibid., 232–6; see further ibid., 236–8; Besson (2007), 15, 17–9.

[12] 29 March 1972, 961 UNTS 187. See further Crawford, Third Report, 74.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:53 Page Number: 327

an international obligation. There, too, however, there is no question of participation by one of those States in an internationally wrongful act by another.[13]

This observation was mirrored in the commentary to Draft Article 27 adopted on first reading, which referred to the 'parallel attribution of a single course of conduct to several States' with the result, if that conduct was not in conformity with their obligations, that 'two or more States will concurrently have committed separate, although identical, internationally wrongful acts'.[14] Ago's Seventh Report also referred to 'identical offences committed in concert',[15] but only for the purposes of delimiting what he intended the Draft Articles to cover (cases of one state's participation in the wrongful act of another) and what was not to be covered (cases of joint conduct).

Beyond this, the latter issue received little formal attention in the ILC until 1999, when a number of governments supported the inclusion of provisions dealing with a plurality of states; others noted the scarcity of international law on the subject, and some suggested that the matter could be adequately covered in the commentaries.[16] In 2000 it was possible for the Special Rapporteur to affirm that the position at general international law was clear and relatively straightforward: in the absence of agreement to the contrary, multiple states committing the same wrongful act would each incur responsibility for their own conduct, independently of any other state.[17] This principle was implicit in the Draft Articles, but it was made explicit through the inclusion of Article 47 in the final version adopted in 2001:[18]

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.[19]

[13] ILC Ybk 1978/II(1), 53. [14] ILC Ybk 1978/II(2), 99. [15] ILC Ybk 1978/II(1), 54.
[16] See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat, UN Doc. A/CN.4/504, 8; Crawford, Third Report, 72.
[17] Ibid., 72–4, 75, discussing *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4, and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Rep. 1992 p. 240.
[18] For the proposed provisions in their original form see Crawford, Third Report, 76–7.
[19] See generally ARSIWA Commentary, Art. 47.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:53 Page Number: 328

The implication of one state in the wrongful act of another, a form of collective responsibility, received significantly more attention during the earlier stages of the ILC drafting process, giving rise to Part I, Chapter IV. In his Seventh Report, Special Rapporteur Ago drew a distinction between cases where one state participates in the wrongful act of another state, and cases of 'indirect responsibility' based on the relationship between a state which directs or compels a wrongful act and the state which performs it.[20] The first case was articulated in what became Draft Article 27 adopted on first reading,[21] the second in Draft Article 28.[22] The justification for making this distinction among various other conceptual divisions that could be envisaged was not clearly explained in the Draft Articles or the commentaries.[23] Although many elements of the substance of Draft Part I, Chapter IV were retained, the text was revised and clarified, and ultimately took shape in four separate provisions in the final version of ARSIWA adopted in 2001: Articles 16–18 on aid or assistance, control or direction, and coercion respectively, and Article 19 confirming that the preceding articles are without prejudice to the responsibility of the state which commits the act in question, or any other.[24]

Besides the work of the ILC, the Institut de Droit International has also made an important contribution in the area of joint or collective state responsibility. Foremost among these was the 1995 resolution on 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties', based on the work of Special Rapporteur Rosalyn Higgins, which addresses state responsibility in connection with conduct carried out in the framework of an international organization.[25]

10.1.2 The influence of private law analogies

In discussing responsibility for the joint and collective conduct of states there is a temptation to borrow terminology commonly employed in municipal private law systems – terms like 'joint and several liability' or 'solidary' responsibility, or 'complicity'. Indeed, the principles

[20] Ago, Seventh Report, ILC Ybk 1978/II(1), 52–3.
[21] ILC Ybk 1978/II(2), 99–105.
[22] Ago, Eighth Report, ILC Ybk 1979/II(1), 4–27.
[23] See Crawford, Second Report, 45.
[24] For detailed analysis of the draft provisions, the reasons for their revision, and the proposed Draft Articles, Arts. 27, 28 and 28*bis* which eventually became ARSIWA, Arts. 16–19, see ibid., 47–55.
[25] IDI Res. 1995/II (Lisbon). See further Higgins, (1995) 66/I Ann. de l'Inst. 251.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:54 Page Number: 329

underlying these concepts as a matter of domestic law can provide useful guidance for international law.[26] Given the relative underdevelopment of this field of responsibility in international law, analogies to established principles of private law can influence the concept of joint and collective responsibility at the international level without threatening established norms.[27] In *Oil Platforms* Judge Simma described the difficulty of establishing the responsibility of multiple tortfeasors as 'a textbook situation calling for such an exercise in legal analogy',[28] and Judge Shahabuddeen also contemplated domestic analogies in his opinion in *Certain Phosphate Lands in Nauru*.[29]

However, more than usual care must be taken when adopting the terminology of private law. Despite some remarkable commonalities in content,[30] concepts have developed differently under different legal traditions, and their meaning cannot be assumed to be uniform.[31] Certain terms may carry misleading connotations when imported into international law. For example 'complicity' is a notion frequently associated with criminal law in national legal systems, which risks confusion when it is used as a cognate for the neutral concept of 'aid and assistance' in the law of state responsibility.[32]

[26] Noyes and Smith (1988), 249–51, citing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953, repr. 1993), 24, and de Visscher, *Theory and Reality in Public International Law* (trans. Corbett, rev. edn, 1968;), 400 in support (among others). See further Crawford, Third Report, 75, on the existence of special rules of responsibility where two persons embark on a 'common adventure' causing loss to a third.

[27] Noyes and Smith (1988), 250–1.

[28] *Oil Platforms (Iran v. US)*, ICJ Rep. 2003 p. 161, 354 (Judge Simma).

[29] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 285 (Judge Shahabuddeen). For the opposite view, asserting that the principles developed in domestic systems have scant application before the International Court because of the fundamentally different bases for jurisdiction, see ibid., 329–30 (Judge Schwebel, diss.).

[30] For example, the general rule that where multiple tortfeasors have caused damage, the victim can hold each of them responsible for the whole of the damage even if it is impossible to ascertain exactly who did what; see Weir, 'Complex liabilities', in Tunc (ed.), 11 *International Encyclopedia of Comparative Law* (1983), 12–14, 43–4; Noyes and Smith (1988), 251–4. For an earlier study see Williams, *Joint Obligations* (1949). More recently, Judge Simma has also noted the 'striking' consistency in treatment of this problem across different national systems: see *Oil Platforms*, ICJ Rep. 2003 p. 161, 354–7 (Judge Simma).

[31] Crawford, Second Report, 45–6; Crawford, Third Report, 504 n. 72, 74–5. See also ARSIWA Commentary, Art. 47, §3; Aust, *Complicity and the Law of State Responsibility* (2011), 193–4.

[32] Aust (2011), 9–10, 193. The word 'complicity' was in common use during earlier stages of the drafting of ARSIWA. Special Rapporteur Ago, in his Seventh Report, separated 'participation, in the form of aid or assistance – in short, of complicity' from participation in the act itself, observed that the notion of complicity was by then well

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:54 Page Number: 330

There is little support outside the scholarly literature for the use of private law terminology in the international law of responsibility.[33] Some treaties do specifically use such terms, such as the Genocide Convention ('complicity')[34] and the Convention on Liability for Damage Caused by Space Objects ('joint and several'),[35] but these are the exception rather than the rule. In *Bosnian Genocide*, the International Court observed that no notion of 'complicity' as such exists in the current international law of state responsibility, but it saw no reason to distinguish in substance between the notion of 'complicity in genocide' in Article III(e) of the Convention and the provision of 'aid or assistance' in the commission of genocide in terms of ARSIWA, Article 16. It chose to apply the latter in order to ascertain whether the respondent was responsible for the former.[36]

Judicial recognition of a notion of 'joint and several liability' as part of general international law is likewise limited. In *Certain Phosphate Lands in Nauru*, Judge Shahabuddeen described the responsibility of the three states charged with administering Nauru as joint and several, such that Australia could be sued alone.[37] In articulating his view of the normal rule he referred *inter alia* to the dissenting opinion of Judge Azevedo in *Corfu Channel*.[38] For the majority in the *Nauru* case, however, the question of whether the liability of the three states was 'joint and several' in terms of responsibility for reparation and the question of whether Australia could be sued alone were two separate issues. The Court did not use the domestic law language in engaging with Australia's argument and concluded that there was nothing to prevent consideration of Nauru's claim against Australia for breach of its obligations under the Trusteeship Agreement.[39] Judge Schwebel, dissenting, likewise found domestic

established in international law, and proposed a Draft Art. 25 entitled 'Complicity of a State in the internationally wrongful act of another State': see ILC Ybk 1978/II(1) 31, 60. However, in formulating their Draft Art. 27 from Ago's Draft Art. 25, the Drafting Committee rejected the word 'complicity' as a potential source of ambiguity or misinterpretation: see ILC Ybk 1978/I, 279. The final incarnation of what began as Ago's Draft Art. 25 refers instead to 'aid or assistance' (ARSIWA, Art. 16).

[33] See generally Aust (2011), 290–2 (on joint and several liability).

[34] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Art. III(e). Admittedly here the word is used in a criminal context.

[35] Arts. IV, V. See further Crawford, Third Report, 74; ARSIWA Commentary, Art. 47, §5.

[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 217.

[37] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 283–6 (Judge Shahabuddeen).

[38] *Corfu Channel*, ICJ Rep. 1949 p. 4, 92 (Judge Azevedo, diss.).

[39] ICJ Rep. 1992 p. 240, 258–9. The decision on jurisdiction did not settle the question of reparation: ibid., 262. The dispute was ultimately resolved by agreement: see Order of 13

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:54 Page Number: 331

analogies and *Corfu Channel* to be of little use, and he, too, refrained from using municipal terminology in his judgment.[40] Judge Ago, also in dissent and without using the language of 'joint and several' liability, commented that if the Court were ultimately to find that Australia should shoulder the full burden of any reparation it would be on an 'extremely questionable basis'.[41]

For his part, Judge Simma would have had no trouble 'elevating the joint-and-several liability doctrine . . . to the level of international law' in *Oil Platforms* to get around the indivisibility of damage caused by both Iran and Iraq during the war.[42] He concluded that there was support for treating the doctrine as a general principle of law in terms of Article 38(1)(c) of the Statute of the International Court of Justice.[43] He went on to identify ARSIWA Article 47(1) as 'another authoritative source' that was in conformity with his conclusions on the applicability of joint and several liability.[44]

None of this shows that the doctrine of joint and several liability is already established under that name at the international level, and the reticence of other judges suggests that a cautious approach is appropriate. The commentary to Article 47(1) confirms that it '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'.[45] The normal case of responsibility arises because conduct attributable to a state is a breach of an international obligation of the state concerned vis-à-vis another state which is also a party to, or entitled to the benefit of, that obligation. The language of international law is sufficient; there is no reason or need to express this basic principle of international law in terms drawn by analogy from private law concepts.

September 1993, ICJ Rep. 1993 p. 322 and the Settlement Agreement, 10 August 1993, 1770 UNTS 379.

[40] ICJ Rep. 1992 p. 240, 329–43, esp. 329–30 (Judge Schwebel, diss.).

[41] Ibid., 328 (Judge Ago, diss.).

[42] The result that Iran might have been held responsible for more damage than it actually caused (as a matter of attribution, quite separate from any question of reparation, which Judge Simma expressly did not address) was less objectionable to him than a finding that it was not liable at all. See *Oil Platforms*, ICJ Rep. 2003 p. 161, 357–8 (Judge Simma).

[43] Ibid., 358. Noyes and Smith (1988), 249–50 similarly approached the question of joint and several liability in terms of its possible interpretation as a general principle of law.

[44] ICJ Rep. 2003 p. 161, 358–9(Judge Simma).

[45] ARSIWA Commentary, Art. 47, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:55 Page Number: 332

The approach of the tribunal in the *Eurotunnel* arbitration supports this view.[46] It was faced with a concession agreement that expressly provided for joint and several liability on the part of the concessionaires but was silent on the responsibility of the governments of France and the United Kingdom.[47] After referring to ARSIWA Article 47(1) and its commentary, and analysing the provisions of the Agreement, the tribunal did not rule out the possibility that one state might be responsible for the conduct of the other either directly or through the Intergovernmental Commission (IGC), but it is clear that this finding was not based on the notion of joint and several liability per se:

> To summarise, there is no equivalent so far as the Principals are concerned of the joint and several responsibility and mutual guarantees exacted from the Concessionaires. To the extent that the Claimants' case depends on the thesis of joint and several responsibility, that is, the *per se* responsibility of one State for the acts of the other, it must fail. But the Fixed Link required close cooperation between the two Governments, cooperation to be effected in particular through joint organs (the IGC and the Safety Committee). The core commitments towards the Concessionaires – in effect, to facilitate the construction and (with specified exceptions) to permit the uninterrupted operation of the Fixed Link – required the continuing cooperation of both Governments, directly and through the IGC. Whether particular breaches of the Concession Agreement result from the fault of one or the other or both States will depend on the particular obligation violated and on all the circumstances.[48]

Overall, municipal law analogies can only ever play a subsidiary role in international law, and they are not among the sources of international law listed in Article 38(1) of the Court's Statute.[49] It is perhaps a step too far to say that it is 'necessary to avoid'[50] making analogies with expressions used in private law, as reference to the underlying principles may serve a useful purpose, and careful use of the terms may not cause any harm if their meaning is clear. But it must be emphasized that the wholesale adoption of domestic terminology into international law is not advisable, is certainly not required and to date has received little support. What matters at the international level are the actual terms of any agreement or arrangement, interpreted in the light of the principles of consent, the independence of states and the *pacta tertiis* rule.[51]

[46] *Eurotunnel Arbitration*, (2007) 132 ILR 1, 57–64.
[47] For the English text of the key provisions of the agreement at issue in the case see ibid., Appendix, 128–35.
[48] Ibid., 63–64.
[49] 26 June 1945, 15 UNCIO 355; see Crawford, Third Report, 74–5.
[50] Dominicé, in Crawford, Pellet and Olleson (2010) 281, 282.
[51] Crawford, Third Report, 74–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:55 Page Number: 333

10.2 Joint and collective conduct by states

Responsibility for joint and collective state conduct can be engaged in a variety of ways. As has been indicated above, these can be divided into two distinct categories,[52] although in practice the differences may not be clear-cut, and various forms of collaborative conduct can coexist in the same case.[53]

The first category arises when there is a plurality of responsible states, each of which has breached its international obligations, whether together or separately. This category is concerned with the attribution of internationally wrongful conduct to multiple states, and is governed by the basic principle of independent responsibility and the normal rules of attribution.

In the second category, by contrast, responsibility arises because one state is implicated in the internationally wrongful act of another, whether through the provision of aid or assistance or by its exercise of control or coercion over the acting state. Besides the standard rules of attribution, a set of further specific rules has developed to deal with responsibility in cases under the second category; these are addressed as exceptions to the principle of independent responsibility.[54]

The categories are not necessarily discrete. Depending on the circumstances, a situation in which a state is implicated in another's act may become a case of joint responsibility under the first category requiring multiple attribution: for example, the provision of military assistance may result in co-authorship rather than merely implication if it is shown that the character of the assistance amounts to participation in the wrongful act itself.[55] Besides these two primary categories there are also questions about the conduct of joint organs and various other bases for solidary responsibility.

10.2.1 Attribution to multiple states: the principle of independent responsibility

The first category of joint or collective responsibility is based on the commission of an internationally wrongful act by more than one state.

[52] Dominicé (2010), 281.

[53] See ARSIWA Commentary, Pt I, Ch. IV, §3; Crawford, Second Report, 46, discussing *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240; see further *Eurotunnel Arbitration* (2007) 132 ILR 1, 57–8. Both cases involved cases of mixed types of joint responsibility.

[54] Dominicé (2010), 289. The separate rules are reflected in ARSIWA, Arts. 16–18.

[55] Dominicé (2010), 283. Aust describes the British involvement in the Iraq war in 2003 as one possible example: Aust (2011), 219–21.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:55 Page Number: 334

Within the category of situations requiring attribution of internationally wrongful conduct to multiple states, there is a further distinction between situations where a plurality of states collaborate as co-authors of an internationally wrongful act (what Noyes and Smith call situations of 'concerted conduct') and situations in which a plurality of states acting independently are responsible for different breaches in respect of the same injury ('independent conduct').[56]

The starting point for determining responsibility in both cases is the basic principle that all states are individually and independently responsible for their own conduct,[57] being conduct that is attributable to them according to the rules of attribution in ARSIWA Part I, Chapter II.[58] This responsibility is specific to each state.

Examples of concerted conduct could be a joint military attack by a coalition of states against another state in violation of the prohibition on the use of force in Article 2(4) of the UN Charter,[59] or an interstate commercial venture causing environmental damage in a third state through failure of due diligence.[60] The fact that several states are

[56] Noyes and Smith (1988), 228–31. The authors include aid and assistance as 'falling squarely in the category of a distinct breach relating to a single event' i.e. independent conduct (at 229), but the act by which aid or assistance is provided may not in itself be a wrongful act. Where it is not, the better view is to treat the situation of aid or assistance as an exception to the principle of independent responsibility, falling in the second separate category (implication in the act of another state). See further Dominicé (2010), 281–4.

[57] ARSIWA and Commentary, Art. 1. [58] ARSIWA and Commentary, Arts. 4–11.

[59] Yugoslavia argued this in its *Legality of the Use of Force* cases against ten NATO member states; very few of the respondents attempted to argue that NATO should be held responsible rather than the member states themselves. See Klein (2010), 302–3 and references at n. 30; Dominicé (2010), 281–2. Another example might be the invasion of Iraq by the United States and the United Kingdom in 2003: see Talmon, in Shiner and Williams (eds.), *The Iraq War and International Law* (2008) 185; Aust (2011), 219–21. The involvement of other states would more likely fall within the category of aid or assistance than co-authorship: see e.g. the arguments of the plaintiff in *Edward Horgan* v. *An Taoiseach*, (2003) 132 ILR 407, 429–31, referring to ARSIWA, Art. 16 to support his allegations that Ireland (a traditionally neutral state and not a member of the 'coalition of the willing') had participated in the unlawful use of force in violation of the Irish Constitution by allowing US military aircraft to stop over at Irish airbases before the invasion. The Irish High Court was not willing to rule on the matter. See further Nolte and Aust (2009), 1.

[60] The principle that states should use their best efforts to prevent cross-border pollution was articulated in the *Trail Smelter Arbitration*, (1941) 3 RIAA 1938, and has been reiterated in numerous instruments since: see e.g. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, Ch. I, Principle 21; GA Res. 2995(XXVII), 15 December 1972, §1 (on co-operation between states in the field of the environment); International Convention

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:56 Page Number: 335

responsible for the same internationally wrongful act does not diminish the specific responsibility of each of those states, which may be separately invoked by those who have suffered injury as a result of that act. This is reflected in ARSIWA Article 47(1),[61] subject to the qualifications in Article 47(2).[62] What is required for each state's responsibility in cases of concerted conduct is that its contribution to the joint action is attributable to it and amounts to an element of the unlawful act. Subsequent questions of reparation and apportioning each state's contribution for purposes of compensation do not affect the principle of responsibility for the conduct in question.[63]

As for responsibility arising from independent conduct, the second subcategory of attribution to multiple states, the classic example is Albania's failure to disclose the presence of mines in its waters, central to the *Corfu Channel* case.[64] Although it could not be established that Albania had itself laid the mines, and allegations of collusion with the minelayer were unable to be proved, the fact that Albania knew the mines were present and failed to warn foreign ships passing through its waters meant that it was held responsible for all the resulting damage to British vessels when the mines exploded. The separate wrongful acts of Albania and the unknown state that laid the mines[65] caused the same injury, and each was independently responsible for it under the normal rules of attribution. Another example of independent conduct arose in the *Soering* case, in which the European Court of Human Rights held that

for the Prevention of Pollution from Ships (MARPOL 73/78), 2 November 1973 / 17 February 1978, 1340 UNTS 184; United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Art. 194(2); Rio Declaration on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/26, Vol. I, Principle 2; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with commentaries), ILC Ybk 2001/II(2), 146; Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, Report of the ILC, 58th Session, UN Doc. A/61/10, 106. On responsibility in the area of international environmental law generally, see Nègre, in Crawford, Pellet and Olleson (2010) 803.

[61] See also Crawford, Third Report, 75; ARSIWA Commentary, Pt I, Ch. IV, §§2–3 and Art. 47.

[62] '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.' See ARSIWA Commentary, Art. 47, §§9–10.

[63] See Crawford, 'State responsibility', (2006) MPEPIL.

[64] *Corfu Channel*, ICJ Rep. 1949 p. 4.

[65] The UK alleged that Yugoslavia had laid the mines, but this was not proved and Yugoslavia was not involved in the proceedings before the International Court. Counsel for Albania suggested that the Greek government might be responsible for laying the mines but the Court dismissed this as conjecture. See ibid., 16–17.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:56 Page Number: 336

a state party to the European Convention would be responsible for violating Article 3 of the Convention if it extradited a person to a non-party state where the person was likely to suffer inhuman or degrading treatment or punishment.[66] The extraditing state was not responsible for directly inflicting such treatment, but through extradition it violated its own obligation under Article 3, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Although on its terms Article 47(1) is limited to situations in which several states are responsible for the *same* internationally wrongful act, not independent wrongful acts, the same principle of independent responsibility applies in cases like *Corfu Channel* or *Soering*. The responsibility of each state is assessed on its own conduct in the light of its own obligations – the usual rules of attribution apply and the responsibility of one state is not diminished by the responsibility of another state or states for the same damage.[67]

10.2.2 Implication in the act of another state: exceptions to the principle of independent responsibility

According to the ILC:

> It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those states in an internationally wrongful act committed by the other.[68]

Thus a second category of collective conduct arises when state A participates in the internationally wrongful act of another, state B. In such cases it is state B which has committed the wrongful act, and state A's responsibility is derived from that of State B on account of its contribution to the commission of the act, even though its own conduct taken independently may not actually amount to a breach of its international obligations.

The exceptions to the principle of independent responsibility are set out in Part I, Chapter IV of ARSIWA.[69] Articles 16, 17 and 18 define the 'exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another'.[70]

[66] *Soering* v. *UK*, (1989) 98 ILR 270; see further the authorities mentioned in ARSIWA Commentary, Pt I, Ch. IV, §4, n. 281).
[67] See further ibid., Art. 47, §8.
[68] ILC Ybk 1978/II(2), 99.
[69] See generally ARSIWA Commentary, Pt I, Ch. IV; Dominicé (2010), 284–9.
[70] ARSIWA Commentary, Pt I, Ch. IV, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:56 Page Number: 337

According to the commentary, Article 19 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'.[71] Situations in which both states committed the wrongful act would be covered by the Chapter II rules of attribution already discussed.

ARSIWA Article 16 addresses situations in which state A provides aid or assistance to state B 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.[72]

An example commonly discussed is the provision of arms by state A to assist state B in performing an act of aggression against a third state.[73] State A's responsibility is engaged by the separate act of the aid or assistance, not by the primary wrongful act of aggression for which state B is responsible – provided that the qualifications of paragraphs (a) and (b) are satisfied. The version of this provision adopted on first reading, Draft Article 27, expressly required that the aid or assistance was rendered 'for the commission of an internationally wrongful act, carried out by the latter' and provided that the aid or assistance was itself internationally wrongful 'even if, taken alone, such aid or assistance would not constitute the breach of an international obligation'.[74] On second reading, the text was clarified by the amendment to 'knowledge of the circumstances' of the wrongful act, which requires an intention to facilitate the commission of the wrongful act. The potentially broad scope of the draft provision was narrowed, so that the final version only captures cases of aiding or assisting where the wrongful act committed would have been a breach of the assisting state's own obligations.[75] It is also clear that mere association or general co-operation with a state that

[71] ARSIWA Commentary, Art. 19, §4.
[72] On the concept of aid or assistance in international law see e.g. Brownlie (1983), 189–92; Quigley, (1986) 57 BYIL 77; Graefrath, (1996) 29 RBDI 370; Aust (2011).
[73] See e.g. Ago, Seventh Report, ILC Ybk 1978/II(1), 59–60; ARSIWA Commentary, Art. 16, §7.
[74] See ILC Ybk 1996/II(2), 61.
[75] For the background to these changes see Crawford, Second Report, 47–51.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:57 Page Number: 338

uses unlawful methods does not suffice to trigger responsibility under the rubric of aid or assistance.[76]

The International Court has recognized Article 16 as a reflection of customary international law.[77] Aust describes it as a 'complex provision which sits between various currents of the development of the international legal system'; with a reminder that interstate co-operation is generally a positive thing, he argues for a narrow interpretation.[78] Some have argued that Article 16 is 'unduly monolithic', in that it does not reflect differences of substance and degree – participation is not always a black and white issue – and there could be scope for the law of state responsibility in this area to develop along the lines of corporate complicity, with distinctions between direct, beneficial and silent complicity.[79] Aid or assistance is also mentioned in Article 41(2), which provides in relevant part that no state shall render aid or assistance in maintaining a situation created by a serious breach of an obligation arising under a peremptory norm of international law (Article 40).

Ago viewed complicity (now aid or assistance) as the 'only real form of participation in the internationally wrongful act of another state'.[80] However, Chapter IV sets out two further situations in which a state may be implicated in the act of another, both of which entail a closer relationship between state A and state B. Under Article 17 state A is responsible because it exercised control and direction over state B for the commission of the internationally wrongful act. This form of responsibility might arise in circumstances where state B is in a relationship of dependence with state A.[81] The same provisos in Article 16(a) and (b) apply, such that state A will only be responsible if it directed and controlled state B with knowledge of the circumstances of the internationally wrongful act, and the act would be internationally wrongful if committed by State A. Article 18 provides for responsibility on the part

[76] This argument is based on the interpretation of Arts. 1(c) and 21 of the Convention on Cluster Munitions, 30 May 2008, CCM/77; see Aust (2011), 203–7.

[77] *Bosnian Genocide*, ICJ 2007 p. 43, 217. For further analysis and confirmation see Aust (2011), 97–191.

[78] Ibid., 4, 192–267.

[79] Ibid., 192–3; see further *Edward Horgan* v. *An Taoiseach*, (2003) 132 ILR 407, 453 ('The issue of "participation" is not a black and white issue. It may well ultimately be, as stated by the Taoiseach, a matter of "substance and degree"'); Clapham and Jerbi, (2001) 24 Hastings ICLR 339.

[80] 'Complicity' was the term used instead of 'aid or assistance' in his Draft Art. 25: see ILC Ybk 1978/II(1) 31, 60.

[81] See Ago, Eighth Report, ILC Ybk 1979/II(1), 5–27; ARSIWA Commentary, Art. 17; Dominicé (2010), 287–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:57 Page Number: 339

of state A because it coerced state B into committing that wrongful act. In such cases, state B might be able to invoke *force majeure* as a circumstance precluding wrongfulness (Article 23), but state A's responsibility remains.[82] Unlike Articles 16 and 17, in the extreme case of coercion state A will be responsible even if the wrongful act committed by state B would not have been a breach of state A's own obligations if it had directly committed the act itself.[83]

Articles 16–18 are unusual within ARSIWA in that they do not sit comfortably within the dichotomy between primary and secondary rules.[84] Articles 16–18 have a special character in that they effectively specify certain conduct as internationally wrongful. Although there is an argument that such provisions have no place in the law of state responsibility, their inclusion is justified by the derivative character of the responsibility in Chapter IV; in domestic systems such rules tend to be treated as part of the general law of obligations. States naturally have different obligations within the international system, however, and derivative responsibility cannot be allowed to undermine the principle that a treaty does not create either obligations or rights for a third state without its consent, or the equivalent principles under general international law.[85] For that reason it is only in the extreme case of coercion that a state could be held responsible in connection with a wrongful act of another state which would not have been a breach of the first state's own obligations had it performed the act itself. The articles require that the 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 without prejudice to the general question of 'wrongful intent' in matters of state responsibility, on which ARSIWA are neutral.[86]

10.2.3 Conduct of joint organs

States will commonly create joint organs or institutions for specific co-operative purposes, for example a boundary commission or joint

[82] See ARSIWA Commentary, Pt I, Ch. IV, §6; Art. 23.
[83] See generally ibid., Art. 18; Dominicé (2010), 288–9.
[84] See Aust (2011), 5–6; Combacau and Alland (1985); David (2010).
[85] *Pacta tertiis nec nocent nec prosunt*: see esp. Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Arts. 34–5. See further Crawford, Second Report, 50–1; ARSIWA Commentary, Pt I, Ch. IV, §8; Art. 16, §6; Aust (2011), 249–66. Cf. Orakhelashvili, in Crawford, Pellet and Olleson (2010) 647, 651–3.
[86] ARSIWA Commentary, Pt I, Ch. IV, §§7–8. On the subjective element of Art. 16 more generally, see Aust (2011), 230–49.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:57 Page Number: 340

research facility. When questions of responsibility for the conduct of such organs arise, a careful distinction must be made between joint institutions with the status of international organizations under international law,[87] and organs that simply act on behalf of their creator states with no separate legal personality of their own.[88] An example of the former is the Iran–US Claims Tribunal;[89] examples of the latter are the Administering Authority in *Certain Phosphate Lands in Nauru*[90] and the Intergovernmental Commission in *Eurotunnel*.[91]

The conduct of a joint organ of the latter type is attributable to each of the states that created it, because it acts on their behalf in exercising delegated authority (Article 5). Although the organ itself is a single entity, there is a plurality of responsible states, so the principle of independent responsibility will apply.[92] The ILC described this as the parallel attribution of a single course of conduct to several states:

> According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts.[93]

Questions of the responsibility of a joint organ arose in *Certain Phosphate Lands in Nauru*. In 1947 a UN trusteeship replaced the former League of Nations mandate over Nauru, with Australia, New Zealand and the United Kingdom jointly designated as the Administering Authority for the territory. Nauru sued Australia alone for breaches of obligations by the Administering Authority. The Court found that

> the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, 'the Administering Authority' for Nauru; that this Authority did not have an international legal personality distinct from those of the States thus designated; and that, of those States, Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice.[94]

[87] As to which see DARIO and Commentary. [88] See Higgins (1995), 253–7.
[89] See *Iran–US Claims Tribunal* v. *AS*, (1985) 94 ILR 321; but cf. Dominicé (2010), 283, for the inclusion of the tribunal as an example of a joint organ.
[90] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240.
[91] *Eurotunnel Arbitration*, (2007) 132 ILR 1, 61. [92] See Dominicé (2010), 283.
[93] Draft Articles Commentary, Art. 27, §2.
[94] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 258.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:58 Page Number: 341

The Court rejected Australia's arguments that all three members of the Authority would need to be sued jointly; it saw no reason why Australia could not be sued alone. The question whether Australia would ultimately bear responsibility for all or only part of any reparation ordered, in the light of the characteristics of the trusteeship arrangement and Australia's primary role in the administration of the territory, was left for determination on the merits.[95]

In *Eurotunnel* the tribunal found that the Intergovernmental Commission was a joint organ of the United Kingdom and France, 'whose decisions required the assent of both Principals. If a breach of the Concession Agreement resulted from action taken by the IGC both States would be responsible accordingly'.[96] Likewise, the responsibility of both states would be engaged by the *omissions* of the organ which acted on their behalf: 'What the IGC as a joint organ failed to do, the Principals in whose name and on whose behalf the IGC acted equally failed to do.'[97]

A possible example of 'joint' inseverable responsibility under international law was the responsibility of the Four Powers for Germany as a whole and Berlin prior to 1990. In a series of cases, courts refused to hold that individual states could be sued alone for conduct arising from the quadripartite arrangements.[98]

10.2.4 Other bases for solidary responsibility

Certain further bases for solidary or joint responsibility may be possible. For example, the fact that an agent acted alone in committing an internationally wrongful act in execution of a mandate will not absolve the principal state or states of their own responsibility under the mandate.[99] Similarly, if the organ of a state acts on instructions of that state jointly with another state, pursuant to treaty or otherwise, the responsibility of both states may arise from any resulting internationally wrongful act – although this is to be differentiated from situations in which the organ of one state has been placed at the disposal of another.[100] In the latter scenario the sending organ's conduct will be attributable to the receiving state alone, provided that the organ is acting in the exercise of elements of the governmental authority of the latter state (ARSIWA Article 6).

ARSIWA Article 11 provides that conduct not attributable to a state under the usual rules of attribution 'shall nevertheless be considered an

[95] Ibid., 262. [96] *Eurotunnel Arbitration*, (2007) 132 ILR 1, 61. [97] Ibid., 104–5.
[98] See Crawford, Third Report, 74 n. 524, citing Crawford, First Report, 46 n. 300.
[99] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 258–9, cited in Dominicé (2010), 283.
[100] ARSIWA Commentary, Art. 6, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:58 Page Number: 342

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'.[101] The provision is aimed mainly at capturing private conduct,[102] but there is no reason why Article 11 could not cover the adoption by a state of conduct of another state. The commentary acknowledges this possibility in the context of state succession, for example, where a successor state which continues a pre-existing ongoing wrongful act of its predecessor may be taken to have assumed responsibility for it. Article 11 could also come into play in certain circumstances if a state provides another state with assistance after the commission of an internationally wrongful act by the latter, provided the cumulative criteria of acknowledgement and adoption are satisfied – although assistance after the fact is generally not governed by the secondary rules of responsibility, but rather by specific treaty provisions.[103] An exception is the positive obligation of co-operation in suppressing a serious breach of a peremptory norm, articulated in ARSIWA Article 41(1).[104]

In some cases responsibility might be engaged by what is effectively a failure to prevent or mitigate harm caused primarily by another state. Obligations of prevention may be specified in international instruments, as well as existing in general international law.[105] Obligations to prevent amount to obligations of result, whether they arise within the framework of responsibility for internationally wrongful acts or within the context of activities not prohibited by international law.[106] ARSIWA Article 14(3) specifies when the breach of an international obligation requiring a state to prevent a given event occurs,[107] but an earlier Draft Article 23 dedicated to obligations of prevention did not survive the second reading.[108] It is clear that a breach of an obligation of prevention will give rise to the breaching state's responsibility just like any other breach, as ARSIWA makes no distinction between different types of

[101] See ARSIWA Commentary, Art. 11.
[102] See e.g. the *Ottoman Empire Lighthouses Concession (France/Greece)*, (1956) 12 RIAA 155, 198; *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3.
[103] See ARSIWA Commentary, Pt I, Ch. IV, §9. [104] See ibid., Art. 41.
[105] See e.g. Genocide Convention, Art. I; ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with commentaries), Art. 3, ILC Ybk 2001/II(2), 148, 153–5.
[106] See generally Hafner and Buffard (2010). On obligations of result, see further Economides (2010) and works cited therein.
[107] Such a breach occurs 'when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation'; see ARSIWA Commentary, Art. 14.
[108] ILC Ybk 1978/I(2), 206–8; Draft Articles Commentary, Art. 23.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:59 Page Number: 343

obligation;[109] the question for present purposes is when such a breach will entail the collective responsibility of more than one state. An example is provided in the *Corfu Channel* case, as Albania was held responsible for failing to warn the UK ships of the presence of mines and thus failing to prevent the harm that ensued, even without having placed the mines there itself.[110]

Among the various possible forms of joint and collective state conduct considered by the ILC, certain types of ancillary or inchoate conduct recognized in national legal (particularly criminal) systems did not make it into ARSIWA as general bases for engaging responsibility, for example incitement, conspiracy, threats and attempts.[111] This is naturally without prejudice to any primary obligations in respect of such matters; for example Article 2(4) of the UN Charter prohibits the threat of force,[112] and Article III(e) of the Genocide Convention requires states to prohibit incitement to genocide. If states breach their primary obligations in respect of such matters, responsibility will attach in the usual way; the point is that these categories of conduct were not deemed necessary for inclusion in a catalogue of *secondary* rules under international law.

10.3 Conduct within the framework of international organizations

An obvious means by which states frequently engage in co-operative conduct is through the establishment of international organizations, as distinct from the types of joint organs discussed above. The principles governing the responsibility of international organizations are set out in the Draft Articles on the Responsibility of International Organizations (DARIO) adopted by the ILC on second reading in June 2011.[113] An important distinction must be made between the conduct of international organizations as such, in the exercise of their separate legal personality, and conduct performed by states within the framework of or

[109] See Economides (2010), 376–81; ARSIWA Commentary, Art. 12, §11.
[110] ICJ Rep. 1949 p. 4. For discussion of the case in this context, see Dominicé (2010), 283–4.
[111] See Ago, Seventh Report, ILC Ybk 1978/II(1), 54–6; Crawford, Second Report, 48, 55–6.
[112] See Stürchler, *The Threat of Force in International Law* (2007).
[113] DARIO and Commentary. For the background see esp. the eight reports of Special Rapporteur Gaja on the Responsibility of International Organizations: First Report, UN Doc. A/CN.4/532; Second Report, UN Doc. A/CN.4/541; Third Report, UN Doc. A/CN.4/553; Fourth Report, UN Doc. A/CN.4/564 and Add.1; Fifth Report, UN Doc. A/CN.4/583 and Corr.1; Sixth Report, UN Doc. A/CN.4/597; Seventh Report, UN Doc. A/CN.4/610; Eighth Report, UN Doc. A/CN.4/640.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:59 Page Number: 344

at the instigation of an international organization. The conduct of a state organ does not lose that quality simply because that conduct happens to be co-ordinated by an international organization, or is even authorized by it;[114] nor are international organizations to be seen as some sort of 'super-state' with powers exceeding those of their members.[115] Determining which entity bears responsibility for wrongful acts will depend on whether the state's conduct is to be treated as the organization's conduct, applying the relevant rules of attribution in each case,[116] or whether the state or organization is implicated in some relevant way in the conduct of the other.[117]

In different circumstances a member state might bear responsibility for the conduct of an international organization, an international organization might bear responsibility for the conduct of a state within the framework of that organization's operations, or the state or organization might separately bear responsibility for what is properly to be seen as its own conduct (whether the primary wrongful act or some form of auxiliary conduct connected to that act). There may also be joint responsibility: a state as member of an international organization may be jointly responsible along with the organization (and other members) for fulfilling obligations under a mixed agreement between the organization and its member states on the one hand and non-member states on the other.[118] In other cases, if the organization alone is party to an agreement with non-members, member states will not incur responsibility under that agreement, but they may nonetheless have different duties of ensuring compliance pursuant to the organization's governing rules.[119]

[114] Crawford, Third Report, 72. In some cases the authorization may make the conduct lawful, e.g. under Chapter VII of the UN Charter.

[115] See *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 174, 179.

[116] See ARSIWA, Pt I, Ch. II, Arts. 4–11; DARIO, Pt I, Ch. II, Arts. 6–9.

[117] DARIO, Art. 1(2) provides: 'The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization'; see DARIO, Pt V. For the responsibility of an international organization in connection with the act of a state or another organization, see DARIO, Pt II, Ch. IV, Arts. 14–19).

[118] See e.g. Case C-316/91, *European Parliament* v. *Council of the European Communities*, (1994) ECR I-625, I-660–661, recital 29, discussed in Gaja, Third Report, UN Doc. A/CN.4/553, 5–6. See further UNCLOS, Annex IX, discussed in Crawford, Third Report, 74; Rosas, in Koskenniemi (ed.), *International Law Aspects of the European Union* (1998) 125.

[119] Case 12/86, *Demirel* v. *Stadt Schwäbisch Gmünd*, (1987) ECR 3719, 3751, recital 11. See further Gaja, Third Report, UN Doc. A/CN.4/553, 5–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:18:59 Page Number: 345

The general principles governing responsibility of either states or international organizations for their own conduct are contained in ARSIWA and DARIO respectively. Of interest for present purposes are the cases in which member states bear responsibility for the conduct of organizations, and those in which responsibility is engaged by the conduct of state organs within the framework of an international organization. The first situation is particularly relevant for injured parties seeking to 'pierce the organizational veil' and overcome difficulties caused by the lack of international mechanisms for enforcing the obligations of international organizations.[120] The issue was central to the litigation in UK courts after the collapse of the International Tin Council in 1985, for example.[121] The Institut de Droit International addressed member state responsibility in its 1995 resolution entitled 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties'.[122] Under the heading 'Current Law', Article 6 provides that 'there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members', save as specified in Article 5, which reads:

a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.
b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights.
c) In addition, a member State may incur liability to a third party
   i) through undertakings by the State; or
   ii) if the international organization has acted as the agent of the State, in law or in fact.

The ILC has also considered the matter. ARSIWA deliberately left a gap: Article 57 states that the Articles are without prejudice to any question of the responsibility of an international organization or the

[120] See e.g. Ryngaert and Buchanan, (2011) 7 Utrecht LR 131, 132.
[121] See *J. H. Rayner* v. *Department of Trade and Industry*, (1989) 81 ILR 670, which cites other relevant decisions in n. 1. For discussion see e.g. Sadurska and Chinkin (1989–90) 30 Va JIL 845; Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (2004), 102–3; Orakhelashvili (2010), 661–3.
[122] IDI Res. 1995/II (Lisbon). More generally see Geslin, (2005) 109 RGDIP 539; Ryngaert and Buchanan (2011).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:00 Page Number: 346

responsibility of any state for the conduct of an international organization.[123] Instead, DARIO Part V deals with state responsibility in connection with the conduct of an international organization.[124] Articles 58–60 closely mirror ARSIWA Articles 16–18 (aid or assistance, control or direction, and coercion), adapted to the context of international organizations,[125] while Article 61 provides for responsibility on the part of a state which uses an international organization to circumvent one of its international obligations, by causing that organization to commit an act that would have breached its obligation if committed by the state.[126]

More interesting for present purposes is Article 62(1), which provides that a state member of an international organization is responsible for an internationally wrongful act of that organization if it has accepted responsibility for that act towards the injured party, or it has led the injured party to rely on its responsibility. The commentary confirms that a negative rule is implicit in the terms of Article 62.[127] In other words, in line with the IDI's Article 6, a state is not responsible for the wrongful acts of an international organization solely by virtue of its membership of that organization; but if it accepts responsibility towards the injured party or leads the injured party to rely on its responsibility, then its responsibility will be engaged. This position has received support in international case law.[128] Under Article 62(2), any international responsibility of a state under paragraph 1 is presumed to be subsidiary, and it does not affect any responsibility on the part of the organization itself.

The second question, that of responsibility for the conduct of states within the framework of international organizations, has proved a murky one in practice. If a state organ is fully seconded to an international organization and under its exclusive control, then it is clear that the organ's conduct is to be treated as conduct of the receiving organization only, not of the sending state.[129] But difficulties have arisen when the sending state in fact retains some control over the conduct of its organs, which continue to act to some extent as organs of that state

[123] See ARSIWA Commentary, Art. 57; see further Crawford, Second Report, 47.

[124] It does not cover all relevant matters, however; questions concerning the attribution of the conduct to a state or a situation such as that envisaged in the IDI's Art. 5(c)(ii) would still fall to be considered under the rules in ARSIWA. See DARIO Commentary, Pt V, §2; Art. 62, §1 (esp. n. 349).

[125] Ibid., Arts. 58–60. [126] Ibid., Art. 61. [127] Ibid., Art. 62, §2.

[128] See e.g. *Arab Organization for Industrialization and ors* v. *Westland Helicopters Ltd*, (1988) 80 ILR 622, 657–61; *JH Rayner* v. *Department of Trade and Industry*, (1989) 81 ILR 670 and the related decisions cited in its n. 1.

[129] DARIO Commentary, Art. 7, §1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:00 Page Number: 347

while they are in the service of the organization. Judicial approaches in such circumstances have been mixed, particularly in the context of human rights claims arising from international military operations. In its 2005 decision in *Bosphorus* v. *Ireland* the Grand Chamber of the European Court of Human Rights held that the European Convention on Human Rights does not prohibit member states from transferring sovereign power to an international organization for co-operative purposes, but the state remains responsible under Article 1 ECHR for all the acts and omissions of its organs, regardless of whether they were a consequence of the necessity to comply with international legal obligations.[130] In its controversial judgment in the joined cases of *Behrami and Saramati* two years later, however, the Court distinguished *Bosphorus* and applied a test of 'ultimate authority and control' to decide that the conduct in question was attributable to the UN, not the respondent states, with the result that the Court had no jurisdiction *ratione personae*.[131]

After the NATO bombing campaign in Kosovo ended in 1999, Security Council Resolution 1244 (1999) determined that the situation in the region continued to threaten international peace and security, and provided for the deployment of an international security force (Kosovo Force – KFOR) and the establishment of an interim civil administration (UN Interim Administration Mission in Kosovo – UNMIK). Behrami's case arose after a group of children came across some unexploded munitions in March 2000, left over from the NATO air campaign in 1999. Not realizing the danger, they began playing with them, and one of the bombs exploded, killing one boy and leaving his brother blind and permanently disfigured. The boys' father and the surviving son raised allegations of violation of the right to life (Article 2 ECHR) against France, as lead nation of the KFOR multinational brigade in the area, for failing to clear or mark the undetonated cluster bombs which they knew to be present in that area.[132]

As for Saramati's case, he had been arrested by UNMIK police on suspicion of attempted murder in April 2001. The Kosovo Supreme Court ordered his release from pre-trial detention in June 2001, but he was subsequently detained again as KFOR believed him to be a security threat to the international presence. KFOR detained him until January 2002,

[130] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Širketi* v. *Ireland*, [2006] ECtHR 45036/98, §§152–3. See further *M & Co.* v. *Germany*, [1990] ECommHR 13258/87, discussed in Zwanenburg (2004), 102–3.

[131] *Behrami* v. *France; Saramati* v. *France, Germany and Norway*, (2007) 133 ILR 1.

[132] For the facts of Behrami's case see ibid., 7–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:00 Page Number: 348

when he was convicted of attempted murder and transferred to UNMIK custody, but in October 2002 the Supreme Court quashed his conviction and ordered his release.[133] Mr Saramati alleged that his detention, authorized by a Norwegian KFOR commander and subsequently upheld by a French one, had amounted to a violation by those two states of his right to liberty of the person, protected by Article 5 ECHR; he also invoked Articles 6 and 13.[134]

Although the parties and intervenors[135] primarily argued the case as a dispute over extraterritorial application of the ECHR, that is, whether the applicants fell within the respondent states' jurisdiction so as to satisfy the threshold in Article 1, the Court found that the more central issue was whether it was competent to examine under the Convention the respondent states' contribution to UNMIK and KFOR.[136] The Court held that the supervision of de-mining fell within the mandate of UNMIK at the relevant time (Behrami's case), and that issuing detention orders fell within the security mandate of KFOR (Saramati's case).[137] Chapter VII of the UN Charter provided the framework for the Security Council to delegate its security powers to KFOR and its civil administration powers to UNMIK.[138] After describing the chain of command for KFOR,[139] the Court found that the Security Council retained 'ultimate authority and control and that effective command of the relevant operational matters was retained by NATO';[140] it held that Saramati's detention was in principle attributable to the UN.[141] As for UNMIK, it was directly answerable to the UN as a subsidiary organ, such that the failure to clear the unexploded munitions in Behrami's case was, in principle, also attributable to the UN.[142] The Court then concluded that it did not have

[133] For the facts of Saramati's case see ibid., 8–9.
[134] Complaints against Germany for its alleged role in his arrest were dropped: ibid., 25–6.
[135] Seven states (Denmark, Estonia, Germany, Greece, Poland, Portugal and the United Kingdom) and the UN participated in the case as third parties; see ibid., 34–40 for their submissions.
[136] Ibid., 28. [137] Ibid., 43.
[138] Ibid., 44. The notion that the Security Council thereby 'delegated' powers is problematic; a better description would be that its power to create the civil and security presences in Kosovo was analogous to its power to create the ICTY, which was upheld in *Tadić*, Jurisdiction, (1995) 105 ILR 419: see discussion in Milanović and Papić (2009), 276–9.
[139] *Behrami and Saramati*, (2007) 133 ILR 1, 46. [140] Ibid., 48.
[141] Ibid., 48. The Court used 'attributable' in terms of DARIO, Draft Art. 3 (2003; corresponding to Draft Arts. 3 and 4 of the version adopted on second reading on 3 June 2011: UN Doc. A/66/10, 78–80); see *Behrami and Saramati*, (2007) 133 ILR 1, 14, 41.
[142] Ibid., 48.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:01 Page Number: 349

competence *ratione personae* to review the conduct that it had found was attributable to the UN, which is not party to the ECHR, stating:

> Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member States, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions, and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.[143]

Distinguishing its earlier decision in *Bosphorus*, the Court continued:

> In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.[144]

There are many aspects of the Court's approach and conclusions that are objectionable, and the decision has been much criticized.[145] By focusing on the question of attribution the Court circumvented the thorny issue of extraterritoriality, which had been highly contentious since *Banković*[146] and was central to the parties' own theory of the case.[147] Still

[143] Ibid., 50. [144] Ibid., 51.

[145] See e.g. Knoll, (2008) 68 ZaöRV 431; Sari (2008); Milanović and Papić (2009); Breitegger, (2009) 11 ICLR 155; Klein, in Crawford, Pellet and Olleson (2010) 297, 303; Bell, (2010) 42 ILP 501.

[146] *Banković* v. *Belgium*, (2001) 123 ILR 94. On extraterritoriality see e.g. Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004); Dennis, (2005) 99 AJIL 119; Wilde, (2007) 40 Is. LR 503; Milanović (2011). (The Court has since clarified its position on the extraterritoriality question and the scope of Art. 1 to some degree, in the July 2011 decisions of *Al-Skeini* v. *UK*, [2011] ECtHR 55721/07, and *Al-Jedda* v. *UK*, [2011] ECtHR 27021/08). The applicants in *Banković* raised arguments relevant to the attribution of conduct to seventeen NATO member states, but these submissions were not addressed by the Court because it dismissed the case on the jurisdictional point. On the responsibility issue see Zwanenburg (2004), 102–3; more generally, ibid., 100–7.

[147] In the end, however, the Court dismissed the arguments for extraterritorial application by the back door when it distinguished *Bosphorus*, [2006] ECtHR 45036/98, partly on the grounds that the impugned actions and omissions did not take place on the territory of the respondent states: see *Behrami and Saramati*, (2007) 133 ILR 1, 51.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:01 Page Number: 350

more problematic was the approach to the analysis of attribution itself. In the context of allegations that the respondent states were responsible for violating the ECHR, it would have been logical for the Court to proceed by asking whether the alleged actions and inactions were attributable to the respondent states, and then whether any attributable conduct represented a violation of those states' obligations under the ECHR, engaging their responsibility.[148] On the matter of attribution to the UN of conduct alleged to have been performed by state organs, it might have been expected that the Court would draw some guidance from DARIO's standard of 'effective control' in situations where state organs are at the disposal of an international organization:[149]

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[150]

Instead, the Court did not at any stage directly examine those questions; nor did it contemplate whether the conduct might be attributable to both the UN and the respondent states simultaneously. After deciding which organs held which mandates – a matter that was irrelevant to the factual question of whether the relevant conduct was attributable to the respondent states – it purported to ask whether the impugned action/inaction could be attributed to KFOR/UNMIK, but in fact it answered the question by making the general observation that actions and omissions of KFOR/UNMIK were attributable to the UN. In effect the Court converted the applicants' allegations against the respondent states for failures under the ECHR into allegations against the UN for failures under SC Resolution 1244, and as the UN is not a party to ECHR, it found unsurprisingly that it had no competence to hear the applications. As to examining the respondent states' contribution to UNMIK and KFOR,

[148] As Milanović and Papić (2009), 273 have observed, this would be the analysis suggested by ARSIWA, Art. 2.

[149] The Court referred to what was then Draft Art. 5 (now Draft Art. 7) in its judgment, at §§30–1 and 138, but did not make it clear whether it thought the rule was actually applicable or whether it considered that the UN had met the criterion of 'effective control' over the conduct of the respondent states. See discussion in Milanović and Papić (2009), 281–6.

[150] Cf. the equivalent provision in ARSIWA, Art. 6, which provides that '[t]he 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*' (emphasis added).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:01 Page Number: 351

which the Court itself had stated was the central question in the case, it turned this on its head with its conclusion that 'the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States'.

The decision in *Behrami and Saramati* left a rather confused picture of state responsibility for conduct performed within the framework of an international organization. In finding that conduct of KFOR and UNMIK was attributable to the UN the Court conflated the secondary rules of attribution with the primary rules of delegation.[151] The finding of 'ultimate authority and control' as the decisive factor for attributing the impugned conduct to the UN (despite NATO's acknowledged 'effective command over operational matters') was at odds with the fact-oriented test of 'effective control' over state organs at the disposal of international organizations.[152] The test of effective control has a long established pedigree as a principle of international responsibility, supported by states,[153] the ILC[154] and the UN alike.[155] The judgment had the potential seriously to undermine accountability for violations of human rights treaties by state organs acting under the umbrella of an international organization. There was no acknowledgment or contemplation of the possibility of attributing the same conduct to multiple persons (whether states or international organizations) simultaneously, although

[151] See Milanović and Papić (2009), 281. [152] See Klein (2010), 301–4, esp. 303.

[153] See Gaja, Second Report, UN Doc. A/CN.4/541, 21–2 (esp. n. 75). On the test of effective control and attribution of conduct to the UN more generally see ibid., 14–23.

[154] See e.g. ibid., 15: 'Questions concerning attribution of conduct to the United Nations or a State have sometimes been raised in relation to conduct taken by military forces in the course of interventions recommended or authorized by the Security Council. In this type of case, responsibility of the United Nations, if any, could not be premised on attribution of conduct. It could not be said that authorized forces are placed at the disposal of the United Nations.'

[155] The Secretary-General of the UN has said: 'In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.' See Report of the Secretary-General on financing of United Nations peacekeeping operations, 20 September 1996, UN Doc. A/51/389, 6. A year after *Behrami and Saramati*, (2007) 133 ILR 1, the Secretary-General reiterated this position in his 2008 report on UNMIK: 'It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control [*sic*]'; see UN Doc. S/2008/354, 4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:02 Page Number: 352

this possibility has been included by the ILC in its Commentary to DARIO since the first reading,[156] and is now recognized in Draft Article 48.[157]

The reaction to *Behrami and Saramati* was mixed. It was heavily criticized in the legal literature,[158] but the reasoning was applied by the European Court in subsequent cases[159] and by the UK House of Lords in *Al-Jedda* v. *Secretary of State for Defence*.[160] Governments expressed different opinions about whether DARIO should be amended to reflect the 'ultimate authority and control' test,[161] and the European Commission questioned the wisdom of codifying the 'effective control' test, given the divergence from that standard in the jurisprudence and the lingering controversy in international practice.[162] Ultimately, the standard of effective control has been retained. In the 2011 commentary to what is now DARIO Draft Article 7, the ILC reinforced the factual character of the effective control test,[163] and offered some comments on *Behrami and Saramati*:

[156] In its most recent form see DARIO Commentary, Pt II, Ch. II, §4: 'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ [*sic*].'

[157] See ibid., Art. 48. For background see Gaja, Sixth Report, UN Doc. A/CN.4/597, 10–14.

[158] See DARIO Commentary, Art. 7, §10, esp. literature cited in n. 115.

[159] See *Gajić* v. *Germany*, Admissibility of App. No. 31446/02, 5 July 2007, ECtHR; *Kasumaj* v. *Greece*, Admissibility of App. No. 6974/05, 28 August 2007, ECtHR; *Berić* v. *Bosnia and Herzegovina*, Admissibility of App. No. 36357/04 and ors, 16 October 2007, ECtHR.

[160] [2007] UKHL 58 (although the majority ultimately distinguished the circumstances in that case from *Behrami and Saramati*, (2007) 133 ILR 1). Lord Brown observed the difficulty of applying the *Behrami and Saramati* standard: 'The precise meaning of the term "ultimate authority and control" I have found somewhat elusive. But it cannot automatically vest or remain in the UN every time there is an authorization of UN powers under Chapter VII, else much of the analysis in *Behrami* would be mere surplusage' (ibid., §148).

[161] See e.g. the comments of the United Kingdom (UN Doc. A/C.6/64/SR.16, 5): 'In the absence of judicial criticism of the effective control text in those cases, no change to draft article 6 was required', but the United Kingdom noted the limitations of effective control as a universal rule of attribution; cf. the comments of Greece (ibid., 11): 'it should be made clear that conduct should be attributed to the international organization exercising ultimate control and not to the State exercising operational control, as confirmed by the European Court of Human Rights in the *Behrami* and *Saramati* cases'.

[162] Comments and observations received from international organizations, 14 February 2011, UN Doc. A/CN.4/637.

[163] DARIO Commentary, Art. 7, §8: 'As has been held by several scholars . . . when an organ or agent is placed at the disposal of an international organization, the decisive question

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:02 Page Number: 353

The Court [in *Behrami and Saramati*] referred to the present work of the International Law Commission and in particular to the criterion of 'effective control' that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether 'the United Nations Security Council retained ultimate authority and control so that operational command only was delegated' . . .

One may note that, when applying the criterion of effective control, 'operational' control would seem more significant than 'ultimate' control, since the latter hardly implies a role in the act in question.

In July 2011, between the second reading adoption of DARIO and the adoption of its commentaries, the European Court of Human Rights released its decision in *Al-Jedda* v. *UK*.[164] This case gave the Court an opportunity to clarify the test for attribution when a state's organs are placed at the disposal of an international organization. First, the Court agreed with the majority of the House of Lords in distinguishing the situation in Kosovo from the military situation in Iraq at issue in *Al-Jedda*.[165] It then observed that the applicable standard for attributing acts of the UK forces in Iraq to the UN was 'effective control':

[I]t was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law Commission, in Article 5 of its draft Articles on the Responsibility of International Organizations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organization should be attributable under international law to that organization if the organization exercises effective control over that conduct . . .[166]

This direct reference to 'effective control' in DARIO as the standard for attribution was a welcome improvement on the convoluted analysis of *Behrami and Saramati*. In an effort to avoid rejecting its previous approach outright, however, the Court ultimately opted for a hybrid DARIO/*Behrami and Saramati* test:

For the reasons set out above, the Court considers that the United Nations Security Council had *neither effective control nor ultimate authority and control* over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.[167]

in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.'

[164] *Al-Jedda* v. *UK*, [2011] ECtHR 27021/08.

[165] See ibid., §18, citing Lord Brown's comment on attribution to the UN.

[166] *Al-Jedda* v. *UK*, [2011] ECtHR 27021/08, §84. [167] Ibid. (emphasis added).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:02 Page Number: 354

So 'ultimate authority and control' snuck in through the back door, without extensive discussion of *Behrami and Saramati* – and now the Court seems to be adopting parallel tests. It is unclear whether these are cumulative or alternative conditions for attribution, or whether the mention of 'ultimate authority and control' was merely an effort to avoid the appearance of rejecting its own precedent.

10.4 Cognate questions

10.4.1 Guarantees and indemnities

In some situations of collective conduct it is conceivable that states will agree to indemnify each other for any loss arising from the joint wrongful conduct. For example, Article V(2) of the Convention on Liability for Damage Caused by Space Objects provides (in relevant part):

> A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching.[168]

Such an agreement of guarantee or indemnity must be explicit. In *Eurotunnel* the concessionaires argued that the British and French governments had mutually guaranteed each other's performance under the concession agreement, such that each state was jointly and severally liable for the acts of the other. The tribunal rejected this argument, observing that although Clause 5.1 of the agreement provided for mutual guarantees of performance as between the concessionaires, there was no equivalent provision for mutual guarantees as between the two states.[169]

It is possible that a situation of indemnification might arise when a state's responsibility is engaged through acknowledgment and adoption of the conduct of others.[170] But care must be taken to distinguish attribution of the conduct from an assessment of its wrongfulness. As such, in circumstances where the adopted conduct is not a breach of the adopting state's own obligations, its assumption of responsibility for the act cannot be taken as amounting to an indemnification for the wrongful

[168] See further sources cited in Noyes and Smith (1988), n. 82; Foster, (1972) 10 Can. YIL 137, 163 n. 84; Cheng, in Jasentuliyana and Lee (eds.), 1 *Manual on Space Law* (1979) 83, 120 n. 226.

[169] *Eurotunnel Arbitration*, (2007) 132 ILR 1, 63–4.

[170] On acknowledgment and adoption as a basis for attributing conduct, see ARSIWA and Commentary, Art. 11.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:03 Page Number: 355

act of another. Nor can a state which aids or assists a state in the commission of an internationally wrongful act be assumed thereby to have agreed to indemnify the victim for all the consequences of the act. In both situations, such indemnification could not simply be inferred.[171]

A specific guarantee or indemnity may act as a *lex specialis* rendering a state responsible for conduct which would not otherwise be attributable to it, whether of another state or states or any other actor.[172]

10.4.2 Contribution between persons collectively responsible

Related to the issue of guarantees and indemnities is the question of contribution between persons collectively responsible. It is an established principle that 'the breach of an engagement involves an obligation to make reparation in an adequate form',[173] and it follows from the basic principle of independent responsibility that this obligation is no less applicable when multiple states or entities are in breach.[174] However, this does not mean that the injured party can recover full reparation separately from every responsible state; while it can *invoke* the independent responsibility of each state, it is uncontroversial that the injured party cannot recover more compensation than the damage it has suffered (ARSIWA Article 47(2)(a)).[175]

Article 47(2)(b) provides that the principle of independent responsibility articulated in Article 47(1) is 'without prejudice to any right of recourse against the other responsible states'. The provision does not specify which right of recourse is at issue, but the commentary makes it clear that Article 47(2)(b) is directed at questions of contribution between responsible states.[176] In other words ARSIWA remains neutral on considerations of whether and when it would be appropriate for state A, for example, as sole respondent in a successful claim for reparation brought by injured state B, to seek recourse against state C on the basis of state C's separate responsibility in connection with the same injury. Some have criticized this neutrality as a lacuna in the law of multiple state

[171] ARSIWA Commentary, Art. 11, §7; Art. 16, §10. [172] See ibid., Pt I, Ch. II, §9; Pt IV.
[173] *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 29. The principle is enshrined in ARSIWA, Art. 31: see ARSIWA Commentary, Art. 31. See further e.g. *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466, 485; *Gabčíkovo Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 81.
[174] Noyes and Smith (1988), 228. See further Orakhelashvili (2010), 647.
[175] This is the principle against double recovery affirmed in e.g. *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 59; see ARSIWA Commentary, Art. 47, §9. See further Chapter 20.
[176] Ibid., Art. 47, §10.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:03 Page Number: 356

responsibility.[177] In any event, the availability of contribution in cases of collective state responsibility is likely to be essential for states' acceptance of any form of 'joint and several liability' under international law.[178]

As always, states might choose to spell out the procedures to be adopted in such circumstances in advance of responsibility arising, in a treaty. The Convention on Liability for Damage Caused by Space Objects offers an example of a system of contribution based on comparative fault.[179] Article IV 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. Paragraph 2 then provides:

> In all cases of joint and several liability referred to in paragraph 1, the burden of compensation for the same 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.

Similarly, where two or more states jointly launch a space object which causes damage, Article V(2) provides for a launching state which has paid compensation in respect of that damage to seek indemnification from the other states responsible for the joint launching; the territorial state is deemed a participant in the joint launching. Again, this provision is without prejudice to the injured party's right to seek the full amount of compensation from each responsible state, which mirrors municipal conceptions of joint and several liability.[180]

Where no treaty provisions govern the matter of contribution it may fall to good-faith negotiations between the responsible states. In *Certain Phosphate Lands in Nauru*, Nauru had asserted grievances against all three members of the Administering Authority (Australia, New Zealand, and the United Kingdom) but when it eventually commenced proceedings in the International Court, it named Australia as the sole

[177] Besson would like to see a more developed and refined approach to *recours internes* between responsible states: see Besson (2007), 34–5, 37–8.

[178] See Noyes and Smith (1988), 255–8, 263.

[179] On *lex specialis* and ARSIWA generally see ARSIWA and Commentary, Art. 55.

[180] For further discussion of the joint and several liability established in the Convention see Noyes and Smith (1988), 225, 244–6, 263–5 and sources cited at n. 82 therein.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:03 Page Number: 357

respondent.[181] The case was ultimately settled between Australia and Nauru, but the United Kingdom and New Zealand subsequently paid Australia a contribution.[182] Besson describes this type of contribution arrangement as restoring 'perfect solidarity' between states.[183]

In other cases, injured state B might bring its claim against both state A and state C rather than a sole respondent, and the tribunal will have to apportion any award of damages between them. It may be that as a matter of equity a court disallows any contribution, for example, on the basis of the maxim *ex turpi causa non oritur actio*. In such cases the victim is compensated, but as between the joint wrongdoers the loss lies where it falls.[184] Or the court may have to grapple with establishing, as a matter of fact, the extent of each of those states' contribution to the wrongful act itself, before it can determine contribution between responsible states in the context of reparation.

On the matter of contribution as an issue of *causation*, ARSIWA offers little guidance.[185] The obligation of reparation only arises if the injury is 'caused by the internationally wrongful act', but the Articles are silent on how to establish the causal link between the conduct of each state and the wrongful act causing the injury, as distinct from the causal link between the wrongful act and the injury.[186] It is reasonable to assume that this requires a return to the principle of independent responsibility – if state A performed an element of the internationally wrongful act and thereby played a part in causing the injury, then responsibility arises, regardless of whether another state's conduct had a more direct causal relationship with the injury.[187] There are no shades of grey in the initial determination of whether responsibility attaches; but the matter becomes more complex at the reparation stage, because contribution as *causation* will affect a tribunal's quantification of damages and correspondingly impact on contribution between responsible states for the purposes of compensating the injured party.

[181] See ICJ Rep. 1992 p. 240, 337–342 (Judge Schwebel, diss.) for the background.
[182] See discussion in Crawford, Third Report, 74.
[183] Besson (2007), 26, 29; see further Wellens, in Wolfrum and Kojima (2010) 3, 27.
[184] Crawford, Third Report, 75. On the operation of the *ex turpi* doctrine in domestic legal systems, see Weir, 'Complex liabilities' (1983) 11 *International Encyclopedia of Comparative Law*, 12–14, 64.
[185] Stern, in Crawford, Pellet and Olleson (2010) 563, 569–70.
[186] On which see ARSIWA Commentary, Art. 31, §10.
[187] This is supported by Dominicé (2010), 282–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:04 Page Number: 358

Assessing contribution is likely to be more straightforward where each state is equally at fault in terms of its contribution to the injury,[188] than where one state's action was more remote and would not have been sufficient on its own to cause the whole of the damage.[189] Difficulties are also foreseeable where one state is responsible not as a co-author of the wrongful act itself, but rather for having aided or assisted the principal wrongdoer: in such cases the assisting state should generally be held responsible only for the consequences which flow from its own conduct, not that of another state,[190] and it may not always be appropriate (or desirable as a matter of policy) for the principal wrongdoer to have a right of internal recourse against states which assisted it.[191] Another facet of contribution, of course, is that the injured party may itself have contributed to the conduct which resulted in its injury. In circumstances where the injured state or individual victim of the wrongful act has 'materially contributed to the damage by some wilful or negligent act or omission', that contribution will be taken into account in the determination of reparation.[192] Approaches taken in municipal tribunals may prove useful as guidance for international decision-makers faced with determining relative responsibility in these various situations, although domestic analogies only go so far in an international context.[193]

10.4.3 International claims involving conduct of private parties

In certain circumstances a state's international responsibility may be engaged through its involvement or 'complicity' not in the wrongful acts of another state, but in the acts of private persons, whether

[188] See Noyes and Smith (1988), 262. In *Oil Platforms* Judge Simma advocated the use of domestic analogies of joint and several liability to overcome the obstacle of 'factually "indivisible" wrongful acts' (ICJ Rep. 2003 p. 161, 359); see further Aust (2011), 274–6.

[189] One such example might be the United Kingdom's contribution to the Iraq war in 2003: although the United Kingdom itself emphasized the 'jointness' of the enterprise and thus could be said to have assumed responsibility, in reality it had little influence over the work of the Coalition Provisional Authority in Iraq, which operated effectively as an organ of the United States. See Talmon (2008); Aust (2011), 220.

[190] See ARSIWA Commentary, Art. 16, §10. The aid or assistance may have been such that the act would not have occurred without it, or it may have been insignificant or merely incidental – this comes back to the notion of 'complicity as a matter of substance and degree'.

[191] Aust (2011), 294–5.

[192] ARSIWA and Commentary, Art. 39. See further Convention on Liability for Damage Caused by Objects Launched into Outer Space, Art. VI; Stern (2010) 563, 570; Moutier-Lopet, in Crawford, Pellet and Olleson (2010) 639.

[193] Noyes and Smith (1988), 225, 265–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:04 Page Number: 359

individuals, groups or corporations. It was on this type of complicity that early scholarship tended to focus, rather than on joint state conduct.[194] Ordinarily, private conduct does not trigger the secondary rules of state responsibility because it is not generally attributable to the state.[195] However, the *Tehran Hostages* case demonstrates two very different mechanisms by which the international responsibility of states may be engaged in connection with the conduct of private parties.[196] The Iranian authorities took no steps to prevent the seizure or rescue the hostages, and in fact Iranian religious leaders and other officials issued statements endorsing the actions of the militants.[197] On 17 November 1979 the Ayatollah Khomeini issued a decree which made Iran's intention to use the situation for political leverage very clear:

> The noble Iranian nation will not give permission for the release of the rest of [the hostages]. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation.[198]

In early 1980 the United States initiated a claim against Iran in the International Court of Justice, but Iran refused to participate. After satisfying itself that it had jurisdiction and that the case was well founded in terms of Article 53 of the ICJ Statute, the Court determined that the incident had engaged Iran's international responsibility. First, the Court found that Iran was responsible for failing to prevent the seizure of the US embassy or bring its occupation to an end.[199] Second, the Court held that the continuation of the occupation of the US embassy and the detention of its inmates as hostages in accordance with the policy decreed by the Ayatollah Khomeini fundamentally transformed the situation, such that the ongoing hostage crisis was to be seen as the responsibility of the state,[200] even though the initiation of the attacks was not attributable to Iran.[201]

In the first case, the finding of responsibility for failure to prevent was based on Iran's own conduct in respect of its primary obligations under conventional and customary international law, rather than any generally

[194] See e.g. Brierly (1928).
[195] See e.g. ARSIWA Commentary, Art. 8, §1; Art. 11, §§2–3; de Frouville (2010), 257–64.
[196] *Tehran Hostages*, ICJ Rep. 1980 p. 3. For an analysis of the case see Rafat, (1980–1) 10 DJILP 425. On the aspects pertaining to the law of state responsibility see ARSIWA Commentary, Art. 11, §4.
[197] See *Tehran Hostages*, ICJ Rep. 1980 p. 3, 33–5.
[198] Ibid., 34.
[199] Ibid., 31–3.
[200] Ibid., 35.
[201] The Court found the attacks to have been of an 'initially independent and unofficial character'; ibid., 28–31, esp. 30.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:05 Page Number: 360

applicable secondary principles of responsibility arising from the conduct of private persons.[202] In such cases, the state should not be seen as an accomplice of the private actor, and the private conduct is not attributed to the state; rather, the actions of that private person are simply a catalyst. The state's responsibility depends on how it responds to the private conduct, in the context of its own international obligations, whether pursuant to the specific terms of a treaty or under general international law.[203] The classic example is every state's obligation of due diligence with regard to the protection of foreign nationals on its territory from attacks, and the punishment of the perpetrators of any attacks.[204] Others include, for example, Article III of the Convention on Liability for Damage Caused by Space Objects: a state shall be liable for certain damage caused by a space object that it has launched 'only if the damage is due to its fault or the fault of persons for whom it is responsible',[205] which could conceivably include private persons or companies. In the context of obligations to prevent transboundary harm from hazardous activities, a state's responsibility might be engaged as a result of private conduct causing such harm if the state has failed to establish appropriate regulation and monitoring mechanisms within its jurisdiction.[206] In all these cases, although the responsibility of the state is in a sense 'connected' to the action of private persons, it arises as a matter of the state's own primary obligations and not through the attribution of that private conduct to the state.

In terms of secondary rules of state responsibility involving the conduct of private persons, the Court's conclusion on the 'second phase' of the crisis is more on point. At first glance, the finding that the ongoing hostage situation was attributable to Iran could be supported by either ARSIWA Article 8 or Article 11. Article 8 covers attributability to the state of conduct in situations in which the person or group engaged in the conduct 'is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[207] Whether the

[202] Ibid., 30–3. On the distinction between the obligation to prevent disturbances to foreign missions under Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, Art. 22(2), and general obligations of prevention as a category of obligation in the law of state responsibility, see Crawford, Second Report, 28.

[203] De Frouville (2010), 275–80. [204] Ibid., 277.

[205] Art. IV(1)(b) contains similar wording.

[206] See ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with commentaries), ILC Ybk 2001/II(2), 156 (commentary to Art. 5, §3). The damage itself will not usually be attributable to the state: Boyle (2010), 98.

[207] See ARSIWA Commentary, Art. 8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 10 Title Name: CRAWFORD
Date:18/3/13 Time:12:19:06 Page Number: 361

case is one of instructions, direction or control, there must be a real link between the actor(s) and state machinery, even though it is not necessary that the conduct involves 'governmental activity'.[208] The standard of control required for attribution has been uncertain.[209] The test of 'effective control' laid down by the International Court in *Military and Paramilitary Activities in and against Nicaragua*[210] was subsequently muddled by the Appeals Chamber of the ICTY, which proposed a test of 'overall control' both for characterizing the conflict in Bosnia and Herzegovina as international, and for imputing the acts committed by Bosnian Serbs to the Federal Republic of Yugoslavia under the law of state responsibility.[211] The Appeals Chamber's treatment of the latter issue was unfortunate, as it confused the rules of international humanitarian law with which it was concerned with the International Court's standard for attribution in the context of state responsibility, a matter beyond the ICTY's mandate.[212] The International Court took the opportunity to set the record straight in *Bosnian Genocide* by reaffirming the *Nicaragua* standard of 'effective control' for engaging state responsibility for private conduct, and emphasizing the distinctive purpose and context of the 'overall control' test articulated by the ICTY.[213] It described ARSIWA Article 8 as expressing a principle of customary international law.[214]

[208] Ibid., Art. 8, §§1–2.
[209] See the profusion of case law discussed in Crawford, First Report, 39–43; de Frouville (2010), 266–71.
[210] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 65.
[211] *Tadić*, Appeal against Conviction, (1999) 124 ILR 61.
[212] See e.g. ARSIWA Commentary, Art. 8, §§4–6; Del Mar, (2010) 21 EJIL 105; cf. de Frouville (2010), 269–71. See further Chapter 5.
[213] *Bosnian Genocide*, ICJ 2007 p. 43, 207–11. [214] Ibid., 207, 211.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:00 Page Number: 362

11 Responsibility for breaches of communitarian norms

11.1 Introduction

It has been a commonplace since Roman times that it is society that requires and generates the law: *ubi societas, ibi jus*. This idea long raised questions on the international law plane, where the *jus gentium* was minimal and put to the test the existence of any international society worthy of the name. Nowadays it seems that international law develops more rapidly than international society does, seeking to serve as a tractor rather than a trailer, reversing the Roman scheme of society and law.[1] But where this happens, the developments may be fragile and called into question. An example of this process may be identified in 'communitarian norms' of international law.

Communitarian norms – also referred to as obligations *erga omnes* – can be provisionally defined as multilateral rights and obligations, established in the interest of and owed to the international community as a whole, entailing a recognized legal interest of each of its members to invoke compliance.[2] Other characteristics of communitarian norms have been identified, in particular universality in the sense of binding force for all states and solidarity in its link to measures of enforcement.[3] But, to the extent they are valid, these seem to be subsumed under the provisional definition.

This chapter is adapted from the essay entitled 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts', in Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 224. The assistance of Rumiana Yotova, St Catharine's College, Cambridge, in the production of that essay is gratefully acknowledged.

[1] That this can happen is evidenced by the EU, which is very much 'law-led': e.g. Treaty of Lisbon, 17 December 2007, [2007] OJ C306/01.

[2] Cf. Crawford, (2006) 319 Hague *Recueil* 325, 344.

[3] Ragazzi, *The Concept of International Obligations* Erga Omnes (1997), 17.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:00 Page Number: 363

Communitarian norms have been identified and applied by international courts and tribunals well before the most recent iterations of the subject. The Permanent Court of International Justice in its very first case, *SS Wimbledon*, allowed for a claim to be brought by the United Kingdom, France, Italy and Japan against Germany in relation to its obligation not to refuse access to the Kiel Canal. Even though Italy and Japan were not individually injured,[4] the Court noted with regard to their standing 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 possessed fleets and merchant vessels flying their respective flags.[5]

The Court concluded that states enjoy freedom of navigation in the Kiel Canal, as it 'has been permanently dedicated to the use of the whole world'.[6] The freedom of navigation is one of the classical examples of a communitarian norm, identified by Hugo Grotius as 'a right [which] equally appertaineth to all nations'.[7] In that context, the Permanent Court had no difficulty in according standing to states which were not directly affected by the breaches in question but nevertheless had a recognized interest in ensuring compliance with the international regime.

Another early instance of application of communitarian norms concerned the obligation of demilitarization of the Åland Islands, which in 1920 was recognized as binding on Finland by an International Committee of Jurists appointed by the Council of the League of Nations, even though Finland was not a state party to the Peace Treaty between Sweden and Russia establishing the regime. The Committee noted:

> The Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties.[8]

The Committee stressed that the obligations of demilitarization of the islands were

> laid down in European interests [*sic*]. They constituted a special international status relating to military considerations, for the Aaland Islands. It follows that

[4] The *Wimbledon* was a British-flagged vessel demise-chartered to a French company, the demise charterer taking the risk of delay. In the event only France recovered damages: *SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 33.

[5] Ibid., 20. [6] Ibid., 28.

[7] Grotius, *Mare Liberum* (1609), Ch. I (ed. Armitage, 2004, 11).

[8] Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion on the legal aspects of the Aaland Islands Question, (October 1920) LNOJ Spec. Supp. No. 3, 17.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:01 Page Number: 364

until these provisions are duly replaced by others, *every State interested* has the right to insist upon compliance with them.[9]

This conclusion identifies the essence of communitarian norms: the community interest in whose defence they are established and the consequent legal interest of every member of the community to invoke responsibility for compliance. The various international regimes relating to demilitarization are also typical instances of integral obligations. This reasoning was relied on by Judge McNair in his separate opinion in *South West Africa* cases when he stated that 'it happens that a group of Great Powers or a large number of States ... assume a power to create by a multipartite treaty some new international régime or status ... This power is used when some public interest is involved.'[10]

Although, then, the concept of the *erga omnes* applicability of communitarian norms was not new,[11] it only crystallized as a modern formulation in the dictum of the Court in the *Barcelona Traction* case, where the Court ventured to say:

> [A]n 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*.[12]

In the following paragraph, the Court gave as examples of such obligations those deriving from the outlawing of aggression and genocide, as well as the basic rights of the human person, including the protection against slavery and racial discrimination.[13]

This holding limited if not reversed the Court's judgment in the *South West Africa* cases, where by the barest majority it had denied standing to Liberia and Ethiopia to invoke the responsibility of South Africa for breach of the Mandate, stating:

> [T]he principle of the sacred trust has no residual judicial content which would, so far as any particular mandate is concerned, operate *per se* to give rise to legal

[9] Ibid., 19 (emphasis added).
[10] *International Status of South West Africa*, ICJ Rep. 1950, 128, 153 (Judge McNair).
[11] See to this effect the conclusions of the ILC in its Report on Fragmentation of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, §381.
[12] *Barcelona Traction, Light & Power Company, Limited (Spain v. Belgium)*, Second Phase, ICJ Rep. 1970 p 3, 32.
[13] Ibid., 32–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:01 Page Number: 365

rights and obligations outside the system as a whole; and, within the system equally, such rights and obligations exist only so far as there is actual provision for them ... Hence, although ... the members of the League had an interest in seeing that the obligations entailed by the mandates system were respected, this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs, and not individually.[14]

According to the Court's conclusion in 1966, reached by the casting vote of the president, Sir Percy Spender, the default rule under general international law was not to recognize individual standing of states for the protection of a 'sacred trust' or common interest; enforcement could only take place through a collective form of invocation within the framework of an international organization.[15]

11.2 The International Law Commission's compromise

Although there is no complete agreement on the enumeration of communitarian norms and although the law in this area is still developing, the principle that in certain cases any state had standing to protest against breaches of certain fundamental norms, and if necessary to institute proceedings to vindicate its interest as a member of the international community, has long been accepted.[16]

The idea was reflected, in the Draft Articles on State Responsibility adopted by the ILC on first reading in 1996, in two unwieldy provisions, Draft Article 19 (dealing with 'international crimes of States') and Draft Article 40 (defining the 'injured State' to include, in the case of state crimes and in certain other cases, all states). On second reading these were radically changed. Draft Article 19 disappeared, being replaced by Articles 40 and 41 (dealing with consequences of serious breaches of peremptory norms). Draft Article 40 was transfigured, emerging as Articles 42 and 48 (distinguishing between the 'injured State' and other states entitled to invoke responsibility even though not individually injured by the breach). Much more attention has been paid in the literature to the debate over 'international crimes of State'.[17] This

[14] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, ICJ Rep. 1966 p. 6, 35.
[15] Judges Tanaka (ibid., 250) and Jessup (ibid., 325) appended strong dissents on this point.
[16] E.g. Jennings and Watts (eds.), 1 (1992), 5.
[17] See Crawford, in Crawford, Pellet and Olleson (2010) 405; Ollivier, in Crawford, Pellet and Olleson (2010) 703. On 'crimes of state' see also the Excursus to this chapter.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:02 Page Number: 366

chapter focuses on the other half of the equation, ARSIWA Article 48 and the accompanying notion of invocation of responsibility in the public interest.[18] Article 48 reads as follows:

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.

The significance of this provision is that – read with Article 42 – it breaks the link between substantive rights and process which previously restricted the development of the law, giving rise to such implausibilities as Draft Article 40. In the *Reparation for Injuries* case, the Court said that 'only the party to whom an international obligation is due can bring a claim in respect of its breach'.[19] The problem with this proposition – unimpeachable in the context of bilateral norms, and indeed of the factual situation underlying that opinion – is at least twofold. First, there is no collective entity with capacity to act, yet it seems extravagant to treat obligations, for example in the environmental or human rights sphere, as owed individually to every state. The collective action problem in international law is not solved by prematurely turning collective obligations into bundles of bilateral obligations, in the manner of the early-modern attempts at multilateral treaty-making.[20] Second, even though every state may have legitimate concerns at some breach of an international

[18] See Simma, (1994) 250 Hague *Receuil* 217. See also Crawford, in Andenas (ed.), 2 *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000) 23.
[19] *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 149, 181–2.
[20] See Marek, in Diez et al. (eds.), *Festschrift für Rudolf Bindschedler* (1980) 17.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:02 Page Number: 367

obligation, particular states may be particularly injured or affected by it, and their priority when it comes to reactions should be recognized.

In short, rather than reducing everything to the level of individually held substantive rights, Article 48 recognizes that certain communitarian norms are owed either to the other states parties (sometimes referred to as obligations *erga omnes partes*) or to 'the international community as a whole' (obligations *erga omnes*).[21] As a consequence, in the case of obligations *erga omnes partes* every state party to the treaty in question has a procedural right, that is, *locus standi* to invoke its application on behalf and for the benefit of all the parties; and in the case of obligations *erga omnes*, every state has standing to invoke it on behalf of 'the international community as a whole'. This provision 'in general achieves a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes'.[22]

The movement from bilateralism to a community-oriented approach in the work of the ILC can be traced back to Special Rapporteur Fitzmaurice's Third Report on the Law of Treaties.[23] He proposed a distinction between 'interdependent' and 'integral' treaty obligations, affecting the capacity of states to derogate from them by a subsequent treaty and entailing their responsibility for doing so.[24] Fitzmaurice gave as examples of interdependent obligations those whose violation by one party prejudices the treaty regime between all, for example in the context of disarmament or of fishing moratoria.[25] Integral obligations on the other hand were defined as 'self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others';[26] examples included obligations under the Genocide Convention, human rights conventions, the 1949 Geneva Conventions, ILO conventions and treaties providing for a certain regime in a given area such as that at the entrance of the Baltic Sea.[27]

[21] See, in the context of international criminal responsibility, Rome Statute for the International Criminal Court, 17 July 1998, 2187 UNTS 2, Art. 5(1); cf. ILC Draft Statute for the International Criminal Court, ILC Ybk 1994/II(2), 26–7, Preamble.

[22] Crawford, Fourth Report, 11.

[23] Fitzmaurice, Third Report, ILC Ybk 1958/II, 27–8, 44ff (Art. 19 and commentary).

[24] Ibid.

[25] Fitzmaurice, Second Report, ILC Ybk 1957/II, 54 n73; Fitzmaurice, Third Report, ILC Ybk 1958/II, 44.

[26] Fitzmaurice, Second Report, ILC Ybk 1958/II, 28.

[27] Treaty of Copenhagen, 14 March 1857, 116 CTS 357; Convention of Washington, 11 April 1857, 116 CTS 465. See further Fitzmaurice, Second Report, ILC Ybk 1957/II, 54; Fitzmaurice, Third Report, ILC Ybk 1958/II, 44.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:02 Page Number: 368

After re-examining in the light of government comments whether these types of obligation should constitute a special case of treaty conflict, the ILC, noting the varying importance of these types of obligation from ones concerning technical matters to those relating to the maintenance of peace, nuclear tests and human rights, decided to 'leave the question as one of international responsibility'.[28] Indeed, these considerations did in due course influence the ILC's definitions of obligations *erga omnes partes* and *erga omnes* in Article 48(1)(a) and (b) respectively, as is made clear in the commentaries.

Article 48 was not adopted without criticism. Some governments expressed concern as to its breadth and potential for abuse, for 'opening the flood gates' of litigation;[29] while some scholars[30] complained that it is too weak compared with its predecessor, reflecting the notion of 'state crime'. Subsequent practice gives no indication that these fears were substantiated. States do not seem inclined to bring international legal proceedings without good reason. If they choose to do so nevertheless, acting (or purporting to act) in the common interest of the international community, they should not be hindered by procedural technicalities. Better to give states standing in court to protect what they perceive as global values than to leave them only with non-judicial means of dispute settlement, whether in the guise of countermeasures or under the rubric of 'responsibility to protect'.

For its part the ILC endorsed in ARSIWA Article 48 the principle of standing to invoke *erga omnes* obligations, relying on the *Barcelona Traction* dictum, and in 2011 adopted an analogous provision in Article 49 of the Draft Articles on Responsibility of International Organizations (DARIO).[31] In line with the *Wall* opinion,[32] this provides for standing of both states and international organizations to invoke the responsibility of an international organization for breaches of communitarian norms. However, it qualifies the standing of international organizations by imposing the requirement that 'the obligation breached is owed to the international community as a whole and safeguarding the interest of the

[28] ILC Ybk 1966/II, 217.

[29] Crawford, Fourth Report, 11 for the comments of Japan and France. See also Crawford, Third Report, 27–8, nn. 142–5 referring to the comments of Italy (ILC Ybk 1998/II(1), 104); Venezuela (UN Doc. A/C.6/54/SR.23, §54); Austria (ILC Ybk 1998/II(1), 138); and the United States (ILC Ybk 1998/II(1), 142).

[30] Cassese (2005), 269–71.

[31] ILC Report 2011, UN Doc. A/66/10, 52.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:03 Page Number: 369

international community underlying the obligation breached is included among the functions of the international organization invoking responsibility'.[33] This functional restriction flows logically from the more limited 'measure of international personality [of international organizations] and the capacity to operate upon the international plane'.[34] A further, practical impediment to the application of DARIO Article 49 is the lack of any judicial forum before which international organizations could bring claims or have their responsibility invoked.[35]

Some light is shed on the status of these provisions by the Court's treatment of Belgium's standing in *Belgium* v. *Senegal*. The case concerned allegations of crimes against humanity and torture made against Hissène Habré, a former president of Chad, who had been granted asylum in Senegal. In 2005 Belgium sought his extradition relying in particular on the 1984 Torture Convention. After four years, Habré not having been tried or extradited during that time, in 2009 Belgium commenced proceedings seeking his extradition. Senegal argued that the claim was inadmissible in that none of the torture victims had Belgian nationality at the time of the alleged offences. Belgium relied, *inter alia*, on ARSIWA Article 42(b)(i), claiming a 'special interest' by reason of the Belgian proceedings and extradition request. The Court declined to decide the case on that ground, holding instead that the relevant provisions of the Torture Convention were obligations *erga omnes partes* 'in the sense that each State party has an interest in compliance with them in any given case'.[36] It concluded:

> The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.[37]

[33] ILC Report 2011, 64, Art. 49(3). [34] *Reparation for Injuries*, ICJ Rep. 1949 p. 174, 179.

[35] Given an appropriate arbitration agreement, such proceedings could be governed by the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States of 1 July 1996, available at www.pca-cpa.org/showpage.asp?pag_id=1188.

[36] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, §68.

[37] Ibid., §69. See also Judge Owada, sep. op., §23; Judge Skotnikov, sep. op., §§21–3; and cf. Judge Xue, diss., §§11–18.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:03 Page Number: 370

Although the Court did not refer to Article 48, the decision is in fact firmly in line with ARSIWA Article 48(1)(a). But the Court's use of the term *erga omnes partes* is significant, suggesting that it may be more parsimonious with *erga omnes* obligations in future.[38]

11.3 Invocation of communitarian norms

In its 2004 Advisory Opinion in *Wall*, the International Court drew broad legal consequences from the internationally wrongful acts flowing from Israel's breaches of communitarian norms as regards other states. In particular, it noted:

> The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law ...
>
> Given the character and importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall ... They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention ... are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.
>
> Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.[39]

It may be observed that the consequences referred to transcend traditional state responsibility and demonstrate certain communitarian characteristics. While respect for the right of self-determination is defined as an *erga omnes* obligation, the humanitarian norms under the Geneva Conventions are characterized as *erga omnes partes*. The scope of the consequences is correspondingly different – those flowing from the breach of self-determination relate not only to all States but also to the

[38] The Court held that the dispute was exclusively one under Torture Convention and not under general international law: Judgment, §55.

[39] *Wall*, ICJ Rep. 2004 p 136, 199–200.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:03 Page Number: 371

United Nations and its organs as part of the international community. Violations of the humanitarian norms on the other hand apparently entail consequences for the other states parties to the Geneva Conventions.

Another aspect of the Court's holding is that the *erga omnes* effects of both breaches are not expressed as procedural faculties to invoke Israel's responsibility in terms of ASRIWA Article 48, but as positive obligations of each and every member of the international community to take lawful measures in response as envisaged in Article 54. Article 54 is a saving clause, dealing with the consequences of serious breaches of obligations under peremptory norms for countermeasures. Other consequences are dealt with in Article 41, in terms which the Court borrowed without acknowledgement.[40] The Court seems to draw these conclusions directly from the *erga omnes* type of the obligations breached, nowhere mentioning whether they are also of a peremptory character or analysing the particular gravity of the breach. All the consequences flowing from the breaches in the area of state responsibility were linked to the *erga omnes* character of the obligations, leaving *a contrario* their effects as peremptory norms to other areas of international law such as the law of treaties.

In this sense, *Wall* can be seen not only as endorsing the ILC provisions on communitarian norms set out in ARSIWA Article 48 and at least envisaged as possible by Article 54, but also as going a step further in the development of the consequences of *erga omnes* obligations.[41]

In fact the ILC did draft and comment on the provisions on serious breaches of obligations under peremptory norms with particular reference to communitarian norms. Indeed, Chapter III of Part II was first labelled 'serious breaches of obligations to the international community as a whole',[42] and referred to obligations *erga omnes* as the issue underlying Article 40,[43] viewing Chapter III as 'a framework for the progressive development within a narrow compass, of a concept which is or ought to be broadly acceptable.'[44] In 2001, Article 40 was modified to refer to serious breaches of peremptory norms on the ground, *inter alia*, that Chapter III is concerned with substance, not standing.[45] There is in truth little or no difference between the two categories.

[40] Ibid., 231 (Judge Kooijmans).
[41] This *erga omnes*-based approach did not remain uncriticized: e.g. ibid., 216–17 (Judge Higgins).
[42] See Crawford, Fourth Report, 12. [43] Ibid., 13. [44] Ibid., 14.
[45] ILC Ybk 2001/I, 105 (Chairman of the Drafting Committee).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:04 Page Number: 372

The issue of responsibility for breaches of communitarian norms surfaced again before the International Court in *Armed Activities on the Territory of the Congo (DRC v. Uganda)* and were dealt with at some length in the separate opinion of Judge Simma, with express reference to ARSIWA Article 48.[46] According to Judge Simma, the Court should have entertained the second counter-claim of Uganda which concerned the maltreatment by Congolese soldiers of persons at the Ndjili International Airport whose nationality could not be ascertained and which was thus declared inadmissible. Even though Uganda did not invoke as a basis for standing the breach of communitarian norms, Judge Simma took the view that 'no gaps exist in the law that would deprive the affected persons of any legal protection'.[47] Furthermore,

> [R]egardless of whether the maltreated individuals were Ugandans or not, Uganda had the right – indeed the duty – to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party's international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard ...
>
> As to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well ... The obligations deriving from the human rights cited above and breached by the DRC are instances *par excellence* of obligations that are owed to a group of States including Uganda, and are established for the protection of a collective interest of the States parties to the Covenant.[48]

He concluded:

> If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their proper place open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.[49]

In line with the Court's reasoning in *Wall*, Judge Simma also views the consequences of violations of communitarian norms as interrelated rights and at the same time as obligations to invoke the international responsibility of the alleged violator. He suggests that the Court should

[46] ICJ Rep. 2005 p. 168, 334ff (Judge Simma). [47] Ibid., 340.
[48] Ibid., 347–8. [49] Ibid., 350.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:04 Page Number: 373

have considered *proprio motu* the Applicant's standing to invoke breaches of *erga omnes* obligations, even if it was not expressly relied on.

In its Application instituting proceedings against Japan in *Whaling in the Antarctic*,[50] Australia invokes an obligation *erga omnes partes* under the International Convention for the Regulation of Whaling, even though basing the jurisdiction of the Court on Article 36(2) of its Statute and the respective declarations of acceptance of Australia and Japan. Still the conduct in question took place in an area subject to an objective international regime to which Japan is a party, and was opposed by a 'strong reaction of the international community',[51] including formal objection by thirty states and the European Commission. The remedies sought by Australia, which invokes Japan's obligations *erga omnes partes* under the Whaling Convention and *erga omnes* in the context of environmental protection under CITES and the Convention on Biological Diversity, coincide with the remedies available under ARSIWA Article 48(2) and do not include any reparation in the sole interest of the Applicant.

Communitarian norms have been invoked at a regional level, for instance within the Council of Europe pursuant to the ECHR. In the *Pfunders* case in 1961, the European Commission of Human Rights defined the rights and obligations under the ECHR as integral, with the interesting practical consequence of broadening their *ratione temporis* scope to extend to instances prior to the ratification of the Convention by the responsible state. It held:

> [T]he obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.[52]

In a later case between Ireland and the United Kingdom, the European Court of Human Rights elaborated further the communitarian nature of the regime of protection established by the ECHR. It stated that,

> Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.[53]

[50] *Whaling in the Antarctic (Australia* v. *Japan)*, ICJ, Application Instituting Proceedings, 31 May 2010.
[51] Ibid., §32. [52] *Austria* v. *Italy*, (1961) 4 ECommHR Ybk 138.
[53] *Ireland* v. *UK*, (1978) 58 ILR 188, 291.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:04 Page Number: 374

The broad possibilities open to the states parties to the ECHR to invoke each other's responsibility for breaches of communitarian norms are confirmed by the jurisdictional clause in ECHR Article 33. But, as observed by Bruno Simma, the fact is that 'so far, States have hardly shown the excessive human rights "vigilantism" dreaded by some'.[54] He notes that in the sixty-year history of the ECHR, only a few instances have occurred where states whose interests were not specifically affected by a breach have invoked it before the Court. These were the two applications by Denmark, Norway, Sweden and the Netherlands against Greece[55] and the later application of Denmark against Turkey.[56]

In other instances, states have sought to invoke communitarian norms when claiming the right to exercise extra-territorial jurisdiction; one apparent example is the litigation under the 'law of nations' in the United States pursuant to the Alien Tort Claims Act.[57] Other less problematic cases, at the international level, include the *Fur Seals Arbitration*[58] and the *US – Shrimp* case before the Dispute Settlement Body of the WTO.[59]

Instances of *actio popularis* seem to emerge in a regional human rights context too. For example, in *Social & Economic Rights Action Centre, Center for Economic & Social Rights* v. *Nigeria* the African Commission on Human Rights accepted an action brought by two non-governmental organizations (NGOs) on behalf of the Ogoni people, which, as is usually the legal situation of a 'people', does not have standing to invoke their rights.[60]

Communitarian norms seem to have a prominent role in the requests for advisory opinions. For instance, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has issued an advisory opinion regarding the responsibilities and obligations of states for sponsoring persons with respect to activities in the International Seabed Area ('the Area').[61] The regime of the Area is an example of one established in

[54] Simma and Pulkowski (2010), 162.
[55] Ibid., quoting (1968) 11 ECommHR Ybk 691; (1969) 12(II) ECommHR Ybk 1.
[56] *Denmark* v. *Turkey*, Friendly Settlement, [2000] ECtHR 34382/97, §§20, 23.
[57] 28 USC §1350. [58] (1893) 1 IELR 43.
[59] *US – Shrimp*, WT/DS58/AB/R, 12 October 1998.
[60] *Social and Economic Rights Action Centre, Center for Economic & Social Rights* v. *Nigeria*, ACHPR Comm. No. 155/96, 13–27 October 2001 (based on the African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 218, Art. 24).
[61] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No. 17, 1 February 2011.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:05 Page Number: 375

the common interest of the international community so as to preserve the Area and its resources as a common heritage of mankind.[62]

This tendency of states to request advisory opinions through an international organization regarding questions of interpretation and application of communitarian norms has also been in evidence in the International Court of Justice. For instance, in the 1951 *Genocide* Advisory Opinion, the Court underlined the communitarian character of the Genocide Convention, stating:

> [T]he contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a convention of this type, one cannot speak of individual advantages and disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[63]

Other examples are the *Wall* Advisory Opinion, the *Nuclear Weapons* Advisory Opinion and the *Namibia* Advisory Opinion. The occurrence of communitarian norms more often in advisory than in contentious proceedings might be due to the combined effect of perceived standing restrictions in contentious proceedings, as well as to the lack of any judicial forum for direct claims by or against international organizations. In this context, ASRIWA Article 48 and Article 52 can be seen as an important development which opens the doors to contentious jurisdiction entailing a binding outcome.

Erga omnes obligations are reflected in the compromissory and other clauses of a number of international treaties, for example Article 8 of the Slavery Convention,[64] Article 38 of the Refugee Convention,[65] Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination,[66] Article 33 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[67] as well as under many clauses in multilateral environmental treaties.[68]

The question of interpretation in the light of general international law within the meaning of VCLT Article 31(3)(c) becomes crucial in the

[62] See United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982, Preamble and Art. 136.
[63] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951 p. 15, 23.
[64] 25 September 1926, 60 LNTS 254.
[65] Convention relating to the Status of Refugees, 22 April 1954, 189 UNTS 137.
[66] 7 March 1966, 660 UNTS 195. [67] 4 November 1950, 213 UNTS 221.
[68] See in general Komori and Wellens (eds.), *Public Interest Rules of International Law* (2009).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:05 Page Number: 376

absence of an explicit clause recognizing the legal interest and standing of all states. In the light of the treaty practice and case law discussed above, the answer to this question should be that the general rule is the one giving states standing to invoke compliance with communitarian norms, provided that other jurisdictional requirements are met. A corresponding procedural framework for the invocation of responsibility for breaches of communitarian norms remains to be developed, for example one permitting invocation by more than one member of the international community in multiparty proceedings, instead of the traditional approach of joining related proceedings.[69]

11.4 The relation between communitarian and other norms

Four years after the *South West Africa* cases, faced with a torrent of criticism,[70] the Court revisited the question of obligations *erga omnes*, recognizing the standing of states to invoke communitarian norms due to the importance of the underlying values and a common interest of each member of the international community in invoking them. What the Court did not do, however, was to link their effects to the ILC's recently formulated notion of peremptory norms of general international law. It took the Court some thirty-five years explicitly to do that[71] – although it has made up for it since.[72] In the meantime, its jurisprudence elaborated the relationship between communitarian and other norms of international law.

The modern Court seems to be consistent in its adherence to the *erga omnes* nature of rights and obligations when dealing with matters of invocation and consequences of international responsibility, while referring to peremptory norms either interchangeably with *erga omnes* or as a distinct notion.

[69] Cf. Rules of the International Court of Justice, 14 April 1978, Art. 47; Rules of the International Tribunal for the Law of the Sea, 17 March 2009, Art. 47; Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising Under Multilateral Agreements and Multiparty Contracts, available at www.pca-cpa.org/showpage.asp?pag_id=1188.

[70] E.g. Orakhelashvili, *Peremptory Norms in International Law* (2006), 519–25.

[71] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Arts. 53, 64.

[72] See, most recently, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, 22 July 2010, §81 referring to 'egregious violations of norms of general international law, particularly those of peremptory character (*ius cogens*)'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:05 Page Number: 377

In the year following *Barcelona Traction*, the Court revisited the legal situation in South West Africa, this time in the form of an Advisory Opinion, where it held, in line with its 1970 dictum:

> [T]he termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof.[73]

In this opinion, the Court not only affirmed the concept of communitarian norms, but broadened their consequences with regard to international responsibility in terms very close to those which would be adopted in ARSIWA Article 41.

Erga omnes-based arguments were also invoked by Australia and New Zealand in the *Nuclear Tests* case, but were not addressed by the Court, which made its pronouncement on the basis of the *erga omnes* effect of the unilateral statements made by French officials and their ability to give rise to international responsibility in case of non-compliance – a quite different matter.[74]

In the jurisprudence subsequent to the *Barcelona Traction* pronouncement on obligations *erga omnes* and their effects, the Court has adopted a more restrictive approach, implicitly qualifying its previous statement. For instance, in the *East Timor* case, while recognizing the *erga omnes* status of the right to self-determination the Court upheld the indispensable third party rule, declining to exercise its jurisdiction in an apparently clear case. It stated:

> Whatever the nature of the obligation invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[75]

The passage is notable for its implicit shift from the language of obligation to that of right, where what was directly at stake was not the right of the people of East Timor to self-determination but the obligation of other states not to recognize a purported acquisition of sovereignty

[73] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971 p. 16, 56.
[74] *Nuclear Tests (New Zealand v. France)*, ICJ Rep. 1974 p. 457, 474.
[75] *East Timor (Portugal v. Australia)*, ICJ Rep. 1995 p 90, 102.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:06 Page Number: 378

involving a use of force not sanctioned either by the people of the territory or by Portugal, its former sovereign. The decision has been criticized,[76] but two points may be made. First, the case was principally if not solely argued on the basis of the right to self-determination, unrelated to the use of force. Second, and more generally, it is common for broad principles enunciated in early cases to be subject to narrowing and refinement by later courts – one thinks, in the common law tradition, of *Donoghue* v. *Stevenson*[77] or *Underhill* v. *Hernandez*.[78]

The Court's conclusion – that the effects of *erga omnes* rights and obligations are specific to the area of state responsibility and do not take priority over other procedural requirements for the exercise of the Court's jurisdiction – was later expanded to cover peremptory norms in *Congo* v. *Rwanda*.[79] Judge Weeramantry, addressing the issue of estoppel in his separate opinion in the *Gabčíkovo-Nagymaros* case, revisited the matter in the following terms:

> [T]he Court, in the discharge of its traditional duty of deciding *between the parties*, makes the decision which is in accordance with justice and fairness *between the parties*. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character – least of all in cases involving environmental damage of a far-reaching and irreversible nature ... There has been conduct on the part of Hungary which, in ordinary *inter partes* litigation, would prevent it from taking up wholly contradictory positions. But can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not.[80]

11.5 Invocation and consequences of breaches of peremptory norms

11.5.1 Defining peremptory norms

Many legal systems – especially those deriving from Roman law – distinguish between *jus dispositivum* and *jus strictum*. The former may be derogated from by individuals in their contractual relations. An act which purports to derogate from the latter, however, is void to the

[76] But cf. ibid., 139–223 (Judge Weeramantry diss.).
[77] *Donoghue (or McAlister)* v. *Stevenson*, [1932] AC 562.
[78] *Underhill* v. *Hernandez*, 168 US 250 (1897).
[79] *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, Jurisdiction and Admissibility, ICJ Rep. 2006 p 6, 31, 52.
[80] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 117–18.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:06 Page Number: 379

extent of the purported derogation. International law is no different in this respect, although the route taken to reach this conclusion was a roundabout one. The early Spanish theorists, who conceived of international law's authority as deriving from the immutable external rules of natural law, were quick to identify non-derogable norms.[81] Indeed, this led Grotius to posit an entire system composed of rules from which no departure was permitted:

> As for the Rest, the Law of Nature is so unalterable, that God himself cannot change it. For tho' the Power of God be infinite, yet we may say, that there are some Things to which this infinite Power does not extend, because they cannot be expressed by Propositions that contain any Sense, but manifestly imply a Contradiction. For Instance then, as God himself cannot effect, that twice two should not be four; so neither can he, that what is intrinsically Evil, should not be Evil.[82]

But by the early twentieth century, wherein international law was conceived of in strictly positivist terms as deriving from the consent of states, the idea of a non-derogable rule of international law seemed impossible.[83] This position altered in the wake of the atrocities of the Second World War. The eventual consequence was VCLT Article 53:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm 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 principle did not emerge without friction. Within the Committee of the Whole, France in particular saw the formulation that would eventually become VCLT Article 53 as vague and liable to lead to substantial differences of opinion along political, social or economic lines.[84]

[81] For example, Vitoria stated: 'if there were any human law which without any cause took away rights conferred by natural and divine law, it would be inhumane and unreasonable and consequently would not have the force of law': *Francisci de Victoria De Indis et de ivre belli relectiones* (ed. E. Nys, trans. J. P. Bate, 1917), 152.

[82] Grotius, (1625), Bk I, Ch. I, §X.5 (2005, 155).

[83] Frowein, 'Ius cogens', (2009) MPEPIL, §3.

[84] 6 May 1969, UN Doc. A/CONF.39/C.1/SR.54, 309–10, esp. §34 ('[Mr de Bresson] appealed urgently to the members of the Conference to believe that the serious concern expressed by his delegation to prevent the too hasty adoption of ideas which, though magnanimous in themselves, were liable to jeopardize the security of international relations').

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:07 Page Number: 380

Since 1970, the International Court and other tribunals have in several cases impliedly recognized the existence of a peremptory rule.[85] The least controversial members of this class are the prohibition of the use of force in Article 2(4) of the UN Charter,[86] of genocide,[87] of crimes against humanity (including systematic forms of racial discrimination),[88] the basic rules of international humanitarian law[89] and the rules prohibiting trade in slaves.[90] Other rules that have this special status include the principle of self-determination, at least in its application to colonial countries and peoples or peoples under alien domination.[91]

11.5.2 Consequences of the serious breach of peremptory norms[92]

As alluded to by the International Court in the *Wall* Advisory Opinion, international law calls for some response to the breach of a peremptory norm by a state. ARSIWA Article 41 provides:

1. States shall cooperate to bring to an end through lawful means any serious breach [of a peremptory norm].
2. No State shall recognized as lawful a situation created by a serious breach [of a peremptory norm], 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 in international law.

The obligations contained in Article 41 are engaged in the face of a 'serious breach' of a peremptory norm. The concept of a 'serious breach' is defined in ASRIWA Article 40(2), which provides simply that a breach will be considered 'serious' where 'it involves a gross or systematic

[85] Further: ARSIWA Commentary, Art. 40, §5. Also the list provided by the Court in *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3, 32; *East Timor*, ICJ Rep. 1995 p. 90, 102.

[86] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 100–1.

[87] *Armed Activities (2002 Application) (DRC v. Rwanda)*, Jurisdiction and Admissibility, ICJ Rep. 2006 p. 6, 32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 111.

[88] *South West Africa*, Second Phase, ICJ Rep. 1966 p. 6, 298 (Judge Tanaka, diss.); *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3, 304 (Judge Ammoun); *Namibia*, ICJ Rep. 1971 p. 16, 78–81 (Vice-President Ammoun).

[89] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 p. 226, 257.

[90] *Roach and Pinkerton (Case 9647)*, IACtHR 3/87, 22 September 1987, §54. Also *Michael Domingues*, IACtHR 62/02, 22 October 2002.

[91] *Wall*, ICJ Rep. 2004 p. 136, 199.

[92] For criticism: Klein, (2002) 13 EJIL 1241.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:07 Page Number: 381

failure by the responsible state to fulfil the obligation'. The commentary provides some further information in this respect, emphasizing the need for a certain threshold of magnitude in the violation of an obligation. Insofar as the requirement of systemic conduct in Article 40(2) is concerned, this refers to the need for organized or deliberate commission: according to the commentary, this represents a comment on factors such as an intention to violate the norm, the scope and number of victims and the magnitude of the consequences.[93] Indeed, with respect to some peremptory norms, the need for a certain systemic intent is a vital element of *any* breach of the norm, the example *par excellence* being genocide.[94] But both thresholds are, to an extent, illusory (unless, as mentioned, systemic conduct is a constitutive element of the breach): peremptory norms are among the most serious prohibitions in international law, and the mere fact of breach (unless considered to be trivial in character) is ordinarily sufficient to warrant the label of 'serious'.[95]

With this in mind, ASRIWA Article 41 sets out three consequences in two paragraphs for the 'serious' breach of a peremptory norm: invalidity and the obligations of non-recognition[96] and non-assistance (Article 41 (2)),[97] and the obligation of co-operation (Article 41(1)).[98]

11.5.2.1 The obligation of non-recognition

Recognition involves the acknowledgement by one state or government that another state or government is legitimate: among other things, such recognition is seen to be declarative (although not constitutive) of statehood.[99] But, as pointed out by Brownlie, recognition need not be so confined; it is a broader concept related to 'evaluation of State conduct in the face of facts which may relate to legal titles, liabilities or immunities'.[100] Thus, just as non-recognition of one 'state' by another demonstrates that the latter considers such claims of statehood to be illegal,

[93] ARSIWA Commentary, Art. 40, §8.
[94] As expressed in the Convention for the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Art. II, an essential element of genocide is the intention 'to destroy, in whole or in part, a national ethical, racial or religious group'. See also the ICC Statute, Art. 6.
[95] A concession made by the ILC: ARSIWA Commentary, Art. 40, §7 ('it is not intended to suggest that any violations of these obligations is not serious or is somehow excusable').
[96] Dawidowicz, in Crawford, Pellet and Olleson (2010) 677.
[97] Jørgensen, in Crawford, Pellet and Olleson (2010) 687. [98] Ibid., 695.
[99] Further: Talmon, (2004) 75 BYIL 101; Crawford, *The Creation of States in International Law* (2006), 12–28; *Brownlie's Principles*, ch. 6.
[100] Brownlie, (1982) 53 BYIL 197, 201–2. Also Orakhelashvili (2006), 282.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:08 Page Number: 382

so, too, does the non-recognition of an act of state. This is noted by Orakhelashvili:

> [T]he duty of non-recognition of the breaches of peremptory norms extends not only to State-creation but to every kind of illegality. It refers to the general duty to refrain from acts and actions, or from taking attitudes, that imply the recognition of the acts offending against peremptory norms in a variety of international legal relations.[101]

The archetypal example of the operation of non-recognition is that of territorial acquisition resulting from aggression. This pre-dates the ARSIWA: for example, Article 5(3) of the General Assembly's Definition of Aggression proclaims that no such acquisition of territory 'is or shall be recognized as lawful'.[102] As Blix notes, the application of the obligation of non-recognition is uncertain,[103] but the thrust of the international law position is that in the event of annexation leading to the continuous and effective control of territory by an aggressor, no prescriptive rights may evolve in favour of the aggressor,[104] or be recognized by the international community.

It remains the best represented of peremptory norms the breach of which may give rise to non-recognition, and multiple examples may be cited,[105] notably the treatment of the regime in Southern Rhodesia.[106] Six days before the issuance of its unilateral declaration of independence from the United Kingdom, the UN General Assembly adopted a resolution which, *inter alia*, appealed to all states 'not to recognize any government in Southern Rhodesia which is not representative of the majority of the people'.[107] This was supplemented by a series of Security Council resolutions which fleshed out the extent of the obligation of non-recognition: states were obliged not to maintain diplomatic relations with the Southern Rhodesian entity,[108] not to recognize the issuance of passports by the entity save on humanitarian grounds,[109] to withdraw consular and trade representation, to deny the legal validity of all purported public acts of the regime and to reject any claim of

[101] Orakhelashvili (2006), 282.
[102] GA Res. 3314(XXIX), 14 December 1974, Annex. This clause echoes the earlier Friendly Relations Declaration, GA Res. 2625(XXV), 24 October 1970, Annex. Further: Dinstein (2011), 183.
[103] Blix, (1970) 130 Hague *Recueil* 587, 662–5. [104] Dinstein (2011), 183.
[105] Dawidowicz (2010), 679–82.
[106] Generally: Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (1990).
[107] GA Res. 2022(XX), 5 November 1965, op. §9.
[108] SC Res. 217 (1965); SC Res. 288 (1970). [109] SC Res. 253 (1968).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:08 Page Number: 383

membership it made to an international organization.[110] These injunctions were generally observed, those states which did not do so – notably South Africa and Portugal – being the subject of express condemnation by the Security Council.[111]

A subsequent episode of collective non-recognition established the limits on the doctrine. In 1966, the General Assembly decided that South Africa had failed to fulfil its obligations with respect to the Mandate of South West Africa (Namibia) through the extension of apartheid to the region, a policy redolent of racial discrimination accompanied by the forcible denial of the Mandate's right to self-determination. On this basis, the Mandate was terminated.[112] South Africa's continued presence in the region, however, led to the Security Council to characterize the situation as one of 'occupation',[113] and to declare in Resolution 276 of 1970 that 'the continued presence of the South African authorities in Namibia is illegal and . . . consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal or invalid'.[114] When this did not provoke the desired response from South Africa, the Security Council called on all states 'to refrain from any relations – diplomatic, consular or otherwise – with South Africa implying recognition of the authority of the Government of South Africa over the Territory of Namibia'.[115]

Security Council Resolution 284 of 1970 then requested an advisory opinion from the International Court on the following question: 'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)'. In the resulting *Namibia* Advisory Opinion, the Court identified a customary limit on non-recognition, under which some public acts of the South African government on behalf of Namibia could be recognized under international law:

> In general, 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 co-operation. 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

[110] SC Res. 277 (1970). [111] SC Res. 277 (1970), op. §6.
[112] GA Res. 2145(XXI), 27 October 1966.
[113] SC Res. 264 (1969), preamble. See also Report of the United Nations Council for South West Africa, 10 November 1967, UN Doc. A/6897.
[114] SC Res. 276 (1970), §2. [115] SC Res. 283 (1970), §1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:08 Page Number: 384

and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[116]

In other words, the Court established that those acts of a non-recognized regime which are of a wholly internal and private law character – and the rights and liabilities flowing therefrom – may nonetheless be recognized.

But the definition of what may be considered to be an internal and private law right capable of recognition has over time expanded, most notably in the case law of the European Court of Human Rights in cases concerning the so-called Turkish Republic of Northern Cyprus (TRNC),[117] created following the Turkish invasion of 1974. In *Loizidou* v. *Turkey*, Turkey argued that in order to provide housing for displaced Turkish Cypriots fleeing from the south, the TRNC was justified in expropriating the houses of displaced Greek Cypriots. The majority did not reject this argument outright, but said that in the circumstances the expropriation was disproportionate.[118] The Court went further in *Cyprus* v. *Turkey*, where it accepted that the remedies available in the TRNC were 'domestic' remedies provided by Turkey:[119]

> It is to be noted that the International Court's Advisory Opinion . . . shows clearly that, in situations similar to those arising in the present case, the obligation to disregard acts of *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.[120]

The Court built on this further in *Demopoulos* v. *Turkey*, where access to the Court was barred under ECHR Article 35(1) on the basis that

[116] *Namibia*, ICJ Rep. 1971 p. 16, 56. Also *Loizidou* v. *Turkey*, Merits, (1996) 108 ILR 443, 462. Generally: Ronen, *Transition from Illegal Regimes under International Law* (2011), 80–100.

[117] SC Res. 541 (1983); SC Res. 550 (1984). Further: Case C-432/92, *R* v. *Minister of Agriculture, Fisheries and Food; ex parte SP Anastasiou (Pissouri) Ltd*, (1994) 100 ILR 257; *Loizidou* v. *Turkey*, Preliminary Objections, (1995) 103 ILR 622; *Loizidou* v. *Turkey*, Merits, (1996) 108 ILR 443; *Demopoulos* v. *Turkey*, [2010] ECtHR 46113/99. Generally: Ronen (2011), 38–54.

[118] *Loizidou* v. *Turkey*, Merits, (1996) 108 ILR 443, 468; 474 (Judge Baka, diss.), 481 (Judge Pettiti, diss.). Further: *Foka* v. *Turkey*, [2008] ECtHR 28940/95; *Protopapa* v. *Turkey*, [2009] ECtHR 16084/90.

[119] (2001) 120 ILR 10, 42–6. Also Loucaides, (2002) 15 LJIL 225.

[120] Ibid., 44–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:09 Page Number: 385

domestic remedies in the TRNC had not been exhausted.[121] The decision has been criticized, most notably by Loucaides, himself a former judge of the Court:

> It is submitted that [the *Namibia*] principle ... was wrongly considered applicable with respect to the 'remedies' provided in the occupied part of Cyprus [in *Cyprus* v. *Turkey*] ... The principle accepts the recognition of certain everyday transactions that are unavoidable *ex necessitate* in the daily relations of the individuals. The opinion does not require the inhabitants of an occupied territory to resort to illegal remedies established by the *de facto* organs before they have a right to bring their case before an international court. As rightly observed by the dissenters in the aforesaid case, 'Episodic recognition by foreign Courts is one thing. The exhaustion requirement is another'.[122] The Court repeats its misapplication of the '*Namibia*' principle in the *Demopoulos* case and finds that the applicants had to resort to the 'Compensation Commission' in the occupied part of Cyprus for their complaints.[123]

11.5.2.2 The obligation of non-assistance

ARSIWA Article 41(2) also articulates an obligation of non-assistance, which, as the commentary points out, extends not only to assistance in the commission of the breach, but assistance in maintaining an internationally unlawful situation that may result:[124] this emphasizes the 'effect-oriented or consequential profile of peremptory norms'.[125]

A significant question surrounding the duty of non-assistance arose in the *Ferrini* case, and its resolution demonstrates those limits to the obligation that derive from the structure of international law. There, the Italian Court of Cassation denied immunity to Germany for atrocities committed in Italy during the Second World War by explicit reference to ARSIWA Articles 40 and 41.[126] According to Bianchi, 'consideration of the legal consequences stemming, under the law of State responsibility, from a serious violation of a *jus cogens* rule may well lead, by way of interpretation, to the non-recognition of a State's jurisdictional immunity'.[127] Following the decision in *Ferrini*, Germany took the matter before the International Court, arguing *inter alia* that the Italian decision

[121] [2010] ECtHR 46113/99, §§68–129. Further: Ronen (2011), 95; L. G. Loucaides, 'Is the European Court of Human Rights still a principled court of human rights after the *Demopoulos* case?', (2011) 24 LJIL 435.
[122] *Cyprus* v. *Turkey*, (2001) 120 ILR 10, 119. [123] Loucaides (2011), 446.
[124] ARSIWA Commentary, Art. 41, §11. [125] Orakhelashvili (2006), 282.
[126] *Ferrini* v. *Federal Republic of Germany*, (2004) 128 ILR 658, 669.
[127] Bianchi, (2005) 99 AJIL 242, 247. See also Orakhelashvili (2006), 283–4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:09 Page Number: 386

conflated Germany's procedural right to immunity with the substantive considerations of peremptory norms. Put another way, the doctrine of state immunity ousted the jurisdiction of Italy's national courts before the issue of peremptory norms could even be considered. In *Jurisdictional Immunities of the State*, the International Court agreed:

> Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *ius cogens*, there is no conflict between those rules and the rules on State immunity. The 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. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943–1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility . . . For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *ius cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in [ARSIWA] Article 41 . . .[128]

11.5.2.3 The obligation of co-operation

A second consequence of a serious breach of a peremptory norm, as prescribed in ARSIWA Article 41(1), is that states must engage in lawful collective action to bring to an end any situation created through the breach. As Jørgensen notes, Article 41(1) is open to wide interpretation.[129] The provision itself makes no presumptions as to the form that such co-operation should take, a point reiterated in the commentary to the provision,[130] although the obvious co-ordinating force would be the United Nations, and particularly the Security Council in the exercise of its powers under Chapter VII of the UN Charter. Thus the International Court stated in the *Wall* opinion:

> [T]he United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the

[128] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ, Judgment, 3 February 2012, §93.
[129] Jørgensen (2010), 697. [130] ARSIWA Commentary, Art. 41, §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:09 Page Number: 387

illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.[131]

The wording of the provision suggests that all states are obliged to co-operate with all 'lawful' efforts to abate the situation. As Jørgensen notes, this may lead to difficulties where there is no obviously affected state to take the lead, which is frequently the case where the breach complained of is the gross and systemic abuse of human rights *within* a state: although states may independently of each other comply with the obligations of non-recognition and non-assistance under ARSIWA Article 41(2), they remain in breach of Article 41(1).[132] Another difficulty lies in assessing what is considered 'lawful' within international law, particularly where questions relating to the use of force and humanitarian intervention are concerned: what some states consider lawful, others may not, leading to a situation in which, pending an authoritative determination of legality which seldom emerges with immediacy, either the parties to the adventure are in breach of international law, or their detractors are acting contrary to the precepts of Article 41(1).

But another substantial difficulty with the entire concept of consequences for the serious breach of peremptory norms exists. It may be seen reflected in the history of UN action in relation to the Middle East following the 1967 war. At an emergency situation in 1967, the General Assembly expressed deep concern at Israel's actions in placing Jerusalem under common civil administration tantamount to annexation.[133] In 1979, the Security Council determined 'that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East',[134] and called on Israel 'to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem'.[135]

When these resolutions were formally rejected by Israel, the Security Council, in a series of 1980 resolutions under Chapter VI of the Charter, declared Israel to be in belligerent occupation of East Jerusalem, the Gaza

[131] ICJ Rep. 2004 p. 136, 200. [132] Jørgensen (2010), 697.
[133] GA Res. 2253(ES-V), 4 July 1967; GA Res. 2254(ES-V), 4 July 1967; cf. 10 July 1967, UN Docs. A/6753 and S/8052 (Israeli submissions that its actions did not amount to annexation of Jerusalem).
[134] SC Res. 446 (1979), §1. [135] SC Res. 452 (1979), §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:10 Page Number: 388

Strip, the West Bank and the Golan Heights.[136] Notably, it affirmed that Israel's attempts to alter the character of Jerusalem were in violation of international law,[137] and that any law passed by Israel in an attempt to further this objective was to be considered 'null and void' as a matter of international law.[138] Furthermore, it determined that the Israeli practice of settling its own citizens within the Occupied Territories in a bid to control the demography of these regions 'constitute[d] a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in a Time of War'[139] and called on all states 'not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories'.[140] The General Assembly rounded the early part of the 1980s out with a series of its own resolutions variously characterizing certain of Israel's actions as 'acts of aggression' that should not be recognized,[141] and contrary to the right of self-determination of the Palestinian people.[142] All such injunctions were rejected by Israel.

Israel's actions led to considerable tension between it and the Arab population of the Occupied Territories, leading to the formation of insurgency organizations such as the Palestine Liberation Organization (PLO), Hamas and the Popular Front for the Liberation of Palestine (PFLP). These movements waged a sustained and violent campaign against the Israeli state in the form of two 'shakings off' or 'Intifada' from 1987 to1993 and 2000 to 2005. In the middle of the Second Intifada, Israel, in an effort to prevent Palestinian dissidents from entering Israel began the construction of a wall around the Occupied Territories. This proposed barrier roughly reflected the course of the Green Line running between Israel and the occupied West Bank, but in practice it ran virtually wholly within the Palestinian areas occupied by Israel, in places encroaching into those areas by over 20 km. Moreover, it included on the western (i.e. Israeli) side of the barrier many of the Israeli settlements in the West Bank, as well as East Jerusalem; it ran through Palestinian lands often separating them from their owners; and while it included check-points through which Palestinians and their goods could pass, the way these were operated made them a serious obstruction to the Palestinians' freedom of movement.[143]

[136] SC Res. 476 (1980); SC Res. 478 (1980). See also GA Res. 36/120E, 10 December 1981; GA Res. 37/123C, 16 December 1982; GA Res. 39/146C, 14 December 1984.
[137] SC Res. 478 (1980), §2. [138] Ibid., §3. [139] SC Res. 465 (1980), §5.
[140] Ibid., §7. [141] GA Res. 37/123A, 18 December 1982.
[142] GA Res. 36/226A, 17 December 1981; GA Res. 39/146A, 14 December 1984.
[143] See further Watts, 'Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)', (2007) MPEPIL, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:10 Page Number: 389

With this in mind, the General Assembly requested an advisory opinion from the International Court as to the legality of 'the Wall' in international law.[144] In the *Wall* Advisory opinion, the Court found the barrier to be contrary to international law, and called on states to bring to an end the situation which had developed as a consequence.[145] But despite the Court's injunctive remarks, the continuing presence of Israel in the Occupied Territories has, in many respects, been met with silence, and in some cases continued material support.[146] Although the General Assembly subsequently called on all members 'to comply with their legal obligations as mentioned in the Advisory Opinion',[147] the Security Council has taken no action with respect to the matter, and no state undertook to alter its behaviour towards Israel, even with respect to the provision of aid.

As noted by the Court in its *Namibia* Advisory Opinion, 'the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end'.[148] ARSIWA Article 41 can only do so much to redress the breach of peremptory norms: when all is said and done, the political will to enforce international law must be present.

11.6 Future prospects

Ever since the Court's dictum in *Barcelona Traction*, the concept of obligations *erga omnes* has been fascinating international lawyers,[149] despite Simma's observation that it remains in 'the world of the "ought" rather than that of the "is"'.[150] The same can be held true for the whole category of communitarian norms and the invocation of responsibility for their breaches on the international plane.

Like Article 53 of the Vienna Convention, Article 48 of the ILC Articles was established more on *a priori* grounds than on the basis of established practice. It is true that there was more to go on, including references to the concept of obligations *erga omnes* by the International Court. Of

[144] GA Res. ES-10/14, 8 December 2003. [145] ICJ Rep. 2004 p. 136, 199–200.
[146] For one potential example, see the 1995 EC–Israel Association Agreements, which apply preferential treatment to the export of goods produced in the West Bank and Gaza Strip: Hauswaldt, (2003) 14 EJIL 591.
[147] GA Res. ES-10/15, 20 July 2004, §3. [148] *Namibia*, ICJ Rep. 1971, p. 16, 52.
[149] Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005), xv.
[150] Simma, in Delbrück and Heinz (eds.), *The Future of International Law Enforcement: New Scenarios – New Law?* (1993) 125.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:10 Page Number: 390

particular value were the analogies to be drawn from the Vienna Convention itself in its handling of multilateral treaties. The two instruments deal with different questions – on the one hand the existence, meaning and application of a treaty obligation, on the other hand, the existence and consequences of its breach.[151] But they are closely related and a co-ordinated approach is clearly necessary.

Article 48 of the ILC Articles may turn out to be like VCLT Article 53 in other respects as well. Just as peremptory norms have been invoked on only a handful of occasions, so, too, is it likely that Article 48 will not be relied on very often. Most substantive multilateral issues are regulated by multilateral treaties which contain their own (usually generous) provisions for invocation, as for example under the WTO Agreements.[152] The question – as with treaty reservations – is: what is the default rule? In the *South West Africa* cases the Court in effect announced that the default rule even in the case of treaties protecting some wider public interest is a narrow one, influenced by bilateral conceptions of injury. The Court in *Barcelona Traction* repudiated that view. The initial version of what became Article 48 – Draft Article 40 adopted on first reading – took an erratic approach, in part motivated by similar restrictive assumptions. It is true that human rights were separately treated. But no secure justification was given for this, and the provision was correspondingly vulnerable. In returning to the broader approach of the Court in *Barcelona Traction* the ILC has not solved all the problems of interpretation, but it has put the basic framework in place for the law of standing in the public interest.

Excursus: international crimes of state

ARSIWA's drafting history and surrounding debates show that the concept of international criminal responsibility on the part of states developed closely intertwined with the other two *grandes verticales*, peremptory norms and obligations *erga omnes*. Although the ARSIWA ultimately omitted any reference to state crimes, such that it remains a purely theoretical construct, it would be incomplete to discuss the law of

[151] Of course the ARSIWA also deal with breaches of non-treaty obligations. But they follow the tradition of parallelism: *prima facie* there is no difference between breaches of treaty and of general international law. See ARSIWA Commentary Art. 2, §7.

[152] See *EC – Bananas III*, WT/DS27/AB/R, 25 September 1997, §135: 'a Member has broad discretion in deciding whether to bring a case against another Member under the DSU'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:11 Page Number: 391

obligations without giving some account of the rise and fall of this controversial category of responsibility.[153]

Allusion has already been made to the beginnings of the ILC's engagement with the concept of state crimes, and its provisional acceptance of the idea in 1976, when it described state crimes and the standard delictual international responsibility of states as 'completely different regimes'.[154] An attempt at articulating the distinction was made in Special Rapporteur Ago's Draft Article 19, which included the following:

> 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
> 3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
> (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.

By contrast, international delicts were defined in purely negative terms in Draft Article 19(4).[155]

Draft Article 40, first adopted in 1985, set out an extended definition of the 'injured State', linking the internationally wrongful act of a state

[153] See generally Weiler, Cassese and Spinedi (eds.), *International Crimes of State* (1989); de Hoogh (1996); Jørgensen (2000); Koskenniemi, in Crawford, Pellet and Olleson (2010) 45, 48–9; Crawford, (2010) 405; Cassese, in Crawford, Pellet and Olleson (2010) 415. The principal Commission reports dealing with international crimes are: Ago, Fifth Report, ILC Ybk 1976/II(1), 24–54; Riphagen, Third Report, ILC Ybk 1982/II(1), 48–50; Riphagen, Fourth Report, ILC Ybk 1983/II(1), 10–24; Arangio-Ruiz, Seventh Report, ILC Ybk 1995/II (1), 3; Arango-Ruiz, Eighth Report, ILC Ybk 1996/II(1), 1; Crawford, First Report, 9–23.

[154] ILC Ybk 1976/II(1), 26.

[155] For the commentary on Draft Art. 19 see ILC Ybk 1976/II(2), 95–122.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:11 Page Number: 392

under Part I to the consequences of that act in Part II. Paragraph 2 articulated a non-exclusive list of situations in which a state or states might have a right correlative to the obligation breached, and paragraph 3 then provided that '[i]n addition, "injured State" means, if the internationally wrongful act constitutes an international crime, all other States'.

In 1996 the ILC adopted certain limited consequences of 'State crimes', in Draft Articles 51–53, based largely on drafts proposed during the 1980s. At the same time the ILC added a footnote to Draft Article 40(3) which spoke volumes about the underlying lack of consensus on the issue:

> The term 'crime' is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term.[156]

The international criminal responsibility regime proposed in the 1996 Draft Articles provoked a barrage of criticism and debate.[157] This focused particularly on Draft Article 19, which threatened to cause more confusion than it resolved with its circularity and its vague specification of situations which 'may result' in an international crime.[158] Its relationship with the definition of 'injured state' in Draft Article 40 was also unclear, and relationships between different provisions of Draft Article 40 itself were problematic, for example between paragraphs 2(e)(iii) and (3).[159] The consequences for commission of an international crime were not sufficiently differentiated from those for commission of any other internationally wrongful act to live up to the claim that these were two completely different regimes of responsibility,[160] and there were no

[156] ILC Ybk 1996/II(2), 63.

[157] See generally Spinedi, in Weiler, Cassese and Spinedi (1989) 7, 45ff; Crawford, First Report, esp. government comments on both sides of the debate at 11–16; ILC Ybk 1998/II(2), 64–77.

[158] Crawford, First Report, 10–11.

[159] Under Draft Articles, Art. 40(2)(e)(iii), breaches of multilateral conventional or customary obligations protecting human rights and fundamental freedoms gave rise to standing on the part of any state party to the convention or bound by the custom. However, it was unclear how this recognition of general interest related to Draft Articles, Art. 40(3), as a single instance of breach would not meet the definition of 'crime' in Draft Articles, Art. 19 as requiring 'serious breach on a widespread scale'. See further Crawford, (2006) 319 Hague *Recueil* 325, 452–77.

[160] Crawford, First Report, 9, 11.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:12 Page Number: 393

procedures for determining whether a crime had been committed and what consequences should follow.[161]

Several states objected to the 'penalization' of international law, finding it repugnant to the whole notion of an international legal system based on sovereign equality, as had Anzilotti.[162] A review of state practice showed limited and inconsistent support for criminalizing acts of states, as opposed to the strong system of individual criminal responsibility which has developed under international law since the Second World War.[163]

In 1998 the ILC decided to set consideration of Draft Article 19 aside and focus on finding a solution that would enable greater consensus, through 'systematic development in the Draft Articles of key notions such as obligations *erga omnes*, peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation'.[164] The question of state crimes was next addressed in 2000. Consideration of a number of different alternatives[165] led to a compromise that resulted in the removal of the notion of state crimes altogether, with the deletion of Draft Article 19 (and accordingly also Draft Articles 51–53). Instead, Part II, Chapter III provides a special regime of responsibility arising in the case of a 'serious breach by a State of an obligation arising under a peremptory norm of general international law' (Article 40(1)). The distinction between the status of the obligation and the seriousness of the breach is made clear in Article 40(2), which defines 'serious' as involving a gross or systematic failure by the responsible state to fulfil the obligation.[166] Thus a minor breach of a peremptory norm will not engage responsibility under this provision; nor will a serious breach of an 'ordinary' obligation, which resolves an issue that was fraught during the drafting of the Articles.[167] Article 41 sets out the particular consequences of a breach within the meaning of Article 40. A proposal to include provision for damages 'reflecting the gravity of the breach' did not survive, as states were concerned that it had a penal character.[168] The description of the injured state is now dealt with in

[161] Ibid. [162] Anzilotti (1902); see further Nolte, (2002) 13 EJIL 1083.
[163] Crawford, First Report, 16–17. [164] ILC Ybk 1998/II(2), 77.
[165] For detailed analysis see Crawford, First Report, 19–23.
[166] See ARSIWA Commentary, Art. 40.
[167] Some have questioned whether it was necessary to retain the word 'serious' in Art. 40 (1), however: see Gaeta, in Crawford, Pellet and Olleson (2010) 421.
[168] This was provisionally adopted in 2000: see Crawford, Third Report, 107–8. See further Wittich, in Crawford, Pellet and Olleson (2010) 667.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 11 Title Name: CRAWFORD
Date:18/3/13 Time:12:01:12 Page Number: 394

Articles 42 and 48, discussed above, which clearly differentiate between breaches of bilateral and multilateral obligations.[169]

The story of Draft Article 19 affords insights into the process and role of codification of customary international law. It is easier to agree on the existence of a category in the abstract than to define its contents and consequences – the proposed definition of an international crime amounted to no more than the admission of a possibility – but in the case of international crimes of state, it was generally felt that Article 19 was an exercise in development of the law rather than codification, and the world was not ready.[170] For the time being, then, the notion of state crimes remains a dormant legal concept (although it may still operate as a rhetorical one). Rather than existing in its own right, it has been broken down into distinct components related to peremptory norms and obligations *erga omnes* and effectively spread through ARSIWA, so as to provide a more broadly acceptable framework of responsibility with one single regime for all internationally wrongful acts. This result was unequivocally confirmed by the International Court in the *Bosnian Genocide* case in 2007.[171]

[169] See further Gaja, in Crawford, Pellet and Olleson (2010) 941.
[170] See Crawford, (2006) 319 Hague *Recueil* 325, 453–5.
[171] *Bosnian Genocide*, ICJ 2007 p. 43, 113–19 (esp. §170).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:44 Page Number: 395

12 Ancillary and secondary responsibility



12.1 Responsibility of states for the conduct of other states and international organizations

12.1.1 The scope of ancillary or secondary responsibility

In accordance with the general principle stated in ARSIWA Article 2, state responsibility arises when conduct attributable to a state breaches an international obligation of that state. But there may be cases where conduct of one state, not acting as an organ or agent of another state, is nonetheless chargeable to the latter state, 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 I of the ARSIWA seeks to define the exceptional cases where this is so.

Three situations are covered in Chapter IV. ARSIWA Article 16 deals with what in national law would be termed 'complicity', that is, where one state provides aid or assistance to another state, thereby facilitating the commission of a wrongful act by the latter. ARSIWA Article 17 deals with cases where one state is responsible for the internationally wrongful act of another state because it has assumed powers of direction or control over the latter, for example by treaty or as a result of belligerent occupation of the latter's territory. ARSIWA 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 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

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:44 Page Number: 396

coercion, would be[1]) 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 or control over, or its coercion of the conduct of the acting state. But there are also important differences between the three cases. Under ARSIWA Article 16, the primary wrongdoer is the acting state and the assisting state has a supporting role. By contrast, in the case of coercion under ARSIWA Article 18, the coercing state is the *fons et origo* of the conduct, and the coerced state is its instrument. As formulated, ARSIWA Article 17 deals with cases where direction or control has actually been exercised by the dominant state, with the subordinate state merely following orders.

With the approval of the Draft Articles of the Responsibility of International Organizations[2] (DARIO) by the ILC, an additional layer of complexity has been added: DARIO Part V deals with analogous situations in which a state's ancillary or secondary responsibility is generated by virtue of the acts of an international organization.[3] DARIO Article 58 is the equivalent to ARSIWA Article 16, and considers situations of complicity as between a state and international organization. DARIO Article 59 is the analogue of ARSIWA Article 17, and deals with situations in which a state directs or controls an international organization. Finally, DARIO Article 60, like ARSIWA Article 18, addresses the coercion of an international organization by a state.

The DARIO, however, deal with two addition situations which, strictly speaking, do not generate ancillary or secondary responsibility for states, but which it is nonetheless convenient to address in this chapter. DARIO Article 61 preserves state responsibility in cases where a state seeks to circumvent its international obligations through the use of an international organization as a buffer or cat's-paw. DARIO Article 62 deals with the individual responsibility of state members of an international organization more generally, and describes two situations in which members may be held so responsible notwithstanding the separate legal personality of the organization.

[1] This qualification is necessary because, if a state really has been coerced, the wrongfulness of its act may be precluded by *force majeure*. Further: Chapter 9.

[2] ILC Report 2011, UN Doc. A/66/10, Ch. V. For an overview of the DARIO see Pronto, (2011) 36 S. Af. YIL 94.

[3] This gap was deliberately left in the ARSIWA, Art. 57 stating that the articles were 'without prejudice to any question of the responsibility . . . of any State for the conduct of an international organization'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:45 Page Number: 397

12.1.2 The standards of direction and control and coercion

Leaving aside for now the notion of aid and assistance as provided for in ARSIWA Article 16, the concept that would later underpin ARSIWA Articles 17 and 18 (as well as DARIO Articles 59 and 60) was known in Ago's shorthand as 'indirect responsibility'.[4] Since the beginning of the twentieth century, however, the notion demonstrated a marked theoretical inconsistency, switching between the so-called 'representation theory' on the one hand, and the 'control theory' on the other, with the latter eventually emerging as the principal conceptual basis for the relevant provisions.[5]

The representation theory of indirect responsibility was spelled out by Anzilotti[6] in 1902. In brief, it posited that a state which was responsible for the international representation of another state in foreign affairs could, as a consequence, be held internationally responsible for the delicts of the representee. His justification for the position was as follows:

> When a country has accepted the supremacy of another State, but without being completely absorbed into it, it retains its international personality and continues to be a separate subject of international law in its relations with other States; the rules of international law prohibiting any act injurious to another State then apply to it as to any other person under international law: it is therefore capable of engaging in an activity contrary to the duties imposed on it by international law, but, as it cannot enter into relations with the injured or offended State, the latter must address itself to the State which represents it, and the duty to redress the damaged caused rests with that State.[7]

Anzilotti's position attracted support for some time.[8] It was incorporated into the 1929 Harvard Research Draft on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners,[9] which provided in Article 3 as follows:

> A State is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions ... For the purpose of this article, a dominion, a colony, a dependency, a protectorate or a community under

[4] ILC Ybk 1979/II(2), 4. [5] Ibid., 4–26.

[6] See e.g. Anzilotti, (1902); Anzilotti (1906); Anzilotti, *Corso di diritto internazionale* (3rd edn, 1928), 473.

[7] Anzilotti (1906), 301.

[8] See e.g. Borchard (1916), 201–2; Fauchille, 1 *Traité de droit international public* (8th edn, 1922), 523; Verdross, (1929) 30 Hague *Recueil* 271, 465. It was also reflected in the views of the Institut de droit international: (1927) 33 Ann. de l'Inst. 488.

[9] (1929) 23 AJIL Spec. Supp. 133. Further: Crawford and Grant (2007).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:45 Page Number: 398

mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

The position also influenced the jurisprudence of the Permanent Court of International Justice, which in *Mavrommatis Palestine Concessions* remarked:

> The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it.[10]

Despite early support for Anzilotti's position, it came under critical scrutiny in the 1930s when it was pointed out that the mere fact of representation did not prevent injured parties from addressing claims to the state so represented. Ago was subsequently to note:

> The mere existence of the international representation relationship between [State] A and [State] B has no consequences for third States except that their relations with the represented State are conducted through the representing State: there is nothing to prevent the represented State from making such reparation through the representing State.[11]

The replacement for the representative theory was the control theory, which held that responsibility can only be attributed indirectly where one state acts so as to compromise the decision-making capacity of another state.[12] Although present in the commentaries of the late nineteenth century,[13] it was developed further in the twentieth, with Eagleton remarking:

> [I]f one State controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting State for the subordinating State is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left, to the respondent State.[14]

As Ago pointed out,[15] Eagleton's development of control theory presented a far more credible basis for responsibility than the simple formal

[10] *Mavrommatis Palestine Concessions*, (1924) PCIJ Ser. A No. 2, 23.
[11] ILC Ybk 1979/II(1), 7. Earlier: Ago, *La responsabilità indiretta nel diritto internazionale* (1934), 30ff. On the failed attempt to refocus the representative theory by Verdross, see ILC Ybk 1979/II(2), 7–9.
[12] ILC Ybk 1979/II(2), 13. [13] See e.g. de Martens, 1 *Traité de droit international* (1883), 379.
[14] Eagleton (1928), 43. [15] ILC Ybk 1979/II(2), 13.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:46 Page Number: 399

question of representation. This was to be Ago's central contribution to the question: to classify the various forms of relationship that might compromise a state's freedom to decide to such an extent that responsibility could be imputed to another. These would eventually evolve into the recognized standards of direction and control and outright coercion.

12.2 Aid or assistance in the commission of a breach[16]

ARSIWA Article 16 provides as follows:

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.

Literally interpreted, ARSIWA Article 16 posits a rather extensive principle of responsibility of one State for the acts of another. It treats as wrongful any aid or assistance rendered for the commission of an internationally wrongful act carried out by the second state – in other words, it seeks to regulate *complicity* and is often referred to by this rubric,[17] although the term itself does not appear in order to prevent the drawing of parallels with municipal criminal law.[18] Unlike its predecessor, Draft Article 27, Article 16 stipulates a 'mental element' which must be fulfilled if international responsibility is to accrue: the state must render the aid or assistance with knowledge of the circumstances of the internationally wrongful act. Significantly, it is distinct from the concept of joint responsibility as developed in ARSIWA Article 47, and represents an autonomous internationally wrongful act on its own.[19]

[16] Generally: Brownlie (1983), 189–92; Quigley (1986); Noyes and Smith (1988); Graefrath (1996); Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (1990); Lowe, (2001) 101 KGZ 1; Dominicé (2010); Aust (2011).

[17] E.g. Aust (2011). See also the remarks of Graefrath (1996), 371:

> the term complicity so far has been used in international relations in the political field. It has a pejorative connotation and denounces an act as illegal because it is part of another illegal act or in support of a crime. It always designates a form of participation and derives the moral condemnation from the illegality of the principal act.

[18] Graefrath (1996), 370–1.

[19] Ibid., 371–2. Further: ILC Ybk 1978/II(2), 104; ARSIWA Commentary, Art. 16, §1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:46 Page Number: 400

12.2.1 ILC development and customary status

ARSIWA Article 16 had a difficult birth, and multiple iterations of the provision were presented to the ILC over its twenty-five-year gestation.[20] Its most concrete iteration prior to the final version was Draft Article 27, which provided on first reading:

> 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 a breach of an international obligation.

This wording proved controversial, and many states registered their disapproval. Perhaps the most strident was Switzerland, which stated that Draft Article 27 'had no basis in positive law' and should be deleted.[21] Other states – notably Germany[22] and the United States[23] – queried whether international law was capable of giving effect to the concept of 'aid and assistance' and further asserted that even if it was, more precision was required of the term 'rendered for the commission' and for the necessary element of intent. Others were more favourable to the principle: the United Kingdom, for example, supported the basic notion of Draft Article 27 but called for a clearer distinction between cases in which complicity was independently wrongful and those in which it was not.[24]

On second reading it was agreed the that the Draft Article should be retained but that further precision was required.[25] Wording close to that of ARSIWA Article 16 was proposed[26] and eventually approved by the Commission with only minor additional modification.[27] The most significant addition was that of paragraph (b), which was included to ensure that states would only be found complicit where they themselves were bound by the obligation violated by the party to which aid or assistance was rendered.

[20] See: Crawford, Second Report, 47–51. Further: Aust (2011), 100–3.
[21] ILC Ybk 1998/II(1), 128. Earlier, Switzerland had queried the status of the provision as a primary rule and asserted that it was too broad: ILC Ybk 1981/II(1), 77.
[22] ILC Ybk 1998/II(2), 128. [23] Ibid., 129.
[24] On the basis that if wrongfulness was independent of any additional act by the state immediately responsible, Draft Art. 27 was redundant: ibid., 128–9. Japan also called for a clearer definition of the principle in general: ILC Ybk 1999/II(2), 107.
[25] Crawford, Second Report, 51.
[26] Ibid., 56. The principal difference between the 1999 iteration of Draft Art. 27 and ARSIWA, Art. 16 was that the former included situations in which one state 'directs or controls' another state. This was later removed and placed into ARSIWA, Art. 17.
[27] Aust (2011), 102–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:47 Page Number: 401

Although at the time ARSIWA Article 16 was seen by some as falling within the 'progressive development' part of the ILC's mandate,[28] the International Court considered in *Bosnian Genocide* that the provision had attained the status of customary international law.[29] Although there had previously existed *sui generis* injunctions against the rendering of aid or assistance, such as the Friendly Relations Declaration[30] and the Definition of Aggression[31] as promoted by the UN General Assembly, and Article 2(5) of the UN Charter, Article 16 provided a framework by which complicity could be prohibited generally, and it has been treated as such in subsequent state practice.[32]

12.2.2 Defining 'aid or assistance'

12.2.2.1 The terms of ARSIWA Article 16

The first question to be answered in any application of ARSIWA Article 16 is whether the state in question has rendered 'aid or assistance' to another state in the commission of an internationally wrongful act. Put another way, the question is one of how the assistance rendered relates to the wrongful act.

[28] See e.g. the comments of Special Rapporteur Ago when introducing the first version of Draft Art. 27 in his Seventh Report: ILC Ybk 1978/II(1), 59: 'In any event, we believe we can at least support our position on this point by evoking the intention of progressive development by which, it seems, the international community must necessarily be guided in the matter.' This had altered by the final adoption of the ARSIWA: ARSIWA Commentary, Art. 16, §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.' Also Quigley (1986), 81–107; Padelletti (1990), 94.

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 217. This conclusion had already been reached much earlier with respect to Draft Art. 27 by Judge Schwebel in a dissenting opinion: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 558 (Judge Schwebel, diss.). Mr Schwebel had previously chaired the drafting committee which gave the draft article its final form on the first reading: ILC Ybk 1978/I, 269.

[30] GA Res. 2625(XXV), 24 October 1970, Principle 1, §9: 'Every State has the duty to refrain from organizing, assisting or participating in acts of civil strife or terrorist acts in other State or acquiescing in organized activities within its territory directed towards the commission of such acts'.

[31] GA Res. 3314(XXIX), 14 December 1974, Annex, Art. 3(f), defining as aggression '[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State'.

[32] On the development of ARSIWA, Art. 16 as a customary rule, see generally Aust (2011), Ch. 4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:47 Page Number: 402

Neither the provision itself nor the ILC's commentary thereto provides a substantial definition of the concept, though there was some discussion of the matter within the ILC.[33] Ushakov during the Commission's 1978 session described the problem of a definition as follows:

> [P]articipation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.[34]

No limitation is placed on the precise *form* of the aid or assistance in question – all that is required is a causative contribution to the illegal act.[35] In the Commentary to Draft Articles adopted on first reading, the ILC provided that 'the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act'.[36] Reservations were raised[37] during the second reading over this definition due to the concern that the qualifier 'materially' could cause confusion with the notion of 'material breach' in Article 60 of the Vienna Convention on the Law of Treaties (VCLT).[38] What was clear, however, was that the assistance rendered did not need to have been *indispensable* to the commission of the wrongful act. To impose such a requirement would invite speculation as to other contingencies and would be difficult to apply.[39] That said, suitably involved 'assistance' may result in a finding of joint responsibility under ARSIWA Article 47, a point emphasized by Brownlie in the context of aggression:

> [T]he supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles equipment and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility.[40]

Beyond this point, however, confusion emerges. It was established on adoption of the ARSIWA that 'the aid or assistance must be given with a

[33] Aust (2011), 195–7.
[34] ILC Ybk 1978/I, 239. Also ibid., 229 (Reuter); ibid., 233 (Riphagen). Further: ILC Ybk 1999/I, 79 (Simma).
[35] Lowe (2001), 5–6. [36] ILC Ybk 1978/II(2), 99ff. [37] Crawford, Second Report, 50.
[38] 22 May 1960, 1155 UNTS 331.
[39] Crawford, Second Report, 50. Also Quigley (1986), 121–2. [40] Brownlie (1983), 191.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:47 Page Number: 403

view to facilitating the commission of the act *and must actually do so*'.[41] Thus the ILC Commentary states that assistance must be 'clearly linked' to the wrongful act, and make a 'significant' contribution to it.[42] But the commentary seems internally inconsistent, providing later that 'the assistance may have only been 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'.[43] This discrepancy may be resolved by reference to the position taken by the ILC in relation to the Draft Articles on the Responsibility of International Organizations (DARIO). In its commentary to DARIO Article 14, the equivalent to ARSIWA Article 16, the Commission expressly links the two provisions before drawing attention to the need for 'significant' assistance in relation to the latter[44] – the required standard would therefore appear to be one of substantial involvement on the part of the complicit state.

In an analysis of the concepts of 'assistance' as manifested in *sui generis* regimes,[45] Aust concludes that state practice tends to indicate that 'the majority of States are eager to limit the concept of assistance to cases in which active participation is given'.[46] Thus mere incitement will not be considered a violation of ARSIWA Article 16,[47] although, as Ago noted in his Seventh Report, it may infringe other rules of international law.[48]

12.2.2.2 Omissions as 'aid or assistance'

Omissions may also be excluded as a form of aid or assistance.[49] In *Bosnian Genocide* the Court remarked:

> [C]omplicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide, while a violation of the obligation to prevent results from the mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely a reflection of the notion that the ban on genocide and the other acts listed in Article III [of the Genocide Convention], including complicity, places States under a negative obligation, the obligation not to

[41] ARSIWA Commentary, Art. 16, §5 (emphasis added). [42] Ibid. [43] Ibid., §10.
[44] ILC Report 2011, 104.
[45] E.g. the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and Their Destruction, 18 September 1997, 2056 UNTS 211; Convention on Cluster Munitions, 30 May 2008, CCM/77; Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161.
[46] Aust (2011), 209. [47] Dominicé (2010), 285. [48] ILC Ybk 1978/II(1), 54–5.
[49] This displaces the general presumption contained in ARSIWA, Art. 2, which provides that state responsibility may be incurred through an omission.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:48 Page Number: 404

commit the prohibited acts, while the duty to prevent places States under a positive obligations, to do their best to ensure that such acts do not occur.[50]

Aust attempts to cast doubt on the absolute character of this pronouncement by reference to *Corfu Channel*.[51] There, the United Kingdom alleged that the Albanian state was responsible for the explosion of several contact mines in the Corfu Channel in 1946. As a result of the incident, HMS *Volage* was severely damaged and HMS *Saumarez* crippled beyond repair. Forty-four servicemen were killed and forty-two injured.[52] A question which remained unresolved when the matter was brought before the Court was exactly who laid the mines. Albania, which lacked a navy, clearly could not have done so.[53] The United Kingdom alleged that Albania was nonetheless complicit in the damage caused on the basis that the state knew of the minefield but failed to inform the UK flotilla.[54] The Court found that the failure to warn was an internationally wrongful act, and found Albania responsible accordingly,[55] a determination that Aust recasts as 'the quintessential aid or assistance to the State which laid the mines'.[56] He dismisses the fact that the Court predicated its findings on the basis of Albania's primary responsibility[57] rather than some form of accessory liability as evidence of judicial economy: 'a separate responsibility for complicity would not then be needed as the complicit State was already obliged to warn third states on the basis of an independent primary obligation.[58] But if such an interpretation were

[50] *Bosnian Genocide*, ICJ 2007 p. 43, 222–3.

[51] Aust (2011), 225–30, citing *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4.

[52] Further: Jones, (1949) 26 BYIL 447; Maher, (2005) 9 AJLH 47.

[53] It is widely assumed that Yugoslavia – an absent and unnamed third party – laid the mines in the context of its conflict with Greece: Chinkin (1993), 319.

[54] ICJ Pleadings 1949-I p. 19, 48:

> The responsibility of Albania rests, firstly, upon a direct complicity in the existence of the minefield which is created by her knowledge of it, whether or not she laid it or connived in its actual laying. Secondly, it rests upon a failure - which was, in the submission of the Government of the United Kingdom, a wilful failure to discharge an imperative international duty to notify the existence of this dangerous minefield. Thirdly, it rests upon the failure of the Albanian authorities to warn His Majesty's ships of their danger when they were seen to be approaching it.

[55] ICJ Rep. 1949 p. 4, 22–3.

[56] Aust (2011), 227. Also Orakhelashvili (2010), 658.

[57] ICJ Rep. 1949 p. 4, 22:

> [Albania's obligations arise from] certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

[58] Aust (2011), 227.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:48 Page Number: 405

ever plausible, it must be reviewed in the light of the strong dictum of the Court in *Bosnian Genocide*: seen through this lens, *Corfu Channel* is reflective of an exercise in joint responsibility under ARSIWA Article 47, and the ILC Commentary treats it in this way.[59]

12.2.2.3 'Aid or assistance': general principles?

What abstract principles may therefore be drawn from the terms 'aids or assists' as they occur in ARSIWA Article 16? First, the complicit state must make some contribution to the wrongful act, though it need not be essential. Second, the contribution must be in the form of a positive act: neither active incitement nor a mere omission will suffice to ground responsibility. Third, despite some inconsistency within the ARSIWA Commentary, comparison with the DARIO Commentary reveals that the assistance rendered must be 'significant'. Fourth, if sufficiently significant, then the contributing state's role may transcend that of mere complicity, and the state may become jointly responsible for the act under ARSIWA Article 47.

Beyond this, little more can be said with certainty. It is perhaps better to say on this point, as Aust does, that aid or assistance 'is a normative and case-specific concept, meaning that its content will always have to be determined in the specific situation'.[60] Certainly, this is the view that has been taken with regard to DARIO Article 14 (and by extension DARIO Article 58). Special Rapporteur Gaja remarked in his Seventh Report:

> One difficulty in defining more precisely aid or assistance in the commission of an internationally wrongful act is that, for the purpose of assessing whether aid or assistance occurs, much depends on the content of the obligation breached and on the circumstances. Thus, it seems preferable not to modify the wording that was used in [ARSIWA Article 16].[61]

12.2.3 The 'subjective' element of complicity

Given the potential breadth of the phrase 'aid and assistance', the essential element in defining complicity lies in the question of intent.[62] Read with the commentary, ARSIWA Article 16 lists two limitations that together amount to a 'subjective' or 'mental' element. Although this proved controversial within the ILC,[63] state aversion to the notion of

[59] ARSIWA Commentary, Art. 47, §8. Further: Chapter 11.
[60] Aust (2011), 230.
[61] UN Doc. A/CN.4/610, §75.
[62] Graefrath (1996), 374–6.
[63] Aust (2011), 232–5. See e.g. Njenga, arguing that 'too narrow a definition [of intent] would nullify the scope of the article . . . [n]o State would admit that it was helping

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:49 Page Number: 406

strict liability in relation to complicity[64] compelled the inclusion of subjective considerations in the wording of ARSIWA Article 16, a point recognized early by Ago:

> The very 'idea' of complicity in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving supplies intends to use them. Without this condition, there can be no question of complicity.[65]

The first limitation occurs in the words of ARSIWA Article 16(a), which requires that the complicit state commit the relevant aid or assistance 'with knowledge of the circumstances of the internationally wrongful act'. The converse of this is stated expressly in the terms of the commentary itself: '[i]f 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.'[66] Despite the attempts of some states to widen the scope of the mental element to include not only actual but constructive knowledge[67] (i.e. the complicit state *should* have known that it was assisting in the commission of an internationally wrongful act), the wording of the provision is confined to knowledge actually in the possession of the complicit state.

The second limitation is not contained within the wording of ARSIWA Article 16, but revealed in the commentary, which states:

> [A]id 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 and assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to

another State to commit a wrongful act': ILC Ybk 1978/I, 236. Cf. Schwebel, noting that 'Hitler's plan of aggression had been published in explicit detail': ibid., 237. Others found the inclusion to be redundant, arguing that 'aid and assistance' already presumed the existence of knowledge: ILC Ybk 1999/I, 70 (Brownlie).

[64] Crawford, Second Report, 49–50.

[65] ILC Ybk 1978/II(1), 58.

[66] ARSIWA Commentary, Art. 16, §4.

[67] See e.g. the statement of the Netherlands: ILC Ybk 2001/II(1), 52. See also, earlier, the statements of Ustor in the ILC, proposing that (ILC Ybk 1975/I, 48):

> separate provision be made for the important case of oblivious complicity by a State which consented to the use of its territory for the commission of unlawful acts against a third State. There was similar complicity when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:49 Page Number: 407

facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.[68]

Leaving aside the purely factual question of whether the assistance so rendered facilitated the commission of the wrongful act, this second element is sufficient to eclipse entirely the requirement of knowledge, as an overt intention to assist presupposes knowledge of assistance. It has arguably been accepted into the customary ambit of complicity by the International Court, which remarked in *Bosnian Genocide*:

> [T]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent . . . of the principal perpetrator.[69]

The Court went on to state that it considered there to be little doubt that the crimes perpetrated at Srebrenica were committed as a result of equipment and resources provided as part of a general policy of 'aid and assistance' by Federal Republic of Yugoslavia (FRY) towards the Republika Srpska, but concluded that complicity could not be made out, as it could not be proved that the FRY supplied aid to the perpetrators of the genocide 'in full awareness that the aid supplied would be used to commit genocide'.[70]

The passages in the *Bosnian Genocide* judgment in which ARSIWA Article 16 was applied by analogy reveal several aspects of the requirements of knowledge and intent. In the first place, '[t]he standard required by [Article 16] – as applied by the [Court] – is one of specific knowledge of the alleged accomplice, crucially of an internationally wrongful act with a high degree of particularity'.[71] In the second, the use of the term 'at the least' by the Court in *Bosnian Genocide* indicates that, as a general rule, something more than mere knowledge is required, namely the need for actual intent that aid and assistance be given to the illegal act.[72]

Some commentators have expressed concerns that the subjective element to ARSIWA Article 16 as so formulated narrows unduly the scope of complicity, possibly to the point of rendering the concept 'unworkable'.[73] Quigley identifies two principal difficulties.[74] First, it is difficult

[68] ARSIWA Commentary, Art. 16, §5. [69] ICJ 2007 p. 43, 218 (emphasis added).
[70] Ibid., 218–19. [71] Dominicé (2010), 286. [72] Aust (2011), 236.
[73] Graefrath (1996), 375. Further: Quigley (1986), 109–17; Orakhelashvili (2010), 650–1. Also Aust (2011), 235–7.
[74] Quigley (1986), 111.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:50 Page Number: 408

to determine the mind of a state – if a complicit state is aware of what it is doing, it may attempt to conceal the provision of aid, possibly through the dissemination of conflicting statements by multiple organs. Second, the complicit state may not in fact desire the illegal result, and instead be animated by some other motive – in such a case, it is argued, even if the assisting state knew of the use to which the aid was put but did not intend the outcome, it could not be held complicit. Graefrath gives the following example:

> According to that definition e.g. a State supplying arms to Turkey under the condition that they not be used to suppress the Kurds cannot be held guilty of complicity if afterwards the weapons were used for exactly that purpose. Even supplying arms knowing that Turkey may use them against the Kurds would not be sufficient to prove the intent required for complicity.[75]

By way of counter-argument, the requirement of outright intent in order to establish complicity is justified by the character of interstate relations and the great diversity of situations which may arise, particularly in the context of military bases, airspace or the use of territory generally.[76] Additionally, as the first reading commentary may be taken as indicating, if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed.[77] It is thus wrong to suggest that the complicit state must be in common cause with the principal in order for ARSIWA Article 16 to apply.[78]

But, more fundamentally, complaints about the need for intent in complicity are misplaced. The provision for complicity in the ARSIWA was (at least initially) a measure of progressive development on the part of the ILC. To complain about the manner in which the ILC has limited complicity is to ignore the fact that ARSIWA Article 16 is still a substantial advance of the concept in international law[79] – though it could be fairly argued that the requirement of actual intent should have been inserted into the text of the provision, rather than elaborated in the commentary. Second, and more substantially, the limitation exists for a reason. If it is true that ARSIWA Article 16 is intended to develop the law, then it must do so in a manner acceptable generally to governments. It was sensible not to advance a relatively novel principle potentially detrimental to state sovereignty in its broadest possible form.[80]

[75] Graefrath (1996), 373. [76] Crawford, Second Report, 50. Also Dominicé (2010), 286.
[77] ILC Ybk 1978/II(2), 99–105; Lowe (2001), 8–9. [78] Lowe (2001), 6–9. [79] Ibid., 12.
[80] Aust (2011), 238: 'Such an interpretation would be detached from international practice and would give rise to expectations on the establishment of responsibility for complicity which are not warranted.'

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:50 Page Number: 409

12.2.4 *Complicity and the* pacta tertiis *rule*

ARSIWA Article 16(b) requires that 'the act would be internationally wrongful if committed by [the aiding or assisting] State'. Thus, if complicity is to be found, the aiding or assisting state must be bound by the rule that the main actor is violating. The commentary[81] links this requirement to the *pacta tertiis* principle.[82] It is of central importance to the provision, but emerged only during the second reading. Draft Article 27 on first reading provided that complicity would give rise to responsibility 'even if, taken alone, such aid or assistance would not constitute the breach of an international obligation'. This, it was felt, was a bridge too far, as it would have enabled an aiding and assisting state to be held independently liable for the breach of a bilateral treaty to which it was not itself a party.[83] In addition, it ran the risk of straying beyond the mandate that the ILC had set itself with regard to the codification of state responsibility and creating a new primary rule,[84] by establishing new obligations incumbent on states in the first instance.

Although generally welcomed by the ILC,[85] some members considered paragraph (b) to be an overly broad restriction. Economides was most vocal in this respect, noting that the provision

> considerably reduced, without good reason, the scope of application of [Draft Article 27]. It did not exclude bilateral obligations alone. It also excluded multilateral obligations by which the aiding or assisting State was not bound. The condition was not necessary, since it was most unlikely that a State would knowingly and deliberately help another State to breach its bilateral or multilateral treaty obligations.[86]

Such criticisms overstate the effects of ARSIWA Article 16(b). Within its ambit are peremptory norms, obligations *erga omnes* and the entire corpus of customary international law.[87] While issues do arise with

[81] ARSIWA Commentary, Art. 16, §6.

[82] See VCLT, Arts. 34 ('A treaty does not create either obligations or rights for a third State without its consent') and 35 ('An obligation arises for a third State from a provision of a treaty if the parties intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'). Further: David, in Corten and Klein (eds.), 1 *The Vienna Convention on the Law of Treaties: A Commentary* (2011) 887.

[83] Crawford, Second Report, 50–1; Dominicé (2010), 286.

[84] ILC Ybk 1999/I, 68 (Crawford).

[85] See e.g. ILC Ybk 1999/I, 70 (Simma); ibid., 70 (Brownlie); ibid., 71 (Rosenstock); ibid., 74 (Hafner).

[86] Ibid., 68. Also Lowe (2001), 7; Orakhelashvili, in Crawford, Pellet and Olleson (2010) 347, 351–3.

[87] ILC Ybk 1999/I, 69 (Crawford); ibid., 70 (Simma).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:50 Page Number: 410

respect to multilateral agreements, the *pacta tertiis* rule provides ample justification for the restriction.

Take the case of a bilateral treaty between state A and state B under which the two states agree not to export certain materials or technology to, or not to trade with, state C. In the language of municipal trade practice law, this is a secondary boycott. State C, as target, is of course not bound by the agreement, pursuant to VCLT Article 34. Why, then, should it be held responsible if, knowing of the treaty, it assists state A in breaching it? Without the inclusion of paragraph (b), ARSIWA Article 16 could become a vehicle by which the effects of well-publicized bilateral obligations are given universal extension. This position is surely different from a situation in which the assisting state is bound by the relevant primary rule, for example where a state bound by the Treaty on the Non-Proliferation of Nuclear Weapons aids another state in obtaining weapons in violation of the treaty.

It has been suggested that Article 16(b) would allow an otherwise complicit state to escape responsibility by arguing that it is bound by a *different* rule from the one breached by the assisted state. Thus Aust suggests:

> Although the aiding and assisting State would not technically be barred from granting such support, it is reasonably clear that through its conduct it will harm a third State (or ... an individual protected by the given human rights treaty). Moreover, the State would have to rely on the purely formal argument that, although it is contributing to a violation of a rule to which it is bound, it could avoid responsibility due to the rule in question being laid down in differing sources.[88]

But this misreads Article 16(b), which merely requires that the conduct in question would have been internationally wrongful if committed by the assisting state and says nothing about the identity of norms or sources.

12.2.5 Complicity and international organizations

This analysis of ARSIWA Article 16 also applies, *mutatis mutandis*,[89] to the case of DARIO Article 58.[90] The provision reads as follows:

> 1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

[88] Aust (2011), 264–5.
[89] Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), 64.
[90] Ryngaert and Buchanan (2011), 142–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:51 Page Number: 411

(a) the 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.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

DARIO Article 58(1) mirrors exactly the wording of ARSIWA Article 16, and thus includes the same requirements of knowledge and the *pacta tertiis* qualification, a link drawn expressly in the ILC Commentary.[91] But paragraph 2 contains no analogue in ARSIWA Article 16. It represents an effort on the part of the ILC to ensure that responsibility does not follow automatically where a state is directed to do something by an international organization,[92] at least in ancillary cases. But as the commentary to the provision makes clear, the fact that *ancillary* responsibility is not generated where a state follows the directive of an international organization does not necessarily exclude *all* forms of state responsibility:

> The fact that a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article, but under the articles on the responsibility of States for internationally wrongful acts.[93]

There is minimal state practice supporting DARIO Article 58 as a rule of customary international law. But it seems likely that such a rule should exist as a matter of principle. If, as was noted in *Bosnian Genocide*,[94] ancillary responsibility as between states may be considered a customary norm, there is no reason why the same logic should not apply as between a state and any other actor on the international plane. This point is made

[91] DARIO Commentary, Art. 58, §1. [92] Ibid., §4.
[93] Ibid., §5. The 'rules of the organization' referred to in DARIO, Art. 58(2) are defined in DARIO, Art. 2(c) as 'in particular, the constitute instruments decisions, resolutions, and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.
[94] ICJ 2007 p. 43, 217.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:51 Page Number: 412

expressly in the commentary, which notes: '[t]he present article uses the same wording as [ARSIWA Article 16] because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State'.[95]

The ILC has been criticized as taking an unduly narrow view of 'aid or assistance' in the context of DARIO Article 58. In particular, commentators complain that states will not be held accountable for their votes for or against the individual policies of the entity, which may impact on vulnerable populations, particularly where the organization in question is a large financial institution such as the World Bank or the International Monetary Fund.[96] Aside from fact that a broader definition of aid or assistance in the present context would risk a wave of abstentions within the voting patterns of international organizations (and an accompanying crisis of legitimacy), these objections, as with criticisms of ARSIWA Article 16, miss the point. DARIO Article 58, at least at this stage, is representative of the 'progressive development' aspect of the ILC's mandate. If it is to become accepted as a codification of custom, it must be presented in such a way as to be palatable to governments generally. Attempting to hold states liable for individual votes – and thereby undermining the *raison d'être* of separate legal personality – is not the way to go about this.

12.3 Direction and control over another state or international organization

12.3.1 The scope and relevance of ARSIWA Article 17

ARSIWA Article 17 provides as follows:

> 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) that act would be internationally wrongful if committed by that State.

[95] DARIO Commentary, Art. 58, §3. The same may be said of responsibility for aid and assistance as between two international organizations: see DARIO, Art. 14.

[96] Clark, (2002) HHRJ 205, 213; d'Aspremont, (2007) 4 IOLR 91, 98; Ryngaert and Buchanan (2011), 143.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:51 Page Number: 413

Unlike ARSIWA Article 16 or DARIO Article 58, in which international responsibility is incurred only to the extent of any aid or assistance so given, Article 17 entails the responsibility of the directing state for the act itself.[97] On the first reading of the Draft Articles, direction and control was contained within Draft Article 28(1), with paragraph (2) of the provision dealing with outright coercion as between states. The two were later separated conceptually into ARSIWA Articles 17 and 18.[98] When first set down, Draft Article 28(1) was intended to encompass situations in which there was a relationship of dependence between one state and another, so as to warrant treating the dominant state as responsible for the wrongful acts of the dependent state.[99] The first reading commentary pointed to three situations in which these might arise:

(a) international dependency relationships, especially 'suzerainty' and international protectorate;
(b) relationships between a federal state and member states of a federation which have retained their own international personality; and
(c) relationships between an occupying state and an occupied state in cases of territorial occupation.[100]

At the time (1977), the ILC considered this field to be 'the most realistic' of the cases in which one state might have been responsible for the wrongs of another.[101] By the time of the second reading (1998), however, its utility had diminished considerably.[102] The mandate system of the League of Nations and the trusteeship regime of the UN had run their course,[103] and aside from the Swiss cantons[104] there are no remaining examples of a federated state with sovereign constituent elements. The relevance of the provision is maintained, however, by its applicability to situations of belligerent occupation.

The situations so contemplated are distinct from those situations of pure representation, where one state has assumed, even exclusively, responsibility for representing another state in international relations,

[97] ARSIWA Commentary, Art. 17, §1.
[98] Crawford, Second Report, 56–7.
[99] Ibid., 52.
[100] Draft Articles Commentary, Art. 28, §10.
[101] Ibid. Further: ILC Ybk 1979/II(2), 4–26.
[102] Crawford, Second Report, 53; ARSIWA Commentary, Art. 17, §3. Also ILC Ybk 1998/I, 129 (comments of France).
[103] See further Duursma (1996) for details in relation to the European micro-states, all of which are now members of the UN.
[104] Schmitt, in Basta-Fleiner and Fleiner (eds.), *Federalism and Multi-Ethnic States: The Case of Switzerland* (2000) 165. Although the Canadian provinces, US states, and German *länder* have also concluded individual treaties with other states proper, these do not have the same measure of constitutional independence: Di Marzo, (1978) 16 Can. YIL 197.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:52 Page Number: 414

but without any power of direction or control over the decision-making process of the dependent state,[105] as with Italy and San Marino, Switzerland and Liechtenstein, and New Zealand and various South Pacific island nations.[106] As the commentary to Draft Article 28 emphasized, in pure cases of representation the represented entity remains responsible for its own international obligations, even where diplomatic communications may be channelled through another state.[107] They are further distinct from situations in which the constituent elements of a federal state do not possess separate legal personality, even where they possess internal autonomy, as in the case of Quebec or Scotland. In such cases the normal principles of attribution as set out in ARSIWA Part I, Chapter II will apply,[108] as demonstrated by *LaGrand*[109] and *Avena*.[110]

12.3.2 Defining 'direction and control'

ARSIWA Article 17, in requiring that the directing state 'directs and controls' another state in the commission of an internationally wrongful act, sets a relatively high bar for the imputation of state responsibility. 'Direction' and 'control' in this instance are separate concepts, with the former referring to 'actual direction of the operative kind' and the latter encompassing 'cases of domination over the commission of wrongful conduct':[111] put another way, the wrongful act must be conceived and carried out at the instigation of the directing power. Both direction and control must be present for ARSIWA Article 17 liability to attach. The existence, however, of a quasi-functional state apparatus in the occupied territory will not exclude the possibility of control by the occupying power.[112]

[105] Draft Articles Commentary, Art. 28, §§5–8.

[106] See e.g. the New Zealand–Western Samoa Treaty of Friendship, 1 August 1962, 435 UNTS 3, Art. V. New Zealand also maintains similar relations with the Cook Islands and Niue. Both the Cook Islands and Niue are self-governing states in free association with New Zealand whose respective constitutions expressly vest full legislative powers exclusively in their legislatures. New Zealand, however, retains representative capacity for the purposes of external affairs: Constitution of Niue, ss. 6, 8; Constitution of the Cook Islands, s. 5. Further: NZ Ministry of Justice and NZ Ministry of Pacific Island Affairs, *Pacific People's Constitution Report* (2000), ch. 3, available at www.justice.govt.nz/publications/publications-archived/2000/pacific-peoples-constitution-report-september-2000.

[107] Draft Articles Commentary, Art. 28, §4.

[108] Generally: Opeskin, (1996) 43 NILR 353; Opeskin, in Opeskin and Rothwell (eds.), *International Law and Australian Federalism* (1997) 1.

[109] *LaGrand (Germany v. US)*, Provisional Measures, ICJ Rep. 1999 p. 9, 16.

[110] *Avena and Other Mexican Nationals (Mexico v. US)*, Provisional Measures, ICJ Rep. 2003 p. 77, 82.

[111] ARSIWA, Art. 17, §7.

[112] Thus the continued existence of a Hungarian government (the Pfeilkreuz movement under Ferenc Szálasi) was not definitive proof that the expropriation of Jewish property

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:52 Page Number: 415

As we have seen, the ILC had certain defined categories of interstate relationship in mind when it first considered Draft Article 28(1). As it stands, in the modern era only belligerent occupation may be expected to arise with any frequency.[113] The mere fact, however, of a contemplated relationship will not automatically give rise to a finding of direction and control. What is required, rather, is the fact of *actual* direction and control over the delictual act.[114] Responsibility will not be imputed under the provision where the directing state merely had the *potential* for control, or where that control was not exercised in that particular case. Nor would such a situation be desirable, as it would place a premium on intervention in the affairs of 'dependent' states which are, *ex hypothesi*, still responsible for their own wrongful acts.[115]

The limited number of cases in which the direction and control standard of ARSIWA Article 17 has been deployed render it difficult to determine its scope of operation, as well as its status (or not) as custom.[116] A key example, however, is the *Robert E. Brown* case,[117] a decision of the Great Britain–United States Claims Commission concerning a claim of denial of justice by a US national against Great Britain with respect to acts performed by the government of South Africa. It was argued that the relevant imputation was justified by Great Britain's status as 'suzerain' over South Africa, a status acquired gradually through a variety of conventions[118] and acts of annexation.[119] The Commission disagreed, noting:

> We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but

was not under Nazi control: *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, (1965) 44 ILR 301, 340–2.

[113] Recent instances include Iraq, Yugoslavia, the DRC, Eritrea and, most significantly, Palestine: Dinstein, *The International Law of Belligerent Occupation* (2009), 8–30.

[114] Crawford, Second Report, 53–4; ARSIWA Commentary, Art. 17, §6.

[115] ILC Ybk 1999/I, 55 (Crawford); Crawford, Second Report, 54.

[116] Though its presence in the ARSIWA on Second Reading was greeted with little in the way of formal protest: ILC Ybk 1998/I, 129.

[117] *Robert E. Brown (United States)* v. *Great Britain*, (1923) 6 RIAA 120.

[118] See: Great Britain–Transvaal Boers, Convention of Peace, Commerce, Slave Trade, etc., 17 January 1852, 107 CTS 299; Great Britain–Transvaal Burghers, Pretoria Convention, 3 August 1851, 159 CTS 57; Convention between Great Britain and the South African Republic for the Settlement of the Transvaal Territory, 27 February 1884, 163 CTS 345.

[119] Initial annexation occurred in 1877, with definitive annexation following in 1900 during the Boer War: Dugard, *International Law: A South African Perspective* (3rd edn, 2005), ch. 2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:53 Page Number: 416

the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown.[120]

The Commission examined the particulars of Great Britain's suzerainty over South Africa, noting that at the time of the events in question, its control as provided by the 1884 Pretoria Convention was qualified: nowhere did that treaty bestow on Britain 'any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way'.[121] Thus suzerainty 'did not operate to render Great Britain liable for the acts complained of'.[122]

A further example is *Heirs of the Duc de Guise*,[123] a decision of the Franco-Italian Conciliation Commission, which held that Italy was responsible for a requisition carried out in Sicily at a time at which the island was under Allied occupation. The Commission, in denying Allied responsibility, pointed to the absence of 'intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees'.[124] The mere potential for Allied control over Italian operations did not provide a sufficient basis for responsibility to be attributed to anyone else than Italy.

12.3.3 Additional considerations

12.3.3.1 Knowledge and opposability of obligation

ARSIWA Articles 17(a) and (b) impose two additional requirements if a directing state is to be found liable for acts of direction and control. These are identical to the requirements of ARSIWA Article 16[125] and are established for the same reasons: an aversion to strict liability in situations of 'indirect' responsibility and the need to preserve the *pacta tertiis* rule. Under paragraph (a), the directing state must have knowledge of the internationally wrongful act. Under paragraph (b), the directing state must be bound by the obligation it has transgressed. The requirement of knowledge may give rise to substantial evidentiary difficulties if responsibility is to be made out – the requirement of opposability, however, may give rise to a presumption of knowledge in the event of breach.[126]

[120] (1923) 6 RIAA 120, 130. [121] Ibid., 131. [122] Ibid.
[123] *Différend Héritiers de SAR Mgr le Duc de Guise (France* v. *Italy)*, (1951) 13 RIAA 150.
[124] Ibid., 161. [125] Crawford, Second Report, 54. [126] Dominicé (2010), 288.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:53 Page Number: 417

12.3.3.2 Responsibility of the directed state

Clearly, ARSIWA Article 17 will result in the responsibility of the directing state. A question remains, however, as to that of the state so directed. Ago was clearly of the view that responsibility could not flow to the directed state simply by reason of the responsibility of the directing state for the act in question. He noted:

> In none of the cases . . . was there any question of responsibility being attributed, in one and the same case, to both the dominant State and the dominated State, the suzerain State and the vassal State, the occupying State and the occupied State or the State which exerted coercion and the State subjected to coercion. Nor was the 'indirect' responsibility of a State presented in any case as being merely 'subsidiary' to the 'direct' responsibility which an internationally wrongful act will always entail for the State that committed it, irrespective of the conditions in which that act may have been perpetrated. In other words, whenever a State has been held indirectly responsible for the act of another State, the former has always been required to answer *in place* of the second and not *in parallel* with it.[127]

Acting under the influence of direction or control, however, does not constitute an excuse within the meaning of ARSIWA Part I, Chapter V, and if a directed state carries out the direction in question, it may nonetheless incur primary responsibility of its own,[128] a fact made clear by the wording of ARSIWA Article 19:

> 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.

As the commentary notes, '[t]he defence of "superior orders" does not exist for States in international law'.[129] If a directed state is to escape liability, it will therefore need to establish the existence of a separate circumstance precluding wrongfulness, for example *force majeure*.

12.3.4 Direction and control of an international organization

DARIO Article 59 transplants the wording and reasoning of ARSIWA Article 17 and applies it to situations in which a state engages in the direction or control of an international organization.[130] It provides:

> 1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

[127] ILC Ybk 1979/II(1), 25–6; Dominicé (2010), 288. [128] Crawford, Second Report, §55.
[129] ARSIWA Commentary, Art. 17, §10.
[130] DARIO Commentary, Art. 59, §1. Further: Ryngaert and Buchanan (2011), 139–40.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:53 Page Number: 418

(a) the 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.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Again, the extent of the borrowing between ARSIWA Article 17 and DARIO Article 59(1) is evident. As is pointed out in the commentary, '[t]here are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.'[131] In any case, the circumstances in which such an event could arise would appear to be rare: '[i]t is all in all rather exceptional that members would have at their disposal means – legal or others – enabling them to exercise a decisive influence on the organization's behaviour.'[132]

DARIO Article 59(2) replicates the terms of DARIO Article 58(2). Direction or control occasioned by the internally lawful application of the rules of an international organization will not give rise to responsibility under the terms of Article 59(1). As with its Article 58(2) counterpart, Article 59(2) will not prevent the identification of a wrongful act based on an ordinary breach of an international obligation under the terms of the ARSIWA. This provision has been the cause of some complaint, on the basis that in certain international organizations, some states exercise such an influence on the internal decision-making processes of the organization that the organization's behaviour reflects little more than the directed will of that state, as in the case of the US influence over NATO, or the Soviet Union's hold over the former Warsaw Pact. It has been suggested that, in such cases, responsibility be sheeted home to the directed state,[133] although there is little in the way of state practice to indicate that this is anything more than a proposition *de lege ferenda*.[134]

[131] DARIO Commentary, Art. 59, §3. For the case of direction and control between two international organizations, see DARIO, Art. 15.
[132] Sands and Klein (eds.), *Bowett's Law of International Institutions* (6th edn, 2009), 528.
[133] D'Aspremont (2007), 101; Ryngaert and Buchanan (2011), 140.
[134] However, attention might be drawn to an incident in which the United States directly engaged with the Chinese government in order to compensate the latter for the accidental bombing of its embassy in Belgrade by NATO forces: Gazzini, (2001) 12 EJIL 391, 424–5; Ryngaert and Buchanan (2011), 140.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:54 Page Number: 419

12.4 Coercion of a state or international organization

ARSIWA Article 18 provides as follows:

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.

This third species of indirect responsibility therefore results from the coercion exercised by one state over another in order to compel the latter to breach an obligation owed to another.

12.4.1 Defining 'coercion'

State practice surrounding this notion is predictably scant, but the ILC nonetheless managed to construct a coherent notion of 'coercion' by linking it to the concept of *force majeure* as contained in ARSIWA Article 23:

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 State to comply with the obligation.[135]

Given the relatively high bar set by the commentary, it is unsurprising that ARSIWA Article 18 has attracted little or no notice. Two examples, however, were mentioned in the commentary to Draft Article 28(2) on its first reading,[136] and should be mentioned.

The first is the *Shuster* case.[137] The matter arose out of a decision by the Persian government to employ William Morgan Shuster, a US national, as Treasurer-General, so as to 'restore that government to an economic basis consonant with its dignity as a member of the family of nations'.[138] Interested parties in this process included Russia and the United Kingdom, which, as part of the 'Great Game', had divided Persia into Russian,

[135] ARSIWA Commentary, Art. 18, §2.
[136] Draft Articles Commentary, Art. 28, §26.
[137] Generally: Bouvé, (1912) 6 AJIL 389.
[138] Ibid., 391.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:54 Page Number: 420

British and neutral zones.[139] When Morgan acted contrary to Russian interests, Russia landed some 8,000 troops in Persia, marched south, and forced the Persian government – following a *coup d'état* – to break its contract of employment with Shuster in December 1911.[140] The Persian government later compensated Shuster on its own recognizance, and the matter was never the subject of adjudication, but commentators at the time considered Russia liable for the Persian breach:

> [T]he responsibility for tortious acts committed in the territory of a state which is sovereign on paper only, and perpetrated at the arbitrary dictation of a superior Power, supported by threats of invasion or actual invasion, is not to be avoided by the real author of the wrong merely because not committed within the territorial limits of the latter, and not carried out through the immediate intervention of its own officials. In other words, the existence of sovereignty, shadowy though it is, in the innocent state, does not negative the idea of responsibility on the part of the government whose act is, in fact, the direct cause of the injury.[141]

The second instance identified by the ILC was the *Romano-Americana Company* case,[142] which concerned the destruction of facilities owned by a US oil company in Romania on the eve of the German invasion of 1916. The facilities were destroyed on the orders of the Romanian government, but in the aftermath of the First World War, the United States took steps to bring a claim for compensation against Great Britain, on the putative basis that the latter had 'compelled' Romania to act as it did. Great Britain denied the claim on the basis that it had taken no action beyond urging the Romanian government to destroy the facilities in order to further the interests of itself and the Entente.[143] The United States appears to have accepted that British instigation was insufficient to create a basis of liability,[144] and redirected its claim to Romania, which accepted responsibility.

[139] Convention between Great Britain and Russia relating to Persia, Afghanistan and Tibet, 31 August 1907, 204 CTS 404.

[140] For Shuster's view of events, see Shuster, *The Strangling of Persia: A Record of European Diplomacy and Oriental Intrigue* (1912).

[141] Bouvé (1912), 400.

[142] Generally: Hackworth, 5 *Digest of International Law* (1943), 702.

[143] See the letter from HM Foreign Office of 5 July 1928 (ibid., 704):

> His Majesty's Government do not deny that, in company with the French and Russian Governments, they urged the Roumanian Government, through their accredited representative in Bucharest, to make the fullest use of the powers assumed by them early in the campaign to prevent the enemy from obtaining the means of prolonging a war disastrous alike to all involved in it at that time, but I must reaffirm that they could not and did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause.

[144] ILC Ybk 1979/II(1), 24.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:55 Page Number: 421

The contrast between the two cases demonstrates an admittedly wide spectrum along which coercion may be held to occur within the meaning of ARSIWA Article 18. In *Shuster*, the Persian government clearly had no other (realistic) option in the face of Russian aggression but to terminate its Treasurer-General's contract. Conversely, diplomatic pressure (however significant) brought to bear on Romania in *Romano-Americana* was acknowledged by the relevant parties to be insufficient.

A subsidiary consideration concerns the *type* of coercive force sufficient to give rise to responsibility under ARSIWA Article 18. Clearly, the threat or use of armed force as deployed in the *Shuster* case would be sufficient. But other forms of duress – such as political or economic measures – may also qualify.[145] Thus the form of duress itself need not be illegal under international law:[146] the focus of the provision is on the coerced state's capacity to exercise its own free will, not on the methods by which a state might attain a sufficiently compromised outcome.[147]

12.4.2 Other considerations

As with AWSIWA Articles 16 and 17, Article 18, paragraphs (a) and (b) contain additional requirements. Article 18(b) represents the by now familiar requirement of knowledge of the *circumstances* of the internationally wrongful act[148] on the part of the coercing state. Paragraph (a), however, does not require that the obligation breached by the state so coerced be also binding on the coercing state, but introduces a test of causation, namely that the act must have been unlawful vis-à-vis the coerced state but for the fact of the coercion.

Paragraph (a) thus reinforces the overlap between *force majeure* as provided for in ARSIWA Article 23, and a successful act of coercion – if coercion is *force majeure*, then the coerced state will be excused from responsibility that would otherwise have accrued. Responsibility for the act is transferred to the coercing state, identifying it as the party against which an injured state might obtain satisfaction.[149]

[145] ILC Ybk 1979/II(2), 103–4.
[146] Reuter, *Introduction au droit des traités* (3rd edn, 1995), 159–61.
[147] Crawford, Second Report, 55; ARSIWA Commentary, Art. 18, §3.
[148] The use of the term 'circumstances' indicates that the coercing state need not be aware of the ultimate unlawfulness of the act, but merely the relevant factual matrix: ARSIWA Commentary, Art. 18, §5: 'while ignorance of the law of no excuse, ignorance of the facts is material in determining the responsibility of the coercing State'.
[149] ARSIWA Commentary, Art. 18, §§4, 6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:55 Page Number: 422

12.4.3 Coercion of an international organization

The mirror provision[150] of ARSIWA Article 18 in the context of international organizations is DARIO Article 60, which replicates the terms of the former almost exactly. It provides:

A State which coerces an international organization 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 that coerced international organization; and
(b) the coercing State does so with knowledge of the circumstances of the act.

As with its commentary to DARIO Articles 58 and 59, the ILC acknowledges its debt to the ARSIWA expressly with regard to Article 60.[151] As to the forms that such coercion may take, an interesting question arises in relation to the economic pressure created by a state threatening to withhold its contribution payments unless its demands are complied with, as in the recent example of the United States threatening to withdraw – and then actually withdrawing – from UNESCO when Palestine was extended membership.[152] Such threats are by no means unknown in the practice of international organizations, and it seems likely that if an unlawful act were to result, it would amount to coercion within the meaning of DARIO Article 60.[153]

DARIO Article 60 lacks an equivalent to the shared paragraph (2) of DARIO Articles 58 and 59, on the basis that 'it seems highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization'.[154] This must be correct: even if the rules of an international organization do not expressly *forbid* a member to exercise coercive force, the abuse of power implied by such an act cannot be the subject of legal penalty.

12.5 Member state responsibility for the acts of international organizations

The question of attribution of conduct as between international organizations and member states has been discussed in the context of effective

[150] Ryngaert and Buchanan (2011), 141.
[151] DARIO Commentary, Art. 60, §1. For responsibility for coercion as between international organizations, see DARIO, Art. 16.
[152] In the context of some organizations, the mere act of withholding is an internationally wrongful act in its own right: see e.g. UN Charter, Art. 17(2) ('The expenses of the Organization shall be borne by its members as apportioned by the General Assembly').
[153] Ryngaert and Buchanan (2011), 141. [154] DARIO Commentary, Art. 60, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:55 Page Number: 423

command and control over peacekeeping forces in Chapter 5. But more general questions concerning the responsibility of member states for the actions of international organizations arise.[155] Two provisions of the DARIO provide convenient departure points in this regard, Article 62, which establishes the separate legal personality of an international organization as a firewall to responsibility, and Article 61, which prevents states from 'circumventing' their obligations by routing their actions through an international organization and then relying on its separate personality to escape responsibility.

12.5.1 Responsibility of member states

12.5.1.1 The basic rule

The basic rule of state responsibility for the acts of international organizations is contained in DARIO Article 62. This provides:

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:
   (a) it has accepted responsibility for that act towards the injured party; or
   (b) it has led the injured party to rely on its responsibility.
2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 62 is, however, more significant for what it does not say, at least expressly. As with its approach to the ARSIWA,[156] the ILC deliberately removed so-called 'negative' rules from the DARIO – that is, rules stating that responsibility could *not* arise in certain circumstances.[157] Rather, the articles carried within them an implied negative rule that any basis of responsibility not within the DARIO was presumptively excluded, a point made expressly in the commentary to DARIO Article 62:

> Consistently with the approach generally taken by the present draft articles as well as by the articles on the responsibility of States for internationally wrongful acts, article 62 positively identifies those cases in which a State incurs responsibility and does not do so when responsibility is not deemed to arise. While it would be thus inappropriate to include in the draft a provision stating a residual,

[155] Generally: Stumer, (2007) 48 HILJ 553; d'Aspremont (2007); Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2009), Ch. 14; Sands and Klein (2009), 526–31; Ryngaert and Buchanan (2011); *Brownlie's Principles*, 182–4.

[156] Crawford, First Report, 48–50, 53–4; ILC Ybk 1998/II(2), 84–7.

[157] See e.g. Draft Articles, Art. 14, which provided that the acts of insurgency groups could not *prima facie* be attributed to states.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:56 Page Number: 424

and negative, rule for those cases in which responsibility is not considered to arise for a State in connection with the act of an international organization, such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.[158]

The idea that an international organization might stand between a state and its responsibility is a comparative newcomer to international law.[159] The first international organizations emerged in the mid-nineteenth century, but these were little more than forums for the collective action of states, and possessed no real agenda of their own.[160] Moreover, the early international organizations tended to deal with 'technical, non-political matters'[161] such as the collective regulation of rivers,[162] or administrative unions providing international services. Thus the International Telegraphic Union was founded in 1865, followed by the Universal Postal Union[163] in 1874 and the International Union of Railway Freight Transportation in 1890, among others.[164]

The conventional understanding of the role of the international organization changed, however, with the advent of the League of Nations in 1919 and then of the United Nations.

12.5.1.2 Judicial confirmation of the basic rule

The notion that an international organization could possess a personality separate from its members was first advanced by the International Court

[158] DARIO Commentary, Art. 62, §2.

[159] For example, in his influential early discussion of responsibility, it does not appear to have crossed Eagleton's mind that member states would *not* be held responsible for the acts of international organizations: Eagleton (1928), 220–9.

[160] Klabbers (2009), 14–20; Sands and Klein (2009), 1–12; Akande, in Evans (ed.), *International Law* (3rd edn, 2010) 252, 253–4; *Brownlie's Principles*, 166. See also and generally: Klabbers, (2001) 70 Nordic JIL 287.

[161] Akande (2010), 253.

[162] See e.g. the River Commissions for the Rhine (1815), the Elbe (1821), the Douro (1835) and the Po (1849) and, most significantly, the European Commission for the Danube, formed after the Crimean War (1856): Klabbers (2009), 15.

[163] See now Constitution of the Universal Postal Union, 10 July 1964, 611 UNTS 7.

[164] On these and other public international unions, see Sands and Klein (2009), 5–8. These are distinct from private international unions such as the International Committee of the Red Cross (1863), the International Law Association (1873), the Institut de Droit International (1873) and the International Ornithological Committee (1883), which have more in common with modern NGOs or, in the case of the International Chamber of Commerce (1919), arbitral institutions: ibid., 4–5. As one might conclude from the organizations listed, some of these were more successful than others.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:57 Page Number: 425

in its Advisory Opinion in *Reparations for Injuries suffered in the Service of the United Nations*.[165]

The notion of international organization possessing a separate identity from its members[166] was later used, in a manner similar to the corporate veil familiar in most municipal legal systems,[167] to shield members of an organization from responsibility for its acts.[168] The wider ramifications of this may be seen in various decisions of the British courts concerning the International Tin Council (ITC).[169]

The ITC was an international organization with some thirty-two members (including the European Communities) which was originally intended to act as a stabilizing force on the world market, buying and selling tin in order to control prices. In 1985, during the sixth iteration of the International Tin Agreement,[170] the ITC ran out of money, leaving a debt estimated at several hundred million pounds sterling. The litigation

[165] ICJ Rep. 1949 p. 174, 178–9:

> the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged . . . Accordingly, the Court has come to the conclusion that the Organization is an international person.

[166] Although not all organizations possess international legal personality, the ILC appears to consider it a defining feature of an international organization, properly so called, as seen by its inclusion in the definition of 'international organization' given in DARIO, Art. 2(a):

> an organization established by a treaty or other instrument governed by international law *and possessing its own legal personality*. International organizations may include as members, in addition to States, other entities. (emphasis added)

On the criteria for international personality on the part of international organizations, see Ryngaert and Buchanan (2011), 135; *Brownlie's Principles*, 168–70.

[167] See e.g. *Salomon* v. *A Salomon and Co*., [1897] AC 22, 29–31 (Lord Halsbury LC):

> Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon, who is often referred to as Soloman. If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

[168] On the early development of the rule, see generally Amerasinghe (1991). The widespread use of individual legal identity for corporate entities in municipal legal systems probably justifies the separation of an organization from its members as a matter of general principles of international law: ibid., 273–5.

[169] Generally: Sands (1987); Sadurska and Chinkin (1989–90); Amerasinghe (1991), 260–5; Klabbers (2009), 276–9; Sands and Klein (2009), 526–9.

[170] 26 June 1981, 1282 UNTS 293.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:57 Page Number: 426

against the ITC by creditors in the British courts threw up a host of issues pertaining to the law of international organizations, including whether the debts of the organization could be enforced directly against its members. Although the question was raised incidentally, and the cases involved at their core considerations of the English law of corporate entities,[171] several pronouncements were made which related to the law of international organizations. In one case, Kerr LJ in the Court of Appeal said that he could not

> find any basis for concluding that it has been shown that there is any rule of international law, binding upon the members States of the ITC, whereby they can be held liable – let alone jointly or severally – in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name.[172]

Similarly, in discussing the existence of a purported rule imposing on members joint and several liability for the debts of an organization unless its constitutive instrument expressly provides otherwise, Lord Templeman found that '[n]o plausible evidence was produced of the existence of such a rule of international law before or at the time of the [Sixth International Tin Agreement] in 1982 or afterwards.'[173] In a further limb of the case, before the European Court of Justice, Advocate General Darmon argued that 'the mere fact of the Community's being a member of the ITC does not, in view of the ITC's separate personality, enable the wrongful acts and omissions of the ITC to be imputed to the Community'.[174]

The opposite conclusion on the question of member state responsibility was reached by an International Chamber of Commerce arbitration tribunal in the *Westland Helicopters* case.[175] The matter concerned the Arab Organization for Industrialization (AOI) established by four Arab

[171] Amerasinghe (1991), 260–5; Klabbers (2009), 278.

[172] *Maclaine Watson & Co. Ltd* v. *Department of Trade and Industry; JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry and ors*, [1989] Ch. 72, 185.

[173] *JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry and ors*, [1990] 2 AC 418, 480. See also the 1995 statement of the Institut de Droit International that '[s]ave as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members': (1996) 66/II Ann. de l'Inst. 455.

[174] Case No. C-241/87, *Maclaine Watson & Co. Ltd* v. *Council and Commission of the European Communities*, (1990) 96 ILR 201, 226.

[175] *Westland Helicopters Ltd* v. *Arab Organization for Industrialization and ors*, (1984) 80 ILR 600. Also Klabbers (2009), 286–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:57 Page Number: 427

states (the United Arab Emirates, Saudi Arabia, Qatar and Egypt) in order to develop their arms industries. The AOI entered into a joint venture with the claimant, and then promptly went into liquidation within twelve months. In attempting to ascertain the potential liability of the AOI's member states for the debts of it organization, the tribunal applied general principles of law to reach the following conclusion:

> In the absence of any provision [in AOI's constitutive instrument] expressly or impliedly excluding the liability of the four States, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom. In default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability.[176]

This award was annulled by the Court of Justice of Geneva on the tangential basis that Egypt had not consented to the Tribunal's jurisdiction.[177] But in upholding the annulment, the Federal Supreme Court of Switzerland noted that the AOI had 'total legal independence' vis-à-vis its members and doubted whether member states could be bound by contracts concluded by an organization in the light of that independence.[178]

The basic rule which emerged from the ITC litigation and the *Westland Helicopters* annulment was unsurprisingly embraced by governments.[179] To take one example, Germany has argued the point on multiple occasions before international courts and tribunals.[180] This wide measure of support led to a relatively uncontroversial adoption of DARIO Article 62 – and its implied negative rule of responsibility – by the ILC.[181]

[176] *Westland Helicopters*, (1984) 80 ILR 600, 613.

[177] *Arab Organization for Industrialization and ors* v. *Westland Helicopters Ltd and ors*, (1987) 10 ILR 622.

[178] *Arab Organization for Industrialization and ors* v. *Westland Helicopters Ltd*, (1988) 80 ILR 652, 658.

[179] Arguments against this view are generally mounted in terms of policy: see e.g. Klabbers (2009), 288–9.

[180] See generally the German submissions on the point of state responsibility for international organizations to the ILC: 12 May 2005, UN Doc. A/CN.4/556, §O. See also *M & Co.* v. *Germany*, [1990] ECommHR 13258/87; *Waite and Kennedy* v. *Germany*, (1999) 118 ILR 121; *Legality of the Use of Force (Serbia and Montenegro* v. *Germany)*, Preliminary Objections, ICJ Rep. 2004 p. 720. The final case was one limb of a series of claims brought against the members of NATO with respect to the bombing campaign in the former Yugoslavia. Each defendant claimed that membership of NATO did not on its own give rise to liability for acts of the organization.

[181] Further: Ryngaert and Buchanan (2011), 136–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:58 Page Number: 428

12.5.2 Exceptions to the basic rule

12.5.2.1 Acceptance of responsibility

The first general exception to the basic position is contained in DARIO Article 62(1)(a) and would appear similar in character to ARSIWA Article 11.[182] The commentary to the provision states:

> The view that member States are not in general responsible does not rule out that there are certain cases, other than those contained in the previous articles, in which a State would be responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned . . . No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the Organization.[183]

The acceptance by members of liability is most often done in the constitutive instrument of the organization in question.[184] The form in which this occurs may vary, and not all formulas will give rise to international responsibility properly so called. On the one hand, the originating treaty may provide for joint and several liability on the part of members, as in the case of the Convention on International Liability for Damage Caused by Space Objects,[185] Article XXII(3) of which provides:

> If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:
>
> (a) Any claim for compensation in respect of such damage shall be first presented to the organization;
> (b) Only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for

[182] Ibid., 141–2. [183] DARIO Commentary, Art. 62, §6.

[184] A possibility acknowledged in the ITC litigation: *Maclaine Watson & Co. Ltd* v. *Department of Trade and Industry; JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry and ors*, [1989] Ch. 72, 243 (Ralph Gibson LJ):

> [P]rinciple should require that, so far as concerns those states who must recognise the validity of the legal personality so created, including those who are party to the constituent agreement, liability upon the contracts of the organization be limited, in the absence of agency, to the parties to the contract unless some positive rule or provision should impose liability. A provision to that effect might be found in the terms, express or implied, of the constituent document of the organization. Such liability, therefore, is not, in my judgment, to be founded simply upon the absence of a provision excluding it.

[185] 29 March 1972, 961 UNTS 187.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:58 Page Number: 429

> such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

In the alternative, the separate personality (and thus responsibility) of the organization may be maintained vis-à-vis third parties, but the constituent instrument may require that members meet the financial liabilities of the organization as an internal matter.[186] For example, Article 300(7) of the Treaty on European Union[187] provides that 'Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States', a form of words which the European Court of Justice has interpreted as not giving rise to any form of liability on the part of member states which is opposable against third parties.[188] For this reason, DARIO Article 62(1)(a) specifies that acceptance of responsibility in such a circumstance operates only where acceptance is made 'towards the injured party'.[189]

12.5.2.2 Injured party reliance

DARIO Article 62(1)(b) introduces a second exception to the basic rule, where the conduct of a member state has led a third party to rely on the former's responsibility with respect to acts of an international organization.[190] This bears some analogy to the concept of estoppel,[191] but neither Article 62(1)(b) nor its commentary makes any reference to a need for detriment on the part of the third party.[192]

Examples of the responsibility of member states as a result of third party reliance are not widespread. One example, mentioned in the commentary,[193] arose in the second *Westland Helicopters* award. There, the tribunal found that member states could be held liable on the basis that the trust of third parties contracting with the organization had been procured via the appearance of financial support by member states.[194] Given the relatively small size of the AOI in that case, and its concomitant lack of financial independence, it might have been that third parties

[186] DARIO Commentary, Art. 62, §7. [187] 24 December 2002, [2002] OJ C225/33.
[188] Case No. C-327/91, *France* v. *Commission*, [1994] ECR I-3641, §25.
[189] DARIO Commentary, Art. 62, §7. [190] D'Aspremont (2007), 98–9.
[191] Stumer (2007), 563; Ryngaert and Buchanan (2011), 145. Generally: Cottier and Müller, 'Estoppel', (2007) MPEPIL; *Brownlie's Principles*, Ch. 18.
[192] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, ICJ Rep. 1984 p. 246, 308–9.
[193] DARIO Commentary, Art. 62, §9.
[194] *Westland Helicopters Ltd* v. *Arab Organization for Industrialization and ors*, Second Arbitral Award, 21 July 1991, §56.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:59 Page Number: 430

were compelled to assume that the organization was little more than a shell for the collective interests of its members.[195] Similar factors (e.g. small membership) have been suggested as indicative of situations in which the intention of member states to bind themselves is apparent from the circumstances, without the need for further positive action,[196] although the area has undergone little by way of systematic elaboration.

12.5.3 Abuse of the separate personality of international organizations

DARIO Article 61 introduces a further qualification to the basic rule of non-liability, and aims to counteract situations in which a state attempts to circumvent its international obligations via the separate personality of an organization.[197] This may be thought to bear out the US Supreme Court's dictum in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* that governments 'cannot avoid the requirements of international law simply by creating juridical entities whenever the need arises'.[198]

DARIO Article 61 provides:

> 1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
> 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

The provision has proved controversial.[199] Its origins[200] lie in a series of decisions by the European Court of Human Rights[201] concerning the obligation of signatories of the ECHR to ensure that international organizations of which they are members provide human rights protection which is the 'equivalent' of that offered under the ECHR. In *Waite and Kennedy* v. *Germany*,[202] the Court examined the question whether the immunity granted to the European Space Agency by the German courts

[195] Ryngaert and Buchanan (2011), 145.
[196] DARIO Commentary, Art. 62, §10. See further the suggestions on the subject made by Belarus to the ILC: UN Doc. A/C.6/60/SR.2, 23 November 2005, §52.
[197] DARIO Commentary, Art. 61, §1. Further: Ryngaert and Buchanan (2011), 144–5.
[198] 462 US 611, 633 (1983).
[199] D'Aspremont (2007), 99–100; Ryngaert, (2011) 60 ICLQ 997, 1011–15.
[200] DARIO Commentary, Art. 61, §§3–5. [201] On which see generally Ryngaert (2011).
[202] (1999) 118 ILR 121.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:02:59 Page Number: 431

constituted an impairment of the right of access to justice with respect to employment claims brought against the organization. The Court said:

> Where States establish certain international organizations in order to pursue or strengthen cooperation in certain fields of activities, and where they attribute to those organizations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose or object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[203]

This position was developed further in *Bosphorus* v. *Ireland*,[204] still the leading case of the Court concerning the responsibility of member states for the acts of organizations.[205] The case concerned the lessee of an aircraft impounded by Ireland under the terms of a European Communities (EC) Regulation; the Court held that notwithstanding the overriding effect of the Regulation insofar as EC–Irish relations were concerned, the matter remained within Ireland's jurisdiction under ECHR Article 1, and thereby engaged its responsibility. The Court remarked:

> Absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards . . . The State is considered to retain Convention liability in respect of treaty commitments subject to the entry into force of the Convention.[206]

But the Court also realized that the separate legal personality of international organizations could not be lightly set aside. As a balancing act between the EC's separate identity on the one hand, and the rights of the individual lessee on the other, it held:

> In the Court's view, State action taken with such legal obligations is justified so long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling the observance, in a manner which can be considered at least equivalent to that for which the Convention provides . . . If such equivalent protection is considered to be provided by the Organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the Organization.[207]

[203] Ibid., 135. [204] [2006] ECtHR 4036/98. [205] Ryngaert (2011), 1000–3.
[206] [2006] ECtHR 4036/98, §154. [207] Ibid., §§155–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:03:00 Page Number: 432

As Ryngaert points out,[208] this passage does not make it clear whether state responsibility persists in spite of membership in an international organization, or whether it only arises in cases where the organization fails to offer equivalent human rights protections. But whichever of the two options might be preferred, the Court since *Bosphorus* has consistently held[209] that '[i]f such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the terms of the Convention when it does no more than implement legal obligations flowing from its membership of the organization'.[210] Ryngaert further notes that,[211] since *Bosphorus*, 'the Court has presumed that all [organizations] "involved" in cases before the Court provide equivalent rights protection', and that rebutting this presumption in accordance with the *Bosphorus* decision[212] has proved to be a very tall order indeed: so far, no further cases have arisen.[213]

As explained in the commentary to DARIO Article 61, three conditions are required in order for international responsibility to accrue under the provision.[214] First, the international organization must have been delegated competence *ratione materiae* in relation to the international obligation of the state.[215] Second, there must be a significant link between the conduct of the circumventing member, and the action of the organization[216] in the sense of a causal link, for example by voting for the act or the legal apparatus which allowed it to occur. Third, the act of the organization must have been such as to be internationally wrongful if committed by the state.[217] Thus there is no DARIO Article 61 equivalent of the *pacta tertiis* rule of ARSIWA Articles 16(b) and 17(b), and indeed such a requirement is excluded expressly by paragraph (2).[218]

To this may be added an additional and problematic element, namely the requirement of intent. As noted in the commentary, 'responsibility will not arise when the act of the international organization . . . has to be regarded as the unintended result of the member State's conduct'.[219] The provision thus carries with it a subjective element of indeterminate

[208] Ryngaert (2011), 1001. [209] Ibid., 1002.
[210] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Širketi* v. *Ireland*, [2006] ECtHR 45036/98, §156.
[211] Ryngaert (2011), 1002.
[212] '[I]f in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient': *Bosphorus*, [2006] ECtHR 45036/98, §157.
[213] See e.g. *Gasparini* v. *Italy and Belgium*, [2009] ECtHR 10750/03. Also DARIO Commentary, Art. 61, §5. Further: Ryngaert and Buchanan (2011), 144–5; Ryngaert (2011), 1003–6.
[214] DARIO Commentary, Art. 61, §§6–8.
[215] Ibid., §6. [216] Ibid., §7. [217] Ibid., §8. [218] Ibid., §9. [219] Ibid., §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:03:00 Page Number: 433

scope. But, as Ryngaert and Buchanan note,[220] this requirement is not overly stringent, and will not only be found to be satisfied in those cases where the state demonstrates an overt intention to circumvent its responsibilities. Rather, the state is under an obligation of due diligence to avoid taking advantage of the separate personality of the organization[221] so as to cause the organization to commit what for it would be an internationally wrongful act.

A further question concerns the point in time at which liability of the state is to be held to crystallize.[222] In *Bosphorus*, which the ILC appears to have adopted as its own,[223] the Court held:

> State action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides ... However, any such finding of equivalence would not be final and would be susceptible to review in the light of any relevant change in fundamental rights.[224]

As Ryngaert notes,[225] this statement when generalized and combined with the apparent due diligence requirement of DARIO Article 61 would require a member state to screen the actions of the international organization continuously in order to ensure that none of the state's obligations were being breached. This may be objected to on policy grounds, as even with a loose requirement of positive action on the part of the state it appears onerous for a state to bear responsibility for the acts of an organization by reason of a transfer of competence, especially where that transfer is long past.[226] Moreover, it may be thought to act as a deterrent to international co-operation at a time when the world is in need of collective solutions to pressing problems.[227]

An alternative and more troublesome view is provided by the European Court's later decision in *Gasparini* v. *Italy and Belgium*,[228] in which the time of accession to the organization was considered to be the point

[220] Ryngaert and Buchanan (2011), 144.
[221] Stumer (2007), 563: 'In such a case, the responsibility of the Member State is, strictly speaking, not for the act of the international organization, but for the failure to ensure that the transfer of power to the organization was consistent with the State's international obligations'.
[222] Ryngaert (2011), 1014–15. [223] DARIO Commentary, Art. 61, §4.
[224] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Širketi* v. *Ireland*, [2005] ECtHR 45036/98, §155
[225] Ryngaert (2011), 1014. [226] Paasivirta, (2010) 7 IOLR 49, 53.
[227] Ibid., 50–1; Ryngaert (2011), 999. [228] [2009] ECtHR 10750/03, 7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 12 Title Name: CRAWFORD
Date:16/3/13 Time:13:03:01 Page Number: 434

at the temporal element must be assessed. One wonders how the respondent states there could have adequately foreseen whether or not NATO's dispute settlement procedures were ECHR-compliant, especially as the ECHR did not exist when Italy and Belgium signed the North Atlantic Treaty[229] in 1949.[230] On balance, however, it does not appear that the *Gasparini* model is what the ILC had in mind in drafting DARIO Article 61, due to the apparent need for a positive contribution by the state to the act of the organization. In *Gasparini* the requirement appears to have been modified so that presumptive liability is based on a perceived deficiency in the organization's procedures. It remains to be seen whether this will become the new norm in ECHR jurisprudence.[231]

The attempt to generalize the practice of the European Court of Human Rights in this way has led to significant criticism of DARIO Article 61. Thus d'Aspremont notes that 'it is anything but clear that such a principle can be transposed to a universal level'.[232] He further sees the dilution of the *culpa* of Article 61 as divorcing the provision from the real intention of the parties,[233] resulting in an unjustified expansion of responsibility. At the same time the provision fails to address appropriately what d'Aspremont sees as a rather more serious problem, namely the exercise of overwhelming control by certain states at the decision-making level of the organization[234] (though it would seem that such cases would be caught within the ambit of DARIO Article 61 as it stands). If it was the ILC's intention to adopt the 'equivalent protection' case law of the European Court of Human Rights wholesale (or at least its practice as developed through *Bosphorus*), then it would appear that at least *some* form of positive action on the part of the state is required, potentially placing a limit on liability.[235]

Ultimately, the adoption of DARIO Article 61 by the ILC remains controversial and the conditions of its application uncertain. It remains to be seen whether a *jurisprudence constante* coalesces around the provision such that it acquires utility beyond the sphere of human rights.

[229] 4 April 1949, 34 UNTS 241. [230] Ryngaert (2011), 1014 n. 78.
[231] Ibid., 1003–6 [232] D'Aspremont (2007), 99. Also Ryngaert (2011), 1011–15.
[233] D'Aspremont (2007), 99–100. [234] Ibid., 100.
[235] Ryngaert and Buchanan (2011), 144. See e.g. *Bosphorus*, [2006] ECtHR 45036/98, where the positive act was an act implementing the decision of the EC to impound the lessee's aircraft.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:14 Page Number: 435

13 Succession to responsibility[1]

13.1 Introduction

State succession refers to 'the replacement of one State by another in the responsibility for the international relations of territory'.[2] The field itself has been the subject of much investigation,[3] although there is still uncertainty about the extent to which there are international law rules or even presumptions of succession. In particular the question arises whether there is a succession of states to obligations of reparation arising from an internationally wrongful act committed by a predecessor state against a third state prior to the date of succession – compendiously, whether there is succession to responsibility.[4] The standard answer to this question is no.[5] But, as noted by O'Connell,

[1] Generally: Hurst, (1924) 5 BYIL 163; O'Connell, 1 *State Succession in Municipal and International Law* (1967), 482–93; O'Connell, (1970) 130 Hague *Recueil* 95, 162–5; Verzijl, 7 *International Law in Historical Perspective* (1974), 219–28; Czaplinski, (1990) 28 Can. YIL 339; Volkovitsch, (1992) 92 Col. LR 2162; Dumberry, (2006) 49 GYIL 413; Dumberry, (2006) 39 RBDI 507; Dumberry, *Succession to State Responsibility* (2007); Mikulka, in Crawford, Pellet and Olleson (2010) 291. Also 1 *Restatement Third* §209, reporters' n. 7.

[2] This definition appears in the Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, 1946 UNTS 3, Art. 2(1)(b), and the Vienna Convention on Succession of States in Respect of State Properties, Archives and Debts, 8 April 1983, 22 ILM 305, Art. 2(1)(a). The definition also appears in the ILC's Articles on the Nationality of Natural Persons in Relation to the Succession of States, ILC Ybk 1999/II(2), Art. 2(a). See, earlier, Verzijl, 7 (1974), 3.

[3] See e.g. O'Connell (1967); Stern, (1996) 262 Hague *Recueil* 9; Eisemann and Koskenniemi (eds.), *State Succession: Codification Tested against the Facts* (2000); Zimmerman, 'State succession in other matters than treaties', (2007) MPEPIL.

[4] Defined in the Vienna Convention on Succession of States in Respect of Treaties, Art. 2(1)(e), as 'the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates'. See also the 1983 Vienna Convention, Art. 2(1)(d).

[5] There is, on the other hand, no question that a new government of an existing state is liable for the delicts of earlier regimes: *Tinoco Claims (Great Britain* v. *Costa Rica)*, (1923) 1

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:15 Page Number: 436

There is no great intellectual incubus behind this supposed rule of international law. What is meant by the proposition that there is no succession to torts or delicts? If it means there is no responsibility respecting international delicts the proposition is patently erroneous, for every diplomatic claim arising out of a failure of the successor State to discharge the obligations of the predecessor is delictual in character. If it means that there is no responsibility respecting events which are characterized by the forum of the successor State as tortious or delictual, this leaves international responsibility to the hazard of a municipal law distinction.[6]

There is a distinction, as noted by O'Connell,[7] between the succession to liability with respect to an internationally wrongful act as opposable to another state and succession with respect to a municipal tort, as in the case of attempts to hold former colonial powers liable for the wholly domestic actions of their colonial administrations. For example, in *Mutua* Kenyan citizens brought a suit before the UK courts for municipal torts committed against them by the administration in the then Crown Colony of Kenya during the 'Mau Mau' uprisings of the 1950s. McCombe J noted that quite aside from the question of succession to international delicts, customary international law had never contained a rule of succession with respect to domestic torts.[8]

As to succession with respect to internationally wrongful acts of the predecessor state, there has long been an aversion to investigating this topic on an institutional level. In 1963, Manfred Lachs, chairman of the ILC's Sub-committee on Succession of States and Governments, proposed to include on the ILC's agenda succession to responsibility.[9] This suggestion was opposed, *inter alia* on the basis that such issues should be considered essentially within the domestic jurisdiction of states,[10] and the Sub-committee excluded succession to responsibility from the scope of the topic.[11] In consequence it figured neither in the ILCs work on state succession nor in its later work on state responsibility. The commentary to the ARSIWA simply states that 'in the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the

RIAA 369; *Socony Vacuum Oil Company Claim* (1955) 21 ILR 55. The same may be said for the government of a new state with respect to the actions of an insurrectional movement: ARSIWA, Art. 10; Dumberry, (2006) 17 EJIL 605. See Chapter 6.

[6] O'Connell, (1970) 130 Hague *Recueil* 95, 163.

[7] O'Connell, 1 (1967), 482.

[8] *Mutua and ors* v. *Foreign and Commonwealth Office*, [2011] EWHC 1913 (QB), §195.

[9] ILC Ybk 1963/II, 260.

[10] See the comments of Elias and Rosenne, respectively: ibid., 282, 287.

[11] Ibid., 299. The question is expressly reserved by the Vienna Convention on Succession of States in Respect of Treaties, Art. 39.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:15 Page Number: 437

predecessor State with respect to its territory'.[12] The Fourteenth Commission of the Institut de Droit International has since 2003 been considering state succession in matters of responsibility, but has yet to produce a resolution.[13] The decision of the Institut to convene the Fourteenth Commission was attended by similar reservations to those which prompted the rejection of the subject by the ILC,[14] although in this case the dissenters were not able to derail consideration.[15]

Scholarly discussion of succession to responsibility has been similarly limited,[16] and the point has only rarely been the subject of litigation or arbitration. Despite this, there has been a certain shift in consensus, from what Dumberry refers to as the 'traditional' or 'absolute' approach of non-succession (referred to here as the 'negative succession' rule) to a more nuanced view that focuses on the facts of the succession in question.[17]

13.2 The negative succession rule

13.2.1 The early authorities

Support for the negative view is drawn from two arbitral decisions of the early part of the twentieth century. The *Robert E. Brown* case[18] arose in the context of the British annexation of the Boer Republics in 1902, towards the close of the Second Anglo-Boer War. Brown, an American national who held concessions for gold mining in the Transvaal, had been deprived of his rights through a proclamation of the Boer government in 1895. He brought a suit before the South African courts in 1897 and won, but the government refused to honour the judgment. Following British annexation of the Transvaal Republic, Brown pressed his case with the British authorities and was again refused. Finally, Brown brought a further claim before the Great Britain–United States Claims Commission for denial of justice, arguing that as successor to the Boer Republics, Britain was answerable for their delicts. Although the

[12] ARSIWA Commentary, Art. 11, §3. [13] (2003) 71/II Ann. de l'Inst. 59, 394.

[14] See the comments by Degan, ibid., 65, 73; Torres Bernardez, ibid., 66. Cf. Salmon, arguing that it was precisely because the ILC had refused to consider the topic that the Institut should take it up: ibid., 73.

[15] The proposal to create the Fourteenth Commission was finally adopted 35:2, with five abstentions: ibid., 74.

[16] Dumberry (2007), 11, 35–7. [17] Dumberry, (2006) 49 GYIL 413, 415.

[18] *Robert E Brown (US)* v. *Great Britain*, (1923) 6 RIAA 120. The article by Hurst (1924) was published in connection with the case, and was intended to support the British position.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:16 Page Number: 438

Commission agreed that a denial of justice on the part of the South African authorities had indeed taken place, it refused to hold Britain liable as successor, stating:

> [W]e are equally clear that [South African] liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces ... nor in the Proclamation of Annexation ... can there be found any provision referring to the assumption of liabilities of this nature ... The contention of the American Agent amounts to an assertion that a succeeding State acquiring territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot indorse this doctrine.[19]

Brown was followed by the same Commission in the *Hawaiian Claims* arbitration.[20] These were actions for wrongful imprisonment, detention in prison, deportation and other outrages allegedly committed on British officials by the authorities of the Hawaiian Republic prior to its annexation by the United States in 1898. Britain, aware that it was possibly contradicting its own argument in *Brown*, attempted to distinguish the cases by reference to the fact that while the British annexation of the Boer Republics was by conquest, the United States had absorbed Hawaii through 'voluntary cession'. The Commission was unimpressed:

> We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle. It was denied in the *Brown* case and has never been contended for to such an extent ... Nor do we see any reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up, some other legal unit. In either case, the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.[21]

13.2.2 Defences and criticisms of the negative succession rule

The negative succession rule has been defended on several grounds, some still current.[22] The first is simple: only states which have actually

[19] (1923) 6 RIAA 120, 129–30. [20] *F. H. Redward (Great Britain)* v. *US*, (1925) 6 RIAA 157.
[21] Ibid., 158.
[22] Hurst (1924), 178, argued that imposition of a rule of state succession with respect to responsibility would 'enable a small and backward State to withstand all pressure from a better governed and more advanced neighbour' and act as a 'direct encouragement to any such backslider ... to render itself secure from intervention and absorption by perpetuating anarchy and misrule within its borders', thereby setting 'a premium on

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:16 Page Number: 439

committed an internationally wrongful act can or should be held responsible for it.[23] This was the position taken by the Commission in the *Hawaiian Claims* case.[24] The argument is justified on the basis of the equality and independence of states,[25] which is valid so far as it goes[26] but misses the point. It is clear that as a matter of international law, responsibility may only be incurred by the state which perpetrates the wrongful act: the question, from the point of view of succession, is whether the obligation to remedy[27] which arises in consequence of the act disappears with the disappearance of the predecessor state.[28] The answer that this secondary obligation disappears by operation of law and irrespective of the circumstances is a doctrinal *a priori*.

A second justification arises from the so-called 'personal' nature of internationally wrongful acts: *actio personalis moritur cum persona*.[29] This maxim is a common law adaptation of the Roman law as to personal succession post-Justinian, where liability in an action *ex delicto* did not pass to an heir.[30] In *Hawaiian Claims*, the Commission remarked:

> The analogy of universal succession in private law, which is much relied upon by those who argue for a large measure of succession to liability for obligations of the extinct State, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts.[31]

misgovernment'. Cf. Hyde, 1 *International Law Chiefly as Interpreted and Applied by the United States* (2nd edn, 1945), 438, arguing that the establishment of a rule of succession would 'diminish the interest of strong powers in seeking to annex and so obliterate the statehood of weaker and backward neighbours'. Such overtly colonialist arguments no longer appear.

23 Daillier, Forteau and Pellet, *Droit International Public* (8th edn, 2009), 618–19.

24 (1925) 6 RIAA 157, 158.

25 Dumberry (2007), 43.

26 See e.g. ARSIWA Commentary, Art. 1, §1.

27 ARSIWA, Art. 31(1); further Chapters 15 and 16.

28 Dumberry, (2006) 49 GYIL 413, 416; Dumberry (2007), 44–6.

29 E.g. Hurst (1924), 177–8 (although Hurst draws a distinction with respect to actions of annexation and conquest); Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, 1997), 169; Reina, (2004) 22 Berk. JIL 583, 587; *Brownlie's Principles*, 442.

30 4 *Institutes of Justinian* (533; trans. Moyle, 5th edn, 1913), §12 ('Actions which will lie against a man under either the civil or the praetorian law will not always lie against his heir, the rule being absolute that for delict . . . no action can be brought against the heir'). Further: Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 131–2, utilizing Justinian to qualify the 'universal' theory of succession to rights and obligations propounded by Grotius (1625), Bk II, Ch. IX, §XII (ed. Tuck 2005), 684 ('That the person of the Heir is to be looked upon as to be the same as the Person of the Deceased, in regard to the Continuance of Property; either publick or private, is an undoubted Maxim').

31 (1925) 6 RIAA 157, 158.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:16 Page Number: 440

This justification has, however, been widely rejected as 'overly simplistic' and even 'hopelessly anachronistic',[32] drawing as it does on a model of the state in which the person of the sovereign is used as an analogy for the body politic. Private law analogies are inherently unreliable, because they beg the question of the character of interstate relations, which are rarely equivalent to the relations between citizens of a law-governed state.[33] While reference to private law sources is on occasion useful (e.g. in the field of civil procedure), those sources so identified must be 'appropriate for international relations'[34] and 'adapted as necessary to the requirements of application against states'.[35]

Dumberry[36] argues persuasively that the analogy of personal succession in Roman law is inapposite. Under the law of personal succession, the death of the individual is a prerequisite to succession. The same may not be said of succession as between states, which is concerned with shifts in responsibility for the external relations of territory. Most forms of state succession do not involve the 'death' of a state or states, but rather the transfer of territory between them (e.g. via secession, cession or annexation). Thus a state need not cease to exist as a formal trigger for the succession process. But even if we are dealing with a situation in which a state *does* cease to exist, the private law analogy advanced by the traditional approach remains inapposite. Even if a state somehow loses its legal personality, its constituent elements – that is, its territory, property and population – persist.[37] It is one thing to deny succession to a transient unliquidated claim and another to deny it to the expropriation of a major asset which enures to the benefit of the territory concerned.

[32] Volkovitsch (1992), 2196.

[33] Ibid., 2209; Schachter, (1982) 178 Hague *Recueil* 9, 77–80. Cf. Lauterpacht, whose mature position on the subject was that municipal analogies had become part of the DNA of international law, thereby converting 'analogy' to 'identity': Lauterpacht, 1 (1970–2004), 307, 336. Lauterpacht's view on the utility of private law analogies/identities in international law (as expressed in Lauterpacht (1927) and in Lauterpacht, (1946) 23 BYIL 1) was an abandonment of the view taken in his earlier doctoral dissertation at the University of Vienna, where he argued that the use of such analogies 'endangers the independence of international law and fails to recognize its peculiarity': Koskenniemi, *The Gentle Civilizer of Nations* (2001), 374.

[34] Schachter (1982), 79.

[35] Volkovitsch (1992), 2209.

[36] Dumberry (2007), 48–50. Also Volkovitsch (1992), 2196.

[37] Ibid., 49. Also Feilchenfeld, *Public Debts and State Succession* (1931), 700. On the extinction of states, see further Crawford, *Creation of States in International Law* (2006), ch. 17; Ziemele, 'States, extinction of', (2007) MPEPIL.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:17 Page Number: 441

A third argument against the private law analogy is that it is no longer accurate: both civil and common law jurisdictions now generally provide for the survivability of actions against deceased tortfeasors.[38] Indeed, this was recognized by the tribunal in *Lighthouses Arbitration*:

> If that argument did in truth set out a general principle of law, it ought to be equally valid in civil law, but that is far from the case. On the contrary, delictual obligations of private individuals, which appear to present the same 'highly personal' nature, normally pass to the heirs. That is not to say that the principles of private law are applicable as such in cases of State succession, but only that the one argument which is sometimes invoked against the transmission of delictual obligations is without force.[39]

Finally, the notion that the 'personal' character of an international delict is anathema to succession is founded on the outdated notion of *culpa* or fault in state responsibility.[40] As is made clear in ARSIWA Article 1, state responsibility as a concept is no longer intrinsically linked to a *mens rea* of any description: rather, responsibility is seen as an objective correlative of an internationally wrongful act.[41]

Attempts have been made in the past to qualify the absolute theory of succession to responsibility by reference to the concept of liquidated damages – that is, damages resulting from the verification and quantification of a claim by a court or tribunal of competent jurisdiction.[42] The argument runs that an internationally wrongful act merely gives rise to a right of suit, and does not create any interest in assets. Until quantification, the claimant has no more than a capacity to appear before a competent adjudicatory body, which may or may not make an award in its favour:[43] a sort of Schrödinger's damages.[44] Thus there can be no state succession to responsibility with respect to an unliquidated claim. As Verzijl notes, this position is again based on an inapposite analogy, this time by reference to the common law concept of the non-transferability of unliquidated debts in private law.[45] That is not to say

[38] Volkovitsch (1992), 2196; Stern, in Stern (ed.), *Dissolution, Continuation and Succession in Eastern Europe* (1998) 197, 200; Dumberry, (2006) 49 GYIL 413, 417–18; Dumberry (2007), 50.
[39] *Lighthouses Arbitration between France and Greece (Claims No. 11 & 4)*, (1956) 23 ILR 81, 93.
[40] Dumberry (2007), 51.
[41] Crawford, First Report, 29–30. For the earlier view of the role of fault in the law of state responsibility, see Brownlie (1983), 38–48.
[42] See e.g. Hurst, who frames his argument in terms of unliquidated damages: Hurst (1924), 169, 170, 172, 176–8.
[43] O'Connell 1 (1967), 485; Verzijl 7 (1974), 220.
[44] Schrödinger, (1935) 23 *Naturwissenschaften* 807; Trimmer, (1980) 124 PAPhS 323.
[45] Verzijl 7 (1974), 220.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:17 Page Number: 442

that the liquidated or unliquidated character of the claim is irrelevant to the transmission of responsibility, merely that it will not be determinative.[46] In *Lighthouses Arbitration*, the tribunal held that one of the claims on foot must succeed, in part because its quantum was easily ascertainable.[47]

13.3 Rebutting the negative succession rule: judicial consideration

Following the decisions of the Great Britain–United States Claims Commission in the *Robert E. Brown* and *Hawaiian Claims* cases, it became received wisdom that the negative succession rule was correct as a matter of law: as O'Connell noted, '[i]t has been taken for granted that a successor State is not liable for the delicts of its predecessor.'[48] Early opposition to the *status quo* was voiced by Feilchenfeld, who rejected the assertion that the mere fact of state succession was sufficient to terminate responsibility,[49] with later resistance registered by O'Connell[50] and Verzijl.[51] The latter stated:

> The doctrine of public international law is haunted by the unyielding and widespread thesis according to which there can be no question of the passing of State responsibility for international delinquencies from a predecessor to a successor State on the ground that the responsibility is by its nature too intimately tied up with the 'person' of the offender . . . [The theory] must therefore, even if it is not unreasonable in itself, be rejected in its absolute variant, because there are different situations conceivable in which its application would be unreasonable, no matter whether the debts are liquidated or not. It tends indeed to become, as a result of unjustified generalization, an assertedly unassailable dogma though it is in fact no more than a legal myth.[52]

Although the state practice of the nineteenth century – such as the 1842 Treaty of Westphalia regulating the dissolution of the Kingdom of Westphalia[53] – appears to have supported negative succession rule

[46] Ibid. [47] (1956) 23 ILR 81, 91–3.
[48] O'Connell 1 (1967), 482. Further: Cheng (1953, repr. 1993), 167, 342.
[49] Feilchenfeld (1931), 689–90.
[50] O'Connell 1 (1967), 484–5; O'Connell, (1970) 130 Hague *Recueil* 95, 164.
[51] Verzijl 7 (1974), 219–28.
[52] Ibid., 219–20. Further: Czaplinski (1990); Volkovitsch (1992); Dumberry, (2006) 49 GYIL 413; Dumberry (2007).
[53] 29 July 1842, 93 CTS 371, Art. 13. Further: Dumberry (2007), 99.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:17 Page Number: 443

generally,[54] a more qualified version of the doctrine has emerged in the twentieth century from judicial and state practice.

Very few international courts or tribunals have had occasion to consider the question of succession to responsibility. Some municipal courts, however, took the opposite view, with the Greek Court of the Aegean Islands holding in the *Samos* case that the Greek state was substituted for the former principality of Samos with respect to acts of customs officials under the preceding Ottoman regime.[55]

Furthermore, in 1924, the United States ratified a treaty with Austria and Hungary dealing with the quantification of amounts to be paid by these states as successors to the Austro-Hungarian Empire with respect to acts committed against US citizens during the First World War.[56] The Tripartite Claims Commission that emerged out of that treaty acknowledged that the doctrine of state succession with respect to responsibility was indeterminate, throwing doubt on the negative succession rule.[57]

13.3.1 Lighthouses Arbitration

A juridical break of sorts with the absolutist position was achieved by *Lighthouses Arbitration*, in which Verzijl was president of the tribunal. The case settled the claims of the French company Collas et Michel, which was commissioned to maintain lighthouses on Crete – territory then under the control of the Ottoman Empire.[58] This concession was

[54] Cf. certain isolated examples, such as the 1343 treaty between Philip VI of France and Humbert II of Viennois whereby the latter's lands (the Dauphiné), on his death, would pass to the second son of the former. According to Art. 8 thereof, Humbert's successor was to pay all debts and be liable for all torts committed by Humbert '[as] a son is bound by the obligations of his father': reproduced with discussion in Feilchenfeld (1931), 20. Further: Volkovitsch (1992), 2176. Dumberry (2007), 134–5, identifies this episode as reflecting an era in which territory was seen as the private patrimony of the individual sovereign, and thus inapplicable to modern inter-state relations.

[55] *Samos (Liability for Torts) Case*, (1924) 2 ILR 70, 70. But cf. the decision of the Supreme Court of Poland, holding that the Polish State Treasury was not liable for damage caused by the Austrian State Railway prior to the emergence of an independent Polish state in 1918: *Niemiec and Niemiec* v. *Białobrodziec and (Polish) State Treasury*, (1923) 2 ILR 64, 65.

[56] 26 November 1924, 48 LNTS 70. Further: Dumberry (2007), 53, 99–102.

[57] *Administrative Decision No. 1*, (1927) 6 RIAA 203, 210:

> The answer must be found in the provisions of the Treaties of Vienna and of Budapest. It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to the liability of a Successor State for the obligations either *ex contractu* or *ex delicto* of a dismembered State.

[58] The sovereignty of Crete in the late 1800s and early 1900s was a complex question, leading to much uncertainty: Ion (1910). See the historical survey provided in the *Lighthouses Arbitration*, (1956) 23 ILR 659, 663–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:18 Page Number: 444

expropriated by the Greek government during the First World War, leading to claims concerning putative Greek responsibility for acts committed by the Cretan government prior to its union with Greece in 1913. The first was Claim No. 11, relating to the expense caused to Collas et Michel by a 1903 order given by the Cretan government to construct two new lights at Spada and Cryo, which was then countermanded in 1908.[59] The second, Claim No. 4, concerned the exemption of the Greek vessel *Aghios Nicolaos* from the payment of normal light dues, ordered by a Cretan law of 1908 which was kept in force until 1914. The tribunal joined the claims as both concerned Greece's succession to the responsibility of the Cretan state.

The tribunal rejected Claim No. 11 on the basis that the Greek government had committed no wrongful act with respect to the decision to countermand the original commission for the lighthouses: rather, blame fell with the Cretan government for contradicting its original order, with the Ottoman government for failing to ensure their construction, and with Collas et Michel itself for undertaking unnecessary preparatory work without due diligence as to the eventual financial consequences.[60] The tribunal also acknowledged the relevance of the distinction between a liquidated and unliquidated claim in questions of succession to responsibility.

> The connection between this territorial succession, on the one hand, and the order and cancellation by the Cretan government in 1903 and 1908 respectively, on the other hand, are too remote to justify a decision which would fix Greece and Greece alone with the general responsibility for the acts and omissions of others which were compete strangers to her ... Moreover, we are here dealing with a claim which was neither recognized as well founded by the Ottoman Empire or by Crete nor determined by a competent tribunal nor liquidated or easily liquidable on the basis of facts giving rise to it.[61]

Claim No. 4 was a different matter, the tribunal holding that three further aggravating circumstances led to the conclusion that Greece should be held responsible for the acts of the Cretan government. First, the Cretan attitude in excepting the *Aghios Nicolaos* was totally contrary to the terms of the concession contract which was binding on it either as an autonomous state or a subdivision of the Ottoman Empire. Second,

[59] These lighthouses also formed the substance of the judgment of the Permanent Court in *Lighthouses in Crete and Samos*, (1937) PCIJ Ser. A/B No. 71, which concerned succession to contracts. Judge Hurst formed part of the Court, appending a separate opinion.

[60] (1956) 23 ILR 81, 89. [61] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:18 Page Number: 445

the concession for the coastal service around Crete – which the *Aghios Nicolaos* was engaged in carrying out – was contrary to the terms of the lighthouse concession awarded to Collas et Michel and given to a Greek shipping company, bringing the matter putatively to the attention of the Greek government. Third, Greece kept the coastal service concession in force after its succession to Crete, thus sanctioning the illegal conduct and adopting it for its own. As such, Greece was responsible for the relevant acts: this responsibility could result 'only from a transmission of responsibility in accordance with the rules of customary law or the general principles of law regulating the succession of States in general'.[62]

Lighthouses Arbitration is notable, however, for its articulated critique of absolutist solutions both for and against succession with respect to responsibility, rejecting both the decision of the Greek court in the *Samos* case and those of the British–American Claims Commission in *Robert E. Brown* and *Hawaiian Claims*:

> Seen from this point of view, the question of transmission of responsibility in the event of territorial change presents all the difficulties of a matter which has not yet sufficiently developed to permit solutions which are both certain and applicable equally in all possible cases. It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors.[63]

The tribunal went on to say:

> [T]he solution must depend on the particular circumstances of each case. An obligation created by an international delict properly so-called, committed in direct violation of the law of nations, such as the invasion of a neutral territory or the arbitrary destruction of a vessel exempt from capture, is something quite different from an obligation which has an origin in private law or in administrative law and which gives rise to an international claim only in consequence of a denial of justice. The hypothesis of the voluntary union of two independent States in one unitary or federal State differs essentially from that brought about by the annexation of one State by another by force of arms. The dismemberment of a unitary State into two or more new States presents certain characteristic features which differ from those inherent in the secession of a colony from the mother country as a new independent State. All these differences cannot but exercise a decisive influence on the solution of the problem of State succession even in cases of delictual obligation.[64]

Thus the tribunal sensibly linked the question of succession in this regard to the form in which succession took place.

[62] (1956) 23 ILR 81, 90. [63] Ibid., 91. [64] (1956) 23 ILR 81, 91–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:18 Page Number: 446

13.2.2 The Gabčíkovo-Nagymaros *case*

The International Court has yet to address the issue of succession to responsibility squarely, but the question was relevant *en passant* in the *Gabčíkovo-Nagymaros* case.[65] The case concerned the fallout from a 1977 treaty[66] concluded between Hungary and Czechoslovakia relating to the construction and operation of a series of barrages on the Danube. Work commenced on the project in 1978, but at Hungary's instigation was slowed in 1983. As a result of domestic pressure, Hungary stopped work altogether in 1989. In response to this, Czechoslovakia put into effect in November 1992 a provisional solution known as Variant C, whereby the Danube would be diverted further upstream and returned 30 km downstream after passing through the Gabčíkovo barrage. On 1 January 1993, Czechoslovakia dissolved and Slovakia became an independent state. By a Special Agreement of 7 April 1993, the dispute was submitted to the International Court.[67] One issue was whether Slovakia could be held responsible for any internationally wrongful acts committed by Czechoslovakia prior to its dissolution. The Preamble to the Special Agreement provided:

> *Bearing in mind* that the Slovak Republic is one of the two successor states of the Czech and Slovak Federal Republic and is the sole successor state in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project . . .

The Court took this statement to mean that Slovakia succeeded to Czechoslovakian responsibility with respect to the project:

> According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia may thus be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia . . .[68]

While this may be taken as an implied acknowledgement of succession to responsibility, the Court's language suggests that it interpreted the Preamble to mean that Slovakia had agreed to assume liability for

[65] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7. Further: Schrijver and Prislan (2008).

[66] Treaty concerning the Construction and Operation of the Gabčíkovo-Nagymaros Series of Locks, 16 September 1977, 1109 UNTS 211.

[67] Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project, 7 April 1993, 32 ILM 1293.

[68] ICJ Rep. 1997 p. 7, 81.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:19 Page Number: 447

Czechoslovakian delicts. The case is thus an example of succession to responsibility by agreement.[69]

It is worth noting that in both the cases considered, responsibility was held to be transferred to the successor state where it either expressly (as in *Gabčíkovo-Nagymaros*) or impliedly (as in *Lighthouses Arbitration*) adopted its predecessor's conduct as its own.[70] From the point of view of state responsibility in general, this is referable as much to ARSIWA Article 11 as to the operation of any rules of state succession.[71]

13.4 Rebutting the negative succession rule: modern state practice

13.4.1 The role of state practice

It is left to state practice to provide further illumination to the topic. Less relevant here is state practice occurring prior to the modern (post-Second World War) era. Following the advent of Article 2(4) of the UN Charter, the acquisition of territory by conquest – the basis on which the relevant claim of succession was made in *Robert E. Brown* – would be considered illegal. Additionally, during this period, there was less support in doctrine and practice for automatic succession even in respect of primary obligations.[72] This shift appears to have been recognized in some jurisdictions. The *Restatement Third* suggests:

> These cases [*Robert E. Brown* and *Hawaiian Claims*] date from the age of colonialism when colonial powers resisted any rule that would make them responsible for the delicts of states which they regarded as uncivilized. The authority of these cases a century later is doubtful. At least in some situations, it would be unfair to deny the claim of an injured party because the state that committed the wrong was absorbed by another state.[73]

The most expansive analysis of the state practice surrounding succession to responsibility has been undertaken by Dumberry,[74] who concludes that aside from specific situations where the successor has agreed to answer for the delicts of the predecessor, the landscape

[69] Dumberry, (2006) 49 GYIL 413, 427–8; Dumberry (2007), 111–16. Cf. Mikulka (2010), 295–6.

[70] Further: Crawford, First Report, 54. Also Verzijl 7 (1974), 222–3; Volkovitsch (1992), 2190–1. Cf. Czaplinski (1990), 345–6.

[71] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 35. Further: Chapter 6.

[72] Mikulka (2010), 296.

[73] 1 *Restatement Third* §209, reporters' note 7.

[74] Dumberry (2007), Ch. 2. For recent state practice, see Dumberry, (2006) 49 GYIL 413.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:19 Page Number: 448

produced by state practice reflects the position taken in *Lighthouses Arbitration*, namely 'the solution adopted in State practice ... essentially depends on the different types of mechanism of succession of States involved'.[75] These may be divided into two categories: those where the predecessor state continues to exist relative to the successor state, and those where it does not.

13.4.2 Succession where the predecessor ceases to exist

In some cases of state succession, the predecessor state will cease to exist.[76] Nonetheless, four examples of such extinction have taken place in the post-1945 period; although not all have implications for succession to responsibility, they are representative of the field. In the first place, there are cases of *voluntary absorption*, where a state becomes part of another state, extinguishing its personality. This occurred in the case of the German Democratic Republic, which became part of the Federal Republic of Germany in 1990,[77] surrendering its seat at the UN in the process.[78]

In the second place is *extinction by merger*. This occurred in the case of the merger of North Yemen and South Yemen,[79] both of which in 1990 surrendered their international identities in order to form the unitary state of Yemen proper. The result has been described as a double succession with neither the North nor the South annexing the other, but rather both becoming extinct in order to form a combined state.[80]

[75] Dumberry (2007), 201.

[76] Unless there is a recognized claim to continuity, as e.g. in the case of the dissolution of the USSR: Crawford, *Creation of States in International Law* (2006), 705.

[77] Treaty Establishing a Monetary, Economic and Social Union, 18 May 1990, 29 ILM 1108; Treaty on the Unification of Germany, 31 August 1990, 30 ILM 457. Also Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 29 ILM 1186.

[78] Generally: Ebke, (1990) 24 IL 1130; Frowein, (1991) 51 ZaöRV 333; Oeter, (1991) 51 ZaöRV 349; Frowein, (1992) 86 AJIL 152; Hailbronner, (1991) 2 EJIL 18; von der Dunk and Kooijmans, (1991) 12 Mich. JIL 510; Bühler, in Eisemann and Koskenniemi (2000) 187, 233–49.

[79] Ribbelink, (1995) 26 NYIL 139, 159; Crawford, *Creation of States in International Law* (2006), 705–6.

[80] Goy, (1990) 36 AFDI 249, 263. This intention is revealed in Art. 1 of the Agreement on the Establishment of the Republic of Yemen, 22 April 1990, 30 ILM 820:

> On the 26th of May 1990 ... there shall be established between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (both parts of the Yemeni Homeland) a full and complete union, based on a merger, in which the individual personality of each of them shall be integrated into a single international person called the 'Republic of Yemen'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:19 Page Number: 449

The third form of state extinction is *voluntary dissolution*, as occurred in relation to Czechoslovakia.[81] At midnight on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist, and was replaced by two new states, the Czech Republic and Slovakia. While the treaty obligations of the predecessor state largely survived the dissolution,[82] both states applied separately for membership in relevant international organizations, including the UN.[83]

The fourth category is *involuntary dissolution*, as occurred in respect of the Socialist Federal Republic of Yugoslavia (SFRY) after 1992.[84] Up until 2000, the union of Serbia and Montenegro – adopting the name of the Federal Republic of Yugoslavia (FRY) – took the view that it was the successor to the SFRY[85] in the same way that the Russian Federation is considered the successor to the USSR. This was not accepted – although General Assembly did not question the FRY's claim to statehood, it was not considered the continuator of the SFRY, but one of five (now six) former republics.[86]

13.4.2.1 The reunification of Germany

From 3 October 1990, the German Democratic Republic (GDR) was taken to have 'acceded' to the Federal Republic of Germany (FRG). By virtue of the Treaty on the Unification of Germany,[87] its individual identity on the international plane was absorbed by its western counterpart, and its territory incorporated as five new *Länder*. Article 24(1) of the Treaty dealt with the international responsibility of the GDR:

> In so far as they arise from the monopoly on foreign trade and foreign currency or from the performance of other state tasks of the German Democratic Republic *vis-à-vis* foreign countries and the Federal Republic of Germany up to 1 July 1990, the settlement of the claims and liabilities remaining when the accession takes

[81] Scharf, (1995) 28 CILJ 29; Bühler (2000), 315–21; Crawford, *Creation of States in International Law* (2006), 706–7.

[82] UKMIL, (1994) 65 BYIL 571, 586–8. Further: *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 71–3.

[83] See: SC Res. 800 (1993); GA Res. 47/221, 19 January 1993 (Slovakia); SC Res. 810 (1993); GA Res. 47/222, 19 January 1993 (Czech Republic).

[84] Bühler (2000), 274–314; Ortega Terol, in Eisemann and Koskenniemi (2000) 889; Crawford, *Creation of States in International Law* (2006), 707–14; Oeter, (2007) 50 GYIL 457. Generally: Radan, *The Break-up of Yugoslavia and International Law* (2002), chs. 6–7.

[85] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Provisional Measures, ICJ Rep. 1993, p. 3, 15.

[86] Badinter Commission, *Opinion No. 8*, (1992) 92 ILR 199; *Opinion No. 9*, (1992) 92 ILR 203; *Opinion No. 10*, (1992) 92 ILR 206. Further: SC Res. 757 (1992), op. §§4–8; SC Res. 1022 (1995), preamble. Also Crawford, *Creation of States in International Law* (2006), 707–8.

[87] Treaty on the Unification of Germany, Art. 1(1).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:20 Page Number: 450

effect shall take place under instructions from, and under the supervision of, the Federal Minister of Finance.

This provision appears to have transferred liability for the GDR's delicts in international law to the FRG as successor.[88]

Two further examples of succession to responsibility can be identified in the processes of German reunification. In 1990, a significant pending issue was the resolution of claims for expropriation against the GDR for the various programmes of nationalization that were undertaken during the Cold War by the USSR (1945–9) and GDR (1949–90), and by the Nazi regime during the Second World War (1939–45).[89] In preparation for unification, the GDR after many years of resistance undertook certain reforms.[90] First, it amended its constitution so as to remove the prohibition on the private ownership of the means of production. Second, it enacted laws for the return of private property confiscated after 1949,[91] most notably the Law for the Settlement of Open Property Questions (Property Act) of 29 June 1990, which was later incorporated into the Treaty on the Unification of Germany.[92] In addition, on 15 June 1990, the GDR and the FRG entered into a Joint Declaration on the settlement of outstanding issues of property rights, which also was to form part of the Treaty.[93] In a subsequent decision of the Federal Administrative Court, it was held that the FRG could not be held responsible for internationally wrongful acts committed by the GDR as a matter of principle; it was,

[88] Oeter (1991), 381; Volkovitsch (1992), 2177–8; Dumberry, (2006) 49 GYIL 413, 422; Dumberry (2007), 86–7. Cf. Quint, (1991) 50 Md LR 475, 534, who limits the operation of the provision to international contractual obligations.

[89] Generally: Quint (1991); Wilburn, (1991) 25 IL 649; Doyle, (1991) 13 Mich. JIL 832; Dumberry, (2006) 49 GYIL 413, 422–5; Dumberry (2007), 86–91.

[90] Zimmerman, in Piotrowicz and Blay (eds.), *Unification of Germany in International and Domestic Law* (1997) 103; Dumberry, (2006) 49 GYIL 413, 423; Dumberry (2007), 88–9. This led to the filing of 2.3 million applications for the restitution of real estate, 97.9 per cent of which were resolved by 31 December 2005: www.badv.bund.de.

[91] The legality of this exclusion was confirmed by both the German Constitutional Court and the European Court of Human Rights, on the basis that Germany had no responsibility for the acts of Soviet occupying forces during the period 1945–1949: *Land Reform*, 84 BVerfGE 90 (1991), repr. in (1990) NJW 1569; *Von Maltzan* v. *Germany*, [2005] ECtHR 71917/01 (and joined proceedings). Further: Doyle (1991); Stewart, (1991) 85 AJIL 690.

[92] Treaty on the Unification of Germany, Annex II, Ch. III, s B(I), No. 5. The Treaty also provided in Art. 9(2) that the law will remain in force insofar as it is compatible with the German Basic Law (*Grundgesetz*) and with the directly applicable law of the European Communities (later the EU).

[93] Treaty on the Unification of Germany, Annex III, Art. 41(1) provides that the Joint Declaration 'shall form an integral part of this treaty'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:20 Page Number: 451

however, decided that as expropriated property seized by the GDR was now part of a unified Germany, the GDR's obligation of compensation had passed to the FRG.[94]

The second example had its origins somewhat earlier. In 1974, the GDR and the United States entered into negotiations in an attempt to resolve the question of the East German expropriation of property owned by American nationals.[95] When no agreement was forthcoming, the United States established a programme for the settlement of such claims by the US Foreign Claims Settlement Commission,[96] which by 1981 had recognized 1,899 valid claims reflecting a total lump sum of US$78 million.[97] These claims remained unsettled until unification, whereupon the FRG agreed to provide compensation for wrongful acts committed by the GDR against US citizens between 1949 and 1976.[98]

13.4.2.2 The dissolution of the Socialist Federal Republic of Yugoslavia

Following the dissolution of the SFRY, an attempt was made to resolve by agreement all questions relating to the succession of states.[99] After a decade of negotiations, an Agreement on Succession Issues was concluded, Article 4 of which establishes a Standing Joint Committee of senior representatives of each successor state, charged with ensuring the effective implementation of the Agreement.[100] Annex F, Article 1, provides:

> All rights and interests which belonged to the SFRY and which are not otherwise covered by this agreement (including, but not limited to, patents, trademarks, copyrights, royalties, and claims of and debts due to the SFRY) shall be shared

[94] BVerwG 7 B 2.99 (1999), repr. in (1999) NJW 3354. Further: Dumberry, (2006) 49 GYIL 413, 425–6; Dumberry (2007), 90.

[95] Agreed Minutes on Negotiations Concerning the Establishment of Diplomatic Relations between the United States of America and the Germany Democratic Republic, with exchange of letters, 4 September 1974, TIAS 7937. On the process, see generally Wilburn (1991).

[96] 22 USC §1644. [97] Wilburn (1991), 651–2.

[98] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Settlement of Certain Property Claims, 13 May 1992, 1911 UNTS 27. Further: Dumberry, (2006) 49 GYIL 413, 425–6; Dumberry (2007), 91–3.

[99] Badinter Commission, *Opinion No. 9*, (1992) 92 ILR 203, 205; UN/EC Conference on the Former Yugoslavia, Statement of Principles, 26 August 1992, 31 ILM 1527, principle (ix); SC Res. 1022 (1995), op. §6. Also Agreement on the Normalization of Relations, 23 August 1996, 35 ILM 1219.

[100] 10 April 2001, 41 ILM 3. Further: Watts, (2002) 41 ILM 1; Stahn, (2002) 96 AJIL 379.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:20 Page Number: 452

among the successor States, taking into account the proportion for division of SFRY financial assets in Annex C of this Agreement. The division of such rights and interests shall proceed under the direction of the Standing Joint Committee established in Article 4 of this Agreement.

Annex F, Article 2 of the Agreement provides that all claims against the SFRY not otherwise covered by the Agreement will be considered by the Committee. This suggests that issues arising from the international responsibility of the SFRY were not treated as simply disappearing, with the precise division of liability between them being determined by the Committee.[101]

13.4.3 Succession where predecessor continues to exist

In other cases of state succession, the predecessor state continues to exist in some form. An example is cession of territory,[102] the simple transfer of territory from one existing state to another. The question of succession to responsibility in such a case may arise where an internationally wrongful act was perpetrated by the predecessor state on the territory in question prior to its transfer to the successor state.

13.4.3.1 Separation from the Union of Soviet Socialist Republics[103]

Several events arising out of the collapse of the USSR have implications for the law of succession to responsibility.[104] The first such instance is the measures taken with respect to the pre-revolutionary Russian bonds which were nationalized following the Russian Revolution in 1917. Until the end of the Cold War, the Soviet government consistently maintained that it was not responsible for the debts incurred by its Tsarist predecessor. A final settlement on the matter was reached between France and Russia on 27 May 1997 whereby Russia would pay France US$400 million in exchange for both signatories relinquishing all other claims, including claims of diplomatic protection. Russia's payment in this respect was *ex gratia*, and cannot thereby be taken as recognition on its part of responsibility for acts committed after 1917; nonetheless, Russia is clearly seen to

[101] Dumberry, (2006) 49 GYIL 413, 430–1; Dumberry (2007), 119–22.
[102] Dörr, 'Cession', (2006) MPEPIL.
[103] Decision by the Council of Heads of State of the Commonwealth of Independent States, 21 December 1991, 31 ILM 151, op. §1. Generally: Blum, (1992) 3 EJIL 354; Bühler (2000), 258–63.
[104] Dumberry, (2006) 49 GYIL 413, 433–7; Dumberry (2007), 150–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:21 Page Number: 453

be the continuator of the RSFSR (i.e. the Soviet entity which existed prior to the formation of the USSR in 1922).

The second event recognized by Dumberry in this respect is the pillage of cultural artefacts by Soviet troops in Germany towards the end of the Second World War and after.[105] Following the disintegration of the USSR, Russia and Germany concluding an agreement for the return of the relevant works. Article 15 of this Agreement provides:

> The contract parties agree that missing or illegally removed cultural goods located in their territory must be returned to their owners or the legal successors thereof.[106]

This may be taken as a commitment by Russia to provide reparations to Germany for the delicts of the USSR, although presumably on the basis of continuity, not succession.

13.4.3.2 The independence of Namibia

It was generally agreed that Namibia was not to be considered the successor state to South Africa – a consensus as to tabula rasa apparently reached well before Namibia's independence. But when Namibia actually declared its independence in 1990, Article 140(3) of its Constitution provided:

> Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

This establishes Namibia's *prima facie* succession to responsibility vis-à-vis South Africa.[107] Dumberry links it to the end of the apartheid regime in South Africa in February 1990.[108] But it is worth noting that

[105] It is estimated that some 2.5 million works of art and cultural relics were transferred from Germany to the USSR during the period of occupation 1945–1949. Some were returned to the GDR in the 1960s and 1970s: Dumberry (2006), 49 GYIL 413, 435. Further: Gattini, (1996) 7 EJIL 67; Wilske, (1999) 3 UCLA JILFA 223.

[106] Agreement between the Republic of Germany and the Russian Federation over Cultural Cooperation, 16 December 1992, 1993-II BGBl 1256, Art. 15 (author's translation).

[107] Dumberry, (2006) 49 GYIL 413, 438–9; Dumberry (2007), 192–4. On the provision generally, see Strydom, (1989–90) 15 S. Af. YIL 111.

[108] Dumberry (2007), 193.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:21 Page Number: 454

Namibia's acquiescence to responsibility is conditional, and that it reserved the right to dissociate itself from South Africa's actions.

The scope of Article 140(3) was investigated by a Namibian court in *Mwandinghi* v. *Minister of Defence*.[109] There, the applicant was injured by forces operating in Namibia under the control of the South African Minister of Defence. On Namibia's independence, the applicant sought to substitute the Minister of Defence of Namibia as defendant on the basis that Namibia had accepted liability via Article 140(3). The Namibian government argued that Article 140(3) had no such effect, but also relied on Article 145 of the constitution, which provided that:

> (1) Nothing contained in this Constitution shall be construed as imposing on the Government of Namibia:
>
> (a) any obligations to any other State which would not otherwise have existed under international law;
>
> (b) any obligations to any person arising out of the acts or contracts of a prior administration which would not otherwise have been recognised by international law as binding on the Republic of Namibia.

In the High Court, Strydom AJP noted that the Article 140(3) ('[a]nything done') was not restricted to lawful acts.[110] Further, Article 145 did not prevent the substitution. While the court accepted 'for the purposes of this case' that 'in international law a new State is not liable for the delicts of its predecessor',[111] it went on to state that the positive acceptance of liability – as seen in *Lighthouses Arbitration* and reflected in Article 140(3) – was according to all commentators perfectly acceptable.[112] Thus '[i]n the present case the new State chose to accept liability, subject to its right to repudiate, and is therefore liable.'[113] The Supreme Court concurred with this view,[114] and further emphasized that the

[109] (1990) 91 ILR 341. Further: Booysen, (1991) 21 CILSA 204; Botha, (1990–1) 16 S. Af. YIL 156; Botha, (1991–2) 17 S. Af. YIL 177.

[110] (1990) 91 ILR 341, 351.

[111] Ibid., 353. Strydom AJP was not expressing unqualified support for the negative succession rule: he mentioned the tribunal's doubt in the *Lighthouses Arbitration*. His position was merely that non-succession was the de facto rule in this particular case: ibid., 353–5.

[112] Ibid., 354–5: 'I know of no principle whereby international law can step in and undo such an acceptance by a State.'

[113] Ibid., 355.

[114] Ibid., 366–8, citing O'Connell, 1 *International Law* (2nd edn, 1970), 267. For some tangential criticisms of the Supreme Court's approach, and particularly its handling of Draft Articles, Art. 10, see Dumberry, (2006) 49 GYIL 413, 441; Dumberry (2007), 196–201.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:22 Page Number: 455

use of the term 'not otherwise have been *recognized* by international law'(emphasis added) in Article 145 was not intended by the drafters of the constitution to refer to obligations which were recognized to exist per se by international law, but to exclude liability for those acts which were not accorded legal recognition in international law – that is, violations of peremptory norms.[115]

13.5 Conclusions

On the basis of this practice, it is difficult to reach any conclusions of general application with regard to succession to responsibility. However, the fact-sensitive approach to such issues promoted in the *Lighthouses Arbitration*, and advanced further by O'Connell, Verzijl and Dumberry, seems preferable to the negative succession rule posited by *Robert E. Brown*, *Hawaiian Claims* and commentators such as Hurst.

As to situations in which the relevant predecessor state ceased to exist following succession, it is significant that in each of the cases identified, the successor state voluntarily accepted liability with respect to the unlawful acts of its predecessor. By contrast, states are far less likely to accept a transfer of state responsibility where the predecessor state remains extant. As Volkovitsch notes,

> A clear line of practice and precedent demonstrates that primary responsibility in such cases remains with the predecessor state and that former colonies and victims of occupation will only be held responsible for their predecessor's delictual liability if they have expressly agreed to assume it.[116]

This position is reflected in the decisions of the various international and domestic courts, from *Lighthouses Arbitration* to *Mwandinghi* and *Gabčíkovo-Nagymaros*.

[115] (1991) 91 ILR 314, 369–9, citing Brownlie, *Principles of Public International Law* (4th edn, 1990), 513. A similar point was made by Strydom AJP: (1990) 91 ILR 341, 354. Further: Chapter 16. For the further development of Art. 140(3) in the context of purely municipal acts of a predecessor government, see *Government of Namibia* v. *Cultura 2000*, (1993) 103 ILR 104.

[116] Volkovitsch (1992), 2201.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 13 Title Name: CRAWFORD
Date:15/3/13 Time:18:31:22 Page Number: 456

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-V Title Name: CRAWFORD
Date:13/3/13 Time:11:49:42 Page Number: 457

Part V

Cessation and reparation

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-V Title Name: CRAWFORD
Date:13/3/13 Time:11:49:42 Page Number: 458

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:16 Page Number: 459

14 Restoration of legal relations after breach

14.1 Introduction

Part II of the ARSIWA sets out the legal consequences for a state considered to be responsible in accordance with the provisions of Part I. It focuses on the 'new legal [relation] which arises upon the commission by a State of an internationally wrongful act'.[1] This chapter considers Articles 28–30 of Part II. It is Article 28 that establishes the connection between Parts I and II of the ARSIWA. Articles 29 and 30 deal with the restoration of the underlying legal relations. Article 29 is concerned with the continuation of those relations. It provides that the duty of the responsible state to perform the obligation breached is not affected by the legal consequences set out in Part II. Article 30 is concerned with the repair of those relations. Paragraph (a) sets out the obligation to cease an internationally wrongful act if it is continuing. Paragraph (b) provides that there is an obligation to offer appropriate assurances and guarantees of non-repetition of the wrongful act if the circumstances require. These paragraphs can be seen to address the negative and positive aspects of future performance respectively. Article 30(a) is concerned with securing an end to wrongful conduct; Article 30(b) is concerned with the prevention of future wrongful conduct.[2]

The general principle underlying the obligations of cessation and to offer assurances and guarantees of non-repetition is respect for the rule of law.[3] As the commentary to Article 30 states,

> 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

[1] ARSIWA Commentary, Pt II, §1. [2] ARSIWA Commentary, Art. 30, §1.
[3] Corten, in Crawford, Pellet and Olleson (2010) 545, 545.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:17 Page Number: 460

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.[4]

The same is true of the obligation to offer assurances and guarantees of non-repetition. As Tams states, 'in situations involving breaches of general international law or multilateral treaties . . ., a future-oriented obligation to prevent future breaches can hardly be limited to bilateral legal relations between injured and responsible states'.[5] This broader concern is reflected in the proposition that a state which is not injured is entitled to claim cessation and assurances and guarantees of non-repetition from a responsible state in the collective interest in some circumstances.[6]

This chapter discusses in turn the legal effects of a breach, particularly the continued duty of performance, the obligation of cessation and the subject of assurances and guarantees of non-repetition.

14.2 Legal effects of the breach

14.2.1 The applicable secondary obligations

Article 28 establishes the connection between Parts I and II of the ARSIWA. It provides:

> 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.

There are two caveats to this proposition. First, the consequences set out in Part II only apply in respect of primary obligations owed to states. While the provisions of Part I are applicable to all obligations of states and not merely those which are owed *to* states, the scope of Part II is limited to the latter category of obligations.[7] Article 33(2) makes it clear that Part II is without prejudice to situations in which the responsibility of a state may be invoked by non-state entities, such as pursuant to procedures available under human rights treaties and investment protection agreements.[8] Second, Part II does not apply to the extent that other rules of international law apply by way of *lex specialis*. This is evident from the general statement in Article 55 that the ARSIWA do

[4] ARSIWA Commentary, Art. 30, §5. [5] Tams, (2002) 27 Yale JIL 441, 444.
[6] ARSIWA, Art. 48, and see Chapter 11. [7] ARSIWA, Art. 33(1).
[8] See also ARSIWA Commentary, Art. 28, §3; Art. 33, §4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:17 Page Number: 461

not apply to the extent that matters dealt with are governed by special rules of international law.[9]

14.2.2 The continuation of the primary obligation

As the result of an internationally wrongful act, a new legal relation is established between the responsible state and the state or states to whom the obligation breached is owed. This arises on the occurrence of a breach and without any requirement of invocation by the injured state.[10] It does not affect the pre-existing relation established by the primary obligation. Article 29 captures this distinction:

> 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.

Even if the responsible state complies with its obligations under Part II, it is not relieved from the duty to perform the obligation breached.[11]

Evidently, there is only a continued duty to perform the obligation breached if the obligation itself subsists despite the breach. Whether, and to what extent, the obligation does subsist is regulated by the rules concerning the relevant primary obligation.[12] For example, a state injured by a material breach of a bilateral treaty may elect to terminate that treaty.[13] The termination of the primary obligation does not, however, affect the secondary obligations that arose prior to termination, such as the obligation to make reparation.[14]

14.3 Cessation

Cessation is often the main focus of the controversy produced by wrongful conduct.[15] Article 30(a) provides:

> The State responsible for the internationally wrongful act is under an obligation:
>
> (a) to cease that act, if it is continuing . . .

In accordance with Article 2, wrongful acts encompass both acts and omissions.[16] The obligation of cessation has been confirmed on a number of occasions by the ICJ. In *Germany* v. *Italy* the Court stated:

[9] See also ARSIWA Commentary, Pt II, §2. [10] ARSIWA Commentary, Art. 29, §3.
[11] ARSIWA Commentary, Art. 29, §2. [12] ARSIWA Commentary, Art. 29, §4.
[13] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 60.
[14] ARSIWA Commentary, Art. 29, §3. [15] ARSIWA Commentary, Art. 30, §4.
[16] ARSIWA Commentary, Art. 30, §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:17 Page Number: 462

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.[17]

Article 30(a) raises a number of issues. The first is what it means for an internationally wrongful act to be 'continuing'. Second, there is the issue of the distinction between the obligation of cessation and the continued duty of performance of the primary obligation. A third issue is the distinction between cessation and reparation.

14.3.1 Wrongful acts that are 'continuing'

As stated by the tribunal in the *Rainbow Warrior* arbitration, for an order of cessation there are 'two essential conditions intimately linked, 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'.[18] The second condition is self-explanatory.[19] The first condition will be satisfied where the internationally wrongful act has a continuing character in the sense used in Article 14, for example where a legislative provision is maintained which is incompatible with a treaty obligation of the enacting state.[20] The commentary states that also encompassed are 'situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions'.[21]

Some conflate the violation of an obligation on a series of occasions with composite acts in the sense used in Article 15.[22] Article 15 is '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', such as genocide.[23] Composite acts are one form of conduct that gives rise to

[17] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ, 3 February 2012, §137. See also e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136, 197.

[18] *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 573. On continuing and composite wrongful acts see also Chapter 8.

[19] For case in which cessation was unavailable on the basis that the primary obligation was held to be no longer in force see ibid., 573–4.

[20] For a case in which cessation was unavailable on the basis that the internationally wrongful act had come to an end see e.g. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Rep. 2010 p. 14, 102.

[21] ARSIWA Commentary, Art. 30, §3.

[22] See e.g. Corten (2010), 547.

[23] ARSIWA Commentary, Art. 15, §2 (emphasis added).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:18 Page Number: 463

continuing breaches.[24] The commentary explicitly distinguishes between composite acts and the violation of an obligation on a series of occasions.[25] During drafting, the language of Article 30(a) was amended to clarify that the obligation of cessation applies also to situations in which an obligation is violated on a series of occasions.[26]

Examples of situations in which an obligation is violated on a series of occasions are found in human rights jurisprudence. In *Ireland* v. *United Kingdom*,[27] Ireland was entitled to complain of a practice made up by a series of breaches of Article 7 of the European Convention for the Protection of Fundamental Freedoms and Human Rights (ECHR)[28] and call for its cessation.[29] The European Court stated:

> The allegation accepted by the Commission under Article 3 concerned a practice or practices and not individual cases as such. Accordingly, the Court's sole task is to give a ruling on that allegation ... A practice incompatible with the [ECHR] 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 ... [T]he rule [of exhaustion of domestic remedies] does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence ...[30]

In subsequent cases the European Court has affirmed that claims concerning a practice alleged to be incompatible with the ECHR are admissible.[31]

In *Avena*[32] at least one of the bases on which Mexico sought cessation was that the United States had violated its obligations under Article 36 of the Vienna Convention on Consular Relations[33] on a series of occasions. This is clear from Mexico's Memorial.[34] As the Court recounted in its Judgment, Mexico claimed that

> competent authorities of the United States regularly fail to provide the timely notification required by Article 36 (1) *(b)* and thereby to [*sic*] frustrate the communication and access contemplated by Article 36 (1) *(a)* and the assistance

[24] ARSIWA Commentary, Art. 15, §1.
[25] ARSIWA Commentary, Art. 15, §5. It is possible that the violation of an obligation on a series of occasions could also constitute a composite act breaching a separate obligation. For example, the wrongful act of genocide is usually made up of a series of acts which are themselves internationally wrongful: ARSIWA Commentary, Art. 15, §9.
[26] ILC Ybk 2000/II(2), 25–6.
[27] *Ireland* v. *UK*, [1978] ECtHR A/25.
[28] 4 November 1950, 213 UNTS 221.
[29] ARSIWA Commentary, Art. 15, §5.
[30] *Ireland* v. *UK*, [1978] ECtHR A/25, §§157–9.
[31] *Georgia* v. *Russia*, Admissibility, [2011] ECtHR 38263/08, §85, and the cases cited therein.
[32] *Avena and Other Mexican Nationals (Mexico v. US)*, ICJ Rep. 2004 p. 12.
[33] 24 April 1963, 596 UNTS 261.
[34] *Avena*, Memorial of Mexico, ICJ, 20 June 2003, §401.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:18 Page Number: 464

contemplated by Article 36 (1) *(c)*. These violations continue notwithstanding the Court's judgment in *LaGrand* and the programme described there.[35]

It does not appear that the Court dealt with the issue of whether there was a continuing breach on the basis of repeated violations; at least it did not do so explicitly.[36] The Court dismissed the claim, merely stating:

Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico's claim seeking cessation.[37]

Only Judge ad hoc Sepulveda appears to have considered the issue.[38]

14.3.2 The distinction between cessation and the continued duty of performance

One issue raised in the drafting of Article 30(a) was the distinction between the obligation of cessation and the continued duty of performance of the underlying obligation, specifically whether the former is merely a function of the latter. The ILC's view can be seen to have evolved over time. What became Article 30(a) originated in an article proposed by Special Rapporteur Riphagen. In 1981 he stated:

[T]he first duty of the author State is to stop the breach of its international obligation. It does not seem relevant whether one considers this duty as a consequence of the continuing 'validity' or 'force' of the primary obligation or as a duty which arise as a consequence of the breach. Actually these are, so to speak, the two sides of one and the same coin.[39]

The first reading commentary, in a paragraph adopted in 1993, states:

In terms of legal theory, cessation may be ascribed either to the continued normal operation of the 'primary' rule of which the previous wrongful conduct constitutes a violation or to the operation of the 'secondary' rule coming into play as an effect of the occurrence of the wrongful act. The Commission is of the view that the very distinction between primary and secondary rules is a relative one and that cessation is situated, so to speak, in between the two categories of rules.[40]

[35] *Avena*, ICJ Rep. 2004 p. 12, 67. [36] See also Thirlway, (2009) 80 BYIL 10, 174–5.
[37] *Avena*, ICJ Rep. 2004 p. 12, 68.
[38] Ibid., Separate Opinion of Judge ad hoc Sepúlveda, 99, 125.
[39] Riphagen, Second Report, ILC Ybk 1981/II(1), 87.
[40] Draft Articles Commentary, Art. 41, §4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:19 Page Number: 465

But it is not clear that cessation is a mere function of the obligation to comply with the primary norm and not a secondary consequence of a breach.[41] The commentary now states:

> 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.[42]

14.3.3 The distinction between cessation and restitution

An issue of more practical importance is the distinction between cessation and forms of reparation, particularly restitution. The result of cessation may be indistinguishable from that of restitution, for example where the conduct required by each is the freeing of hostages or the return of objects and premises seized.[43] It is nonetheless necessary to distinguish between cessation and restitution, as restitution is subject to limitations that cessation is not. First, restitution is only required to the extent that it is not materially impossible and that it does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[44] There may be an obligation of cessation even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.[45] While the consequences of past acts cannot always be erased, it is always possible to take action in relation to future events.[46] Second, in general an injured state may specify the form that reparation should take.[47] However, there may be an obligation of cessation even if an injured state declines to seek restitution.[48]

A number of cases touch on the relation between cessation and restitution. For example, in *Rainbow Warrior* the Secretary-General issued a

[41] Crawford, Third Report, 22.
[42] ARSIWA Commentary, Art. 30, §6. See Crawford, Third Report, 22, for further reasons why cessation is a secondary consequence of a breach. These reasons were supported by the ILC: ILC Ybk 2000/II(2), 25.
[43] ARSIWA Commentary, Art. 30, §7.
[44] ARSIWA, Art. 35.
[45] ARSIWA Commentary, Art. 30, §7.
[46] Corten (2010), 548.
[47] ARSIWA, Art. 43(2)(b).
[48] See Crawford, Third Report, 64; ARSIWA Commentary, Art. 30, §8; ARSIWA Commentary, Art. 43, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:19 Page Number: 466

binding ruling that the agents concerned should be detained at a French military facility on the island of Hao for three years.[49] Before the end of the three-year period, the agents were removed to France. The tribunal held that France had breached its obligations in removing one of the agents and in failing to order the return of both.[50] The majority of the tribunal held that France's obligations had expired three years after the date on which the agents had arrived on Hao, so it could not be said that France was still in breach of its obligations.[51] New Zealand argued that the appropriate remedy was restitution, in the form of the return of the agents to Hao for the balance of the three-year term. The majority accepted France's submission that in effect New Zealand was seeking cessation, not restitution.[52] But an order for cessation could not be made given that the primary obligation was no longer in force.[53]

It has been said that the 'relation of these two concepts [of cessation and restitution] seems to have caused confusion to the Tribunal in the *Rainbow Warrior*' and that 'the confusion . . . left New Zealand without an adequate remedy for the violation of its rights by France'.[54] An order of restitution would not have provided New Zealand with an adequate remedy in the circumstances. It is true, as the tribunal noted, that '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'.[55] But, as the commentary states, '[e]vidently 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.'[56]

The majority appeared to distinguish between cessation and restitution on the basis that where a state in essence seeks a return to the situation demanded by law, it seeks cessation and not restitution.[57] Sir Kenneth Keith cast doubt on the distinction drawn by the majority, stating:

> I do not find it necessary to come to a conclusion on . . . the characterization of the request either as *restitutio* or as cessation, and the differences between them.

[49] *Rainbow Warrior*, (1990) 82 ILR 500, 515–17, cited in ARSIWA Commentary, Art. 30, §8.
[50] Ibid., 560, 566.
[51] Ibid., 567–8. Sir Kenneth Keith dissented on this point: ibid., Separate Opinion of Sir Kenneth Keith, 580, 584–90.
[52] Ibid., 572. [53] Ibid., 573. [54] Gray, in Crawford, Pellet and Olleson (2010) 589, 590.
[55] *Rainbow Warrior*, (1990) 82 ILR 500, 572–3. [56] ARSIWA Commentary, Art. 30, §8.
[57] *Rainbow Warrior*, (1990) 82 ILR 500, 571–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:19 Page Number: 467

Could I simply say that I am not sure, for instance, about the validity of the distinction in theory or in practice. It is notable that the International Court in deciding that the respondent States must take positive steps or refrain from unlawful actions in the *Teheran* and *Nicaraguan* cases did not attach such labels . . .[58]

It is clear that a return to the situation demanded by law can be the result sought by way of a claim for restitution.

Also relevant is the *Arrest Warrant* case.[59] In that case the ICJ held that the issue and international circulation of an arrest warrant by Belgium against the incumbent Minister of Foreign Affairs of the DRC violated Belgium's obligation to respect the immunity from criminal jurisdiction and the inviolability which the minister enjoyed under international law. The ICJ determined that the appropriate remedy was an order that Belgium 'must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated'.[60] The ICJ clearly made this order on the basis of the obligation of restitution. After quoting from the *Chorzów Factory* case,[61] the ICJ stated that '[i]n the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law'.[62] Belgium could equally have been ordered to cancel the arrest warrant based on the obligation of cessation. The ICJ acknowledged that the conduct of Belgium constituted a continuing breach; it went on to state that the 'warrant is still extant, and remains unlawful, notwithstanding the fact that Mr Yerodia has ceased to be Minister for Foreign Affairs'.[63]

In *Germany* v. *Italy*, the Court held that in allowing civil claims to be brought against Germany in the Italian courts relating to violations of international humanitarian law committed during the Second World War, Italy had violated its obligation to respect the jurisdictional immunity which Germany enjoys under international law.[64] In fashioning the appropriate remedy, the Court reasoned as follows:

In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts

[58] Ibid., Sir Kenneth Keith sep. op., 580, 584.
[59] *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, ICJ Rep. 2002 p. 3. [60] Ibid., 33.
[61] *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9.
[62] *Arrest Warrant*, ICJ Rep. 2002 p. 3, 32. [63] Ibid., 32.
[64] *Jurisdictional Immunities*, ICJ, 3 February 2012, §139(1).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:20 Page Number: 468

and other judicial authorities infringing Germany's sovereign immunity become unenforceable. This 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. Furthermore, even if the 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.

It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established.[65]

This decision highlights a distinction between cessation and restitution. To the extent that wrongful conduct produces broader effects, the reversal of those effects falls within the obligation of restitution. As is stated in the commentary, '[r]estitution involves the reestablishment 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 the situation may be traced to that act.'[66]

These considerations dispose of the idea sometimes expressed that the Court cannot make orders which equate to orders of specific performance against states.[67] Of course, the language of specific performance (peculiar to the common law) is not used, but in principle international courts and tribunals can make orders having mandatory effect, whether by way of declaration or otherwise. The *content* of those orders is a

[65] Ibid., §137. [66] ARSIWA Commentary, Art. 35, §1.

[67] For example, Gray states that 'the jurisdiction of the International Court of Justice to give remedies such as specific performance or injunctions where there is no express provision for this in the agreement from which the Court derives its jurisdiction is not clear': Gray, *Judicial Remedies in International Law* (1987), 95. However, she also states that '[i]n those cases such as the *Serbian Loans*, *Lighthouses*, and *Socobelge* cases where the Court declares that a contract has been duly entered into and is binding on the parties or that an arbitral award is binding, although this is not formally an order for specific performance it is clear what the parties ought to do': ibid., 98.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:20 Page Number: 469

different question: for example, if the subject matter of an obligation falls within the inherent competence of the state, as in the case of the termination of a concession concerning the natural resources of the state, a declaration of invalidity or an order to restore the *status quo ante* may be inappropriate or even futile, and compensation the only effective remedy.[68] But in the context of a state-to-state obligation, there is normally no such inherent competence, and the governing principle is *pacta sunt servanda* – expressed in most general terms, international obligations are to be performed.[69]

14.4 Assurances and guarantees against repetition

Article 30(b) provides:

> The State responsible for the internationally wrongful act is under an obligation:
>
> . . .
>
> (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

As with cessation, it is necessary for the primary obligation to subsist for the issue of assurances and guarantees of non-repetition to arise,[70] although it is not necessary for there to be a continuing breach. The words 'if circumstances so require' indicate the 'rather exceptional character of the measures'.[71] Whether assurances and guarantees of non-repetition are required will depend on the circumstances of the case, particularly the nature of the obligation breached and the breach itself.[72]

14.4.1 The status of the obligation to offer assurances and guarantees

Whether an obligation to offer assurances and guarantees of non-repetition arises as a legal consequence of responsibility was much

[68] The appropriateness of the mandatory order, equivalent to specific performance, in *Texaco* v. *Libya*, (1977) 53 ILR 389, 511, has been questioned on this ground: cf. *LIAMCO* v. *Libya*, (1977) 62 ILR 140, 197–9. The ultimate effect of the *Texaco* order was, it appears, a higher settlement.

[69] Thus in *Belgium* v. *Senegal* the Court made a mandatory order by way of a declaration that 'the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him': *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, §122(6).

[70] ARSIWA Commentary, Art. 30, §1.

[71] ARSIWA Commentary, Art. 30, §13.

[72] ARSIWA Commentary, Art. 30, §13.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:20 Page Number: 470

debated in the ILC: indeed, of the articles discussed in this chapter this paragraph was the most contentious.

As adopted on first reading, the provision that was to become Article 30(b) stated that the 'injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act'.[73] But doubt was expressed as to 'whether article [30(b)] can properly be formulated as an obligation at all. It may be asked what the consequences of a breach of that obligation could be. For example, could a State which had tendered full reparation for a breach be liable to countermeasures because of its failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely. If, despite earlier assurances, there is a repetition of the breach, this may be treated as a circumstance of aggravation, but that could be true in any event'.[74]

In the ILC debates some questioned whether the offering of assurances and guarantees of non-repetition could be regarded as a legal consequence of responsibility, as opposed to a political or moral commitment, and suggested the provision be deleted entirely.[75] Most members supported the retention of Article 30(b),[76] but were of the view that assurances and guarantees of non-repetition are only required in limited circumstances.[77] Simma, for example, stated:

> As it currently stood, the text might indeed be rather too broad and lenient, but there were cases in which there was a real danger of a pattern of repetition ... That concern could be met by adopting the formulation proposed in the Sixth Committee by the Czech Republic: instead of saying 'where appropriate', say 'if circumstances so require', because there were undeniably circumstances which required the wrongdoer to do more than merely apologize.[78]

This amendment to the text was subsequently made.

After these debates, but prior to the adoption of the ARSIWA, the Court delivered its decision in *LaGrand*.[79] The case concerned the United

[73] Draft Articles, Art. 46.
[74] Crawford, Third Report, 24. The chairman agreed with this comment: ILC Ybk 2000/I, 23.
[75] ILC Ybk 2000/II(2), 26. See, e.g., the comments in ILC Ybk 2000/I, 12 (Pellet), 23 (Chairman). After the decision in *Avena*, Pellet stated that he 'had withdrawn his reservations about the fact that assurances and guarantees of non-repetition might be withheld', but he was adamant that assurances and guarantees of non-repetition were a form of satisfaction: ILC Ybk 2001/I, 239.
[76] ILC Ybk 2000/I, 28 (Crawford).
[77] See, e.g., ILC Ybk 2000/I, 15 (Gaja), 16 (Kamto), 20 (Hafner), 27 (Tomka).
[78] ILC Ybk 2000/I, 23 (Simma).
[79] *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:21 Page Number: 471

States' admitted failure to notify two arrested German nationals of their rights under Article 36(1)(b) of the Vienna Convention on Consular Relations. One was executed prior to the proceedings being filed, the other between the Provisional Measures decision and the decision on the merits. The United States submitted that the Court did not have jurisdiction to order assurances and guarantees of non-repetition. The Court disagreed, stating:

> The Court considers 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 [seeking assurances and guarantees of non-repetition].[80]

In relation to Germany's general demand for an assurance of non-repetition, the Court stated:

> The United States has presented an apology to Germany for this breach. The Court considers however 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.
>
> In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention.
>
> . . . The Court considers 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.[81]

In the ILC, Gaja, speaking as chairman of the Drafting Committee, explained:

> [T]he discussion in the Drafting Committee had understandably revolved around the interpretation that should be placed on the ruling . . . in [*LaGrand*]. Some members of the Committee had seen the Court's ruling as support for the

[80] Ibid., 485 (internal reference omitted).

[81] Ibid., 512–13. In relation to the more specific assurances sought by Germany, see ibid., 513–14, 514.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:21 Page Number: 472

retention of article 30, subparagraph (*b*), while others considered that the Court had not taken a clear position on the obligation to provide assurances and guarantees of non-repetition ... It had, however, been agreed that, while the decision in the *LaGrand* case was important, it was not the only basis on which the Committee should decide on the issue of assurances and guarantees of non-repetition. In the end, the Committee had decided to retain article 30, subparagraph (*b*), and article 48, paragraph 2 (*a*), on the grounds that the provisions were drafted with great flexibility and introduced a useful policy. In particular, the words 'if circumstances so required' clearly indicated that such guarantees and assurances did not form a necessary part of the legal consequences of all internationally wrongful acts. Some members of the Committee, however, had held that the provision lacked substantial roots in existing State practice and that there was no clear evidence of an emerging principle of international law in that direction.[82]

When President Guillaume visited the ILC he acknowledged that

the Court had definitely left some things unsaid and it had done so, in his view, because it considered the issue of non-repetition to be unimportant in the case at hand.[83]

The commentary to Article 30 does not suggest that Article 30(b) is merely progressive development: nonetheless, some have suggested that Article 30(b) is best viewed as such.[84] Gaja's comment that the provision was retained on the basis that it 'introduced a useful policy' could also suggest that conclusion. As noted by the ILC, there was state practice of assurances and guarantees of non-repetition being given outside the judicial context.[85] However, it is unclear whether these assurances and guarantees where given were based on a perceived legal obligation.[86] During the drafting process, only two states made comments critical of Article 30(b). Germany's criticism that '[s]ome doubt exists, however, as to whether the injured State has, under customary international law, the right to "guarantees of non-repetition"... To impose an obligation to guarantee non-repetition *in all cases* would certainly go beyond what State practice deems to be appropriate'[87] was answered by the change in the wording of Article 30(b) referred to above. The United States referred to 'article 30 *(b)* on assurances and guarantees of non-repetition,

[82] ILC Ybk, 2001/I, 239. [83] ILC Ybk 2001/I, 213.
[84] Barbier, in Crawford, Pellet and Olleson (2010) 551, 553; see also ILC Ybk 1993/I, 164 (Arangio-Ruiz); ILC Ybk 2000/I, 18 (Kamto).
[85] ILC Ybk, 2000/I, 18 (Crawford), 18 (Tomka), 20 (Hafner), 28 (Crawford).
[86] Higgins, in Crawford, Pellet and Olleson (2010) 537, 542; Barbier (2010), 553.
[87] ILC Ybk 1998/II(1), 145 (emphasis added).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:22 Page Number: 473

which it believes should be deleted as it reflects neither customary international law nor State practice'.[88] This comment was likely influenced by the pending decision in *LaGrand*. The vast majority of states did not comment on Article 30(b).[89]

Assurances and guarantees of non-repetition have been sought in a number of subsequent cases.[90] The Court has stated that such requests are 'undoubtedly admissible';[91] 'the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition'.[92] But in no decision since 2001 up to the time of writing has the Court held that a state was required to offer assurances and guarantees of repetition. In some cases it has held that there was nothing to indicate that the wrongful conduct would be repeated.[93] In two cases it has held that the conduct of the respondent state was sufficient to meet the request for assurances and guarantees of non-repetition. In *Armed Activities on the Territory of the Congo* it held that obligations assumed by Uganda under an agreement with the DRC and Rwanda to respect the sovereignty and territorial integrity of the DRC met the DRC's request for assurances and guarantees of non-repetition.[94] In *Avena* it held that what it said in respect of the United States' programme in *LaGrand* 'remains applicable, and therefore meets [the] request'.[95]

It is clear that the Court at least considers that it has the power to order assurances and guarantees of non-repetition. However, in none of the decisions in which assurances and guarantees of non-repetition have been sought has the Court identified the basis on which it was discussing

[88] ILC Ybk 2001/II(1), 57.

[89] There were comments from the Czech Republic, Mongolia, Uzbekistan, the Netherlands and the United Kingdom. See ILC Ybk 1998/II(1), 150–1; ILC Ybk 2001/II(1), 57.

[90] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Rep. 2002 p. 303; *Avena*, ICJ Rep. 2004 p. 12; *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, p. 43; *Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Rep. 2009 p. 213; *Pulp Mills*, ICJ Rep. 2010 p. 14; *Application of the Interim Accord of 13 September 1995 (former Yugoslav Republic of Macedonia v. Greece)*, ICJ, 5 December 2011; *Jurisdictional Immunities*, ICJ, 3 February 2012.

[91] *Cameroon* v. *Nigeria*, ICJ Rep. 2001 p. 466, 452.

[92] *Navigational Rights*, ICJ Rep. 2009 p. 213, 267; *Pulp Mills*, ICJ Rep. 2010 p. 14, 105.

[93] *Cameroon* v. *Nigeria*, ICJ Rep. 2001 p. 466, 452; *Bosnian Genocide*, ICJ 2007 p. 43, 235; *Navigational Rights*, ICJ Rep. 2009, p. 213, 267; *Interim Accord*, ICJ, 5 December 2011, §168; *Jurisdictional Immunities*, ICJ, 3 February 2012, §138.

[94] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005, p. 168, 256.

[95] *Avena*, ICJ Rep. 2004, p. 12, 69.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:22 Page Number: 474

the issue, referred to Article 30(b) or affirmed the existence of a free-standing obligation to offer assurances and guarantees of non-repetition. This is of little consequence for proceedings before the Court. But whether there exists a customary international law obligation to offer assurances and guarantees of non-repetition does have relevance for the resolution of disputes outside the judicial context.

It is true that a number of decisions of the Human Rights Committee have referred to the respondent state having an 'obligation to ensure that similar violations do not occur in the future'.[96] However, this obligation is sourced in Article 2 of the International Covenant on Civil and Political Rights.[97] Similarly, orders made by the Inter-American Court of Human Rights requiring states to ensure that violations are not repeated are based on Article 1 of the American Convention on Human Rights.[98]

There continue to be examples of states seeking assurances and guarantees of non-repetition outside the judicial context. When China alleged in 2009 that the United States had entered its exclusive economic zone in the South China Sea, a spokesman of the Chinese Defence Ministry stated: 'We demand the United States respect our legal interests and security concerns, and take effective measures to prevent a recurrence of such incidents.'[99] Similarly, when Japan alleged in 2011 that Chinese ships had entered its territorial waters, it demanded that China prevent a recurrence.[100]

Commentators are also divided over the status of the obligation to offer assurances and guarantees of non-repetition. According to Stern, 'one may entertain certain doubts as to the status of this obligation as a

[96] For example, *Judge* v. *Canada*, (2002) UN Doc. CCPR/C/78/D/829/1998; *Lobban* v. *Jamaica*, (2004) UN Doc. CCPR/C/80/D/797/1998; *Brough* v. *Australia*, (2006) UN Doc. CCPR/C/86/D/1184/2003; *Raihman* v. *Latvia*, (2010) UN Doc. CCPR/C/100/D/1621/2007. Such decisions are relied on, for example, by Barbier, in Barbier (2010), 555.

[97] 16 December 1966, 999 UNTS 171; Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, §17. See, e.g., *Raihman* v. *Latvia*, (2010) UN Doc. CCPR/C/100/D/1621/2007, §10. See also Higgins (2010), 542.

[98] 22 November 1969, 1144 UNTS 123; Higgins (2010), 543. See e.g. *Castillo Petruzzi* v. *Peru*, [1999] IACtHR 11.319, §222.

[99] 'US warships head for South China Sea', *Independent*, 13 March 2009, available at www.independent.co.uk/news/world/americas/us-warships-head-for-south-china-sea-1644484.html.

[100] 'Japan protests over China ships in disputed waters', Reuters, 24 August 2011, available at www.reuters.com/article/2011/08/24/us-japan-china-disputes-idUSTRE77N0R620110824.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:22 Page Number: 475

rule of positive law'. By contrast Barbier has stated that '[e]ven if caution is in order, it can without doubt be considered that guarantees of non-repetition are now part of the legal consequences of an internationally wrongful act.'[101] Even if there were considered to be a customary international law obligation to offer assurances and guarantees of non-repetition, the question still arises: what are the consequence of a failure to offer assurances and guarantees of non-repetition and what additional consequence would there be if an assurance or guarantee was not complied with?

14.4.2 The distinction between assurances and guarantees of non-repetition and reparation

Special Rapporteur Riphagen originally envisaged guarantees against repetition as a form of satisfaction.[102] Special Rapporteur Arangio-Ruiz was of the view that safeguards against repetition are a separate form of reparation,[103] and this view was reflected in the articles adopted on first reading.[104] The first reading commentary explained that '[u]nlike other forms of reparation which seek to reestablish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function. They furthermore presuppose a risk of repetition of the wrongful act ... [T]he injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily'.[105]

Whether assurances and guarantees are a form of satisfaction caused a marked division of opinion during the drafting of Article 30(b).[106] Although the ILC ultimately concluded that assurances and guarantees of non-repetition were better considered as an aspect of the continuation and repair of the legal relationship affected by the breach, there is nonetheless some overlap between assurances and guarantees of non-repetition and satisfaction in practice. The commentary to both Article 30 and Article 37, which deals with satisfaction, acknowledges that assurances and guarantees of non-repetition can constitute a form of satisfaction.[107]

[101] Stern, in Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 93, 104; Barbier (2010), 555.
[102] Riphagen, Second Report, ILC Ybk 1981/II(1), 101.
[103] Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 43.
[104] Draft Articles, Arts. 42(1), 46.
[105] Draft Articles Commentary, Art. 46, §§1–2.
[106] See e.g. ILC Ybk 2001/I, 212 (Pellet).
[107] ARSIWA Commentary, Art. 30, §11; ARSIWA Commentary, Art. 37, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:23 Page Number: 476

This is not merely an issue of classification, but an issue with practical consequences. If assurances and guarantees of non-repetition are purely a form of satisfaction they would only be available to the extent an injury cannot be made good by restitution or compensation.[108] If that were the case, a state other than an injured state would also not be able to seek assurances and guarantees of non-repetition in the collective interest.[109]

14.4.3 Appropriate assurances and guarantees

Whether assurances and guarantees of non-repetition are required will depend on the character of the obligation and of the breach and on whether there is a real risk of repetition.[110] This calls for a case-by-case analysis. The distinction between assurances of non-repetition and guarantees of non-repetition is that assurances are normally given verbally, whereas guarantees involve something more, such as the taking of preventive measures.[111] The commentary gives examples of assurances and guarantees of non-repetition sought in diplomatic practice from the turn of the twentieth century.[112]

In *LaGrand* the Court stated that where a foreign national was not advised of their rights under Article 36 and was 'subjected to prolonged detention or sentenced to severe penalties', as occurred with the individuals in question, an apology would not be sufficient.[113] The Court considered that the programme undertaken by the United States met Germany's request for a general assurance of non-repetition. In so holding, the Court suggests that what is required is the use of 'best efforts' to avoid repetition, as opposed to an assurance or guarantee that no violation will ever occur again: the 'programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it.'[114] In *Avena*, before reaffirming its conclusion in *LaGrand*, the Court observed:

> While it is a matter of concern that, even in the wake of the *LaGrand* Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law

[108] ARSIWA, Art. 37(1). [109] ARSIWA, Art. 48(2); Barbier (2010), 556–7.
[110] ARSIWA Commentary, Art. 30, §13. [111] ARSIWA Commentary, Art. 30, §12.
[112] ARSIWA Commentary, Art. 30, §§12–3. [113] *LaGrand*, ICJ Rep. 2001, p. 466, 512.
[114] Ibid., 513.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:23 Page Number: 477

enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national.[115]

In *LaGrand* the Court stated that if the situation arose again despite the United States' programme,

> 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. This obligation can be carried out in various ways. The choice of means must be left to the United States.[116]

It is unclear where this 'duty of the United States to address violations'[117] flows from. Higgins, writing extrajudicially, stated that it 'could be viewed either as a reiteration of a primary obligation, or as a remedy for breach'.[118] The judgment in *Avena* makes it clear that this duty is not a consequence of the obligation to offer assurances and guarantees of non-repetition, but either a component of the obligation under Article 36(2) or required by way of reparation for a breach of Article 36(1). The Court referred to the 'review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1'.[119] Thus the Court's statement that the 'choice of means must be left to the United States' does not reflect the character of assurances and guarantees that the Court can award. These decisions also suggest that it is not particularly onerous to meet a request for assurances and guarantees of non-repetition.

In *Armed Activities on the Territory of the Congo*, the DRC requested that Uganda provide assurances and guarantees of non-repetition of the wrongful acts complained of, which included violations of the principle of non-use of force and the principle of non-intervention. The DRC alleged that assurances and guarantees of non-repetition were justified on the basis of threats made, including an alleged statement by the then Minister of Foreign Affairs that 'the withdrawal of our troops from the Democratic Republic of the Congo does not mean that we will not return there to defend our security!'.[120] The DRC requested 'a solemn

[115] *Avena*, ICJ Rep. 2004, p. 12, 68. [116] *LaGrand*, ICJ Rep. 2001, p. 466, 514.
[117] Ibid., 514.
[118] R. Higgins, 'The International Court of Justice: Selected Issues of State Responsibility', in Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 271, 278 n. 48.
[119] *Avena*, ICJ Rep. 2004, p. 12, 70. See also ibid., 72.
[120] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005, p. 168, 255.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:23 Page Number: 478

declaration that [Uganda] will in future refrain from pursuing a policy that violates the sovereignty of the Democratic Republic of the Congo and the rights of its population' and 'demands that specific instructions to that effect be given by the Ugandan authorities to their agents'.[121] The Court considered that an agreement entered into between the DRC, Uganda and Rwanda after proceedings were filed with the Court which, *inter alia*, emphasized 'the need to ensure that the principles of good neighbourliness, respect for the sovereignty, territorial integrity, and non-interference in the internal affairs of sovereign states are respected, particularly in the region' met the DRC's request for assurances and guarantees of non-repetition.[122] The Court reasoned:

> [I]f a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law.[123]

This is reflective of a broader tendency on the part of the Court to consider that the existence of the international obligation breached and the Court's declaration that a state's previous conduct was a breach of that obligation is a sufficient protection against repetition. In *Cameroon* v. *Nigeria*, the Court stated:

> [T]he Judgment delivered today specifies in definitive and mandatory terms the land and maritime boundary between the two States. With all uncertainty dispelled in this regard, the Court cannot envisage a situation where either Party, after withdrawing its military and police forces and administration from the other's territory, would fail to respect the territorial sovereignty of that Party.[124]

Similarly, in *Germany* v. *Italy* the Court stated:

> [A]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure

[121] Ibid. [122] Ibid., 255–6. [123] Ibid., 256.
[124] *Cameroon* v. *Nigeria*, ICJ Rep. 2001, p. 466, 452.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 14 Title Name: CRAWFORD
Date:18/3/13 Time:12:35:25 Page Number: 479

that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.[125]

But *Avena* was an example of '[s]ome countries [that] simply apologized each time and then went on to continue their violations in an almost routine fashion'.[126]

The reluctance of the Court to order assurances and guarantees of non-repetition is evident from extrajudicial writings of Rosalyn Higgins:

> [T]hese remedies have the 'characteristics of being future-looking' and concerned with 'other potential breaches'.
>
> This raises, it seems to me, major evidentiary problems for a court, which is told not that a specific violation of an 'obligation' is continuing, but rather that a breach has occurred in the past and it is highly likely more such breaches will occur. But what evidence is sufficient to show this? From whom should it emanate? By when, in the timetable of the litigation, should it be produced and to what tests of examination should it be subjected? Must it relate to the nationals of the applicant State in the case in issue? And can all of this be 'piggy-backed' on to the initial case in which the applicant claims an unsatisfied violation against itself and its national?
>
> The problems of jurisdiction, of quality of evidence and of sound administration of judicial proceedings, suggest to this writer that assurances and guarantees should be approached with the greatest caution.[127]

[125] *Jurisdictional Immunities*, ICJ, 3 February 2012, §138. See also *Interim Accord*, ICJ, 5 December 2011, §168.

[126] ILC Ybk 2000/I, 23 (Simma).

[127] Higgins (2010), 543.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:39 Page Number: 480

15 Reparation

15.1 The basic principle

The classic general statement of the consequences of an internationally wrongful act was made by the Permanent Court in the *Chorzów Factory* case, in the following words: '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'[1] The *Chorzów Factory* case was brought by Germany against Poland in relation to injury suffered by two Germany companies when Poland took possession of the factory in question. The Permanent Court was using the term 'reparation' in its most general sense.[2] It was rejecting Poland's argument that the Court's jurisdiction to interpret and apply the relevant treaty did not entail jurisdiction to deal with disputes over the form and amount of reparation to be made.[3]

In a subsequent phase of the same case, the Permanent Court went on to specify the content of the obligation to make reparation in more detail:

> 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

[1] *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9, 21.
[2] Crawford, Third Report, 17.
[3] The International Court went on to state that '[r]eparation 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': *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9, 21. On the issue of jurisdiction to award reparation, see Chapter 19. By this stage of the dispute, Germany was already no longer seeking the return of the factory in question or of the property seized with it: *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9, 17.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:39 Page Number: 481

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.[4]

This definition of the obligation to make reparation, emphasizing its function of re-establishing the *status quo ante*, has been reaffirmed on numerous occasions, by the International Court,[5] investment tribunals,[6] international human rights courts and committees,[7] and other bodies.[8]

15.2 'Full' reparation

15.2.1 The position taken in the ARSIWA

During the drafting of the ARSIWA, members of the ILC raised concerns about the obligation to provide 'full' reparation. These included the objection that what is required is not 'full' reparation but 'as much reparation as possible' and the objection that in determining reparation due, a responsible state's ability to pay should be taken into account.[9] On the other hand, there was a feeling that as the expression 'full reparation' had appeared in the Draft Articles and had not been criticized to a significant extent by governments, the expression should be retained.[10] The Drafting Committee ultimately decided not to include any term qualifying the expression 'full reparation'. In explanation, it merely stated that 'the Committee had decided to retain the wording of the article adopted on first reading as a statement of the general principle of reparation'.[11] It was nonetheless clearly accepted that the obligation to provide 'full reparation' only requires the elimination of the

[4] *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 47.

[5] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 232; *Ahmadou Sadio Diallo (Guinea v. DRC)*, ICJ, 30 November 2010.

[6] See, e.g., *CME* v. *Czech Republic*, Partial Award, (2001) 9 ICSID Reports 121, 239.

[7] See, e.g., *Papamichalopoulos* v. *Greece*, [1995] ECtHR 14556/89; *Velásquez Rodríguez case*, [1989] IACtHR Ser. C No. 7.

[8] See, e.g., *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 524; *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 651. ARSIWA, Pt II, which contains the articles dealing with reparation, applies only in relation to obligations owed to states and so does not apply to situations in which the responsibility of a state is invoked by a non-state entity, such as pursuant to procedures available under human rights treaties and investment protection agreements. However, in many of these cases, the international law of state responsibility concerning reparation is nonetheless applied by analogy.

[9] ILC Ybk 2000/II(2), 27.

[10] Ibid.

[11] ILC Ybk 2000/I, 388 (Chairman of the Drafting Committee).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:39 Page Number: 482

consequences of a wrongful act 'as far as possible', as stated in the *Chorzów Factory* case.[12]

Concerns about the potential inability of states to provide reparation due did, however, influence the wording of several other provisions of the ARSIWA. Draft Article 42(3) had stated that '[i]n no case shall reparation result in depriving the population of a State of its own means of subsistence'. Some members of the ILC considered that the provision was of critical importance for developing states. However, both ILC members and governments commented that such a provision would be open to abuse.[13] Importantly, there was no historical example which supported the retention of the provision. Instances in which compensation payments had been delayed could be explained on the basis of the defences of necessity or distress and in other instances full reparation had been waived.[14] The issue was better addressed in the individual provisions dealing with the different forms of reparation and in the context of countermeasures.[15]

This change was made on the second reading. The ARSIWA state that restitution is only required to the extent that it 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation',[16] and that satisfaction 'shall not be out of proportion to the injury'.[17] The main concern was the potentially crippling effect of compensation payments.[18] In the ARSIWA, the quantum of compensation payable is limited by the requirement of causation (discussed in further detail below).[19] However, situations could arise in which crippling compensation payments would not be excluded by this requirement.[20] Article 50, dealing with countermeasures, to some extent addresses this concern, stating that '[c]ountermeasures shall not affect . . . obligations for the protection of fundamental human rights'.[21] The commentary refers to the ICCPR and ICESCR and the fact that under these instruments '[i]n no case may a people be deprived of its own

[12] ILC Ybk 2000/II(2), 29; *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 47. See also ARSIWA Commentary, Art. 31, §2.
[13] ILC Ybk 2000/II(2), 27. [14] Crawford, Third Report, 21; ILC Ybk 2000/II(2), 28.
[15] ILC Ybk 2000/II(2), 25; ILC Ybk 2000/I, 13 (Simma). The Special Rapporteur also stated that '[e]specially given concerns about limiting to a reasonable extent the burden of reparation, [a principle of mitigation of damage] should also be included in the proposed article': Crawford, Third Report, ILC Ybk 2000/II(1), 62.
[16] ARSIWA, Art. 35(b). [17] ARSIWA, Art. 37(3).
[18] Crawford, Third Report, 20–1; ILC Ybk 2000/II(2), 39.
[19] ARSIWA Commentary, Art. 34, §5. [20] ILC Ybk 2000/I, 24 (Crawford).
[21] ARSIWA, Art. 50(1)(b).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:40 Page Number: 483

means of subsistence'.[22] While this provision could protect a state from countermeasures were it unable to make a compensation payment, and the defences of necessity and duress could entitle a state to delay payment of compensation, neither of these considerations can affect the quantum of compensation due, consistent with previous state practice.

15.2.2 Subsequent case law

The Eritrea–Ethiopia Claims Commission appeared to take the view that the potentially crippling effect of a compensation payment could be considered in determining its quantum. The Claims Commission ultimately held that it did not need to decide the issue,[23] presumably because it awarded a net payment of only US$11 million to Ethiopia.[24] Nonetheless, it addressed the issue at some length. It referred to the ILC's deletion of Draft Article 42(3) but stated:

> Awards of compensation of the magnitude sought by each Party would impose crippling burdens upon the economies and populations of the other, notwithstanding the obligations both have accepted under the Covenants. Ethiopia urged the Commission not to be concerned with the impact of very large adverse awards on the affected country's population, because the obligation to pay would fall on the government, not the people. The Commission does not agree. Huge awards of compensation by their nature would require large diversions of national resources from the paying country – and its citizens needing health care, education and other public services – to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations.

Article 5(13) of the December 2000 Agreement directs that, '[i]n considering claims, the Commission shall apply relevant rules of international law,' which include rules of human rights law applicable as between the Parties. Accordingly, the Commission could not disregard the possibility that large damages awards might exceed the capacity of the responsible State to pay or result in serious

[22] ARSIWA Commentary, Art. 50, §7; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Art. 1(2); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Art. 1(2).

[23] *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 524; *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 651.

[24] *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 630; *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 770. Ethiopia's Group Number One damages claims amounted to approximately US$7.4 billion and its Group Number Two damages claims amounted to approximately US$6.9 billion, which the Claims Commission determined was more than three times Eritrea's estimated total national product in 2005. Eritrea's claims against Ethiopia amounted to approximately US$6 billion: *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 522.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:40 Page Number: 484

injury to its population if such damages were paid. It thus considered whether it was necessary to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs.[25]

The Claims Commission relied on limited practice to support the proposition that 'the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations'.[26] It relied, for example, on the Treaty of Peace with Japan[27] which, as explained in the ILC debates, was a situation in which full reparation was waived and which does not provide guidance regarding the general principles to be used in determining the quantum of compensation owed.[28]

The UN Compensation Commission provides an example of a situation in which the principle of full reparation has been given effect to despite financial hurdles. In Resolution 687, the Security Council decided to create a commission to deal with claims resulting from Iraq's invasion and occupation of Kuwait, as well as a fund to pay compensation payments held to be due by the commission.[29] The resolution stated that the Secretary-General was to recommend

> mechanisms for determining the appropriate level of Iraq's contribution to the Fund, based on a percentage of the value of its exports of petroleum and petroleum products, not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy . . .[30]

While Iraq's ability to pay was considered in establishing the Compensation Commission, it only affected the method by which compensation

[25] *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 523–4; *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 650–1.

[26] *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 523 n. 11, and *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 651 n. 11, both citing *Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability*, (2007) 26 RIAA 10, 17–19.

[27] Treaty of Peace with Japan, 8 September 1951, 136 UNTS 45.

[28] ILC Ybk 2000/II(2), 28. See also Treaty of Peace with Japan, 8 September 1951, 136 UNTS 45, Art. 14(b).

[29] SC Res. 687 (1991), §18. See also SC Res. 692 (1991), §3.

[30] SC Res. 687 (1991), §19. For the Secretary-General's recommendations, see UN Doc. S/22559 (1991), UN Doc. S/22661 (1991).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:40 Page Number: 485

payments were to be met; it did not affect Iraq's obligation to provide full reparation.[31] Since 2003, the percentage that Iraq contributes to the UN Compensation Commission Compensation Fund has been set at 5 per cent, though it has been as high as 30 per cent in the past.[32] As at July 2012, the Compensation Commission had made US$37.7 billion available for distribution to successful claimants.[33]

15.3 The notion of injury

15.3.1 Injury defined

Although the term 'damage' appeared in the Draft Articles of 1996 under the rubrics of 'compensation' and 'satisfaction', they contained no comprehensive definition of the term.[34] In 2000, the Drafting Committee proposed such a definition in a provision which read:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.[35]

It is not correct to say that injury 'consists' of damage. While damage may sometimes be the gist of injury, that is, the legal wrong done to another arising from a breach of an obligation, in other cases it may not be, and it is also possible for there to be damage without any legal wrong (*damnum sine iniuria*).[36] This is reflected in the final wording of Article 31, which states that '[i]njury *includes* any damage, whether material or moral, caused by the internationally wrongful act of a State'.[37] The formulation is perhaps inelegant, but criticisms that no difference is made between the concepts of injury and damage are misplaced.[38]

The commentary to Article 31 reaffirms that there is no general requirement of damage as a necessary element of an internationally

[31] On the challenges of mass claims procedures generally, see Chapter 20.
[32] SC Res. 986 (1995), §8(c); SC Res. 1483 (2003), §21. See also Holtzmann and Kristjánsdóttir (eds.), *International Mass Claims Processes: Legal and Practical Perspectives* (2007), 358–9; SC Res. 705 (1991), §2; SC Res. 1330 (2000), §12. This method of funding the compensation payments has been a source of tension and problems in the early life of the Claims Commission and ultimately led to the establishment of the 'oil-for-food' programme: Holtzmann and Kristjánsdóttir (2007), 358–9.
[33] UNCC, Press Release, 26 July 2012, available at www.uncc.ch/pressrel.htm.
[34] Draft Articles, Arts. 44(2), 45(1). [35] ILC Ybk 2000/II(2), 68.
[36] Crawford, Fourth Report, 9. [37] ARSIWA, Art. 31(2) (emphasis added).
[38] See e.g. Stern (2010) 563, 569.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:41 Page Number: 486

wrongful act.[39] Rather, the precise nature of damage, if any, required for responsibility to arise depends on the primary obligation in question. For example, some environmental conventions require 'significant' damage.[40] In the WTO system, when an obligation under one of the covered agreements is infringed, there is presumed to be damage (a 'nullification or impairment' of benefits).[41] In the light of the wide range of primary obligations, it was not possible for the ILC to formulate a more specific provision defining injury. In the present state of international law, it would be wrong to presume any specific definition of 'injury' or 'damage' which is applicable across the board. The various primary obligations of states do not derogate as a *lex specialis* from a general rule about injury or damage. Rather, each obligation is tailored to meet the particular requirements of the context.

Beyond meeting any requirement of damage contained in a primary obligation, whether a wrongful act causes damage, and its character, is highly material in determining the quantum and form of reparation due. For example, were state A to take wrongful possession of state B's ship, restitution would be the appropriate remedy. If the ship was damaged in the process, compensation would also be appropriate, and the quantum of compensation due would depend on the extent of the damage. If the ship was seriously damaged, state B might elect compensation equal to the value of the ship and forgo restitution.

15.3.2 Material and moral injury

Article 31 defines injury to include 'damage, whether material or moral'. The commentary explains that the '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'.[42]

Material damage refers to damage to property or other substantive interests of a state and its nationals which is assessable in financial terms. Moral damage encompasses two distinct concepts: moral damage to a state and moral damage to a state's nationals. Moral damage to

[39] ARSIWA Commentary, Art. 31, §6. See further Chapter 2.
[40] For example, the Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, GA Res. 51/229 (1997) (not yet in force), Art. 7.
[41] Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3(8).
[42] ARSIWA Commentary, Art. 31, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:41 Page Number: 487

individuals includes such things as individual pain and suffering, loss of loved ones or the personal affront associated with an intrusion into one's home or private life. Moral damage to a state refers to injury which is not financially assessable but amounts to an affront to the state, for example a violation of its sovereignty or territorial integrity.[43]

There was concern among members of the ILC regarding the use of the expression 'moral damage', given the differing conceptions of 'moral damage' in various national legal systems. There are obvious difficulties in using terms drawn from national law which have not developed autonomously in international law. This is true not only due to the differing conceptions of 'moral damage' but also because 'moral damage' in domestic law is concerned solely with moral damage to individuals.[44] Despite these concerns, use of the term was considered necessary to convey the broad meaning of 'injury'.[45] So long as the kinds of non-material loss which may be compensable are not forced into any single theory of moral damage, it is appropriate to use the term.[46]

15.3.3 'Legal injury'?

An issue not addressed in the ARSIWA or the Commentary is whether 'injury' includes a notion of 'legal injury', meaning injury arising from the mere fact of the breach of an international obligation. When the issue was raised during the final adoption of the commentary, Simma stated that 'a lack of consensus on th[e] issue seemed to have been "papered over" at some stage'.[47] The issue was not able to be resolved and so the mention of legal injury was deleted from the commentary.[48] In the event, Simma was correct: Article 31 arguably does little more than paper over some difficult issues.

But the better view is that no notion of 'legal injury' is included within the Article 31 concept of injury, for two reasons. First, the forms of reparation available in the ARSIWA (restitution, compensation and satisfaction) address material and moral damage only.[49] At times, satisfaction has been described as being available for 'non-material' injury, which could be considered broad enough to include 'legal injury'.[50] However, the position taken in the ARSIWA is clearly that satisfaction is available to make good moral damage and not to remedy the mere

[43] ARSIWA Commentary, Art. 37, §§3–4. [44] Crawford, Fourth Report, 9.
[45] ILC Ybk 2000/I, 388 (Chairman of the Drafting Committee).
[46] Crawford, Fourth Report, 9. [47] ILC Ybk 2001/I, 264 (Simma). [48] Ibid., 264–5.
[49] ARSIWA Commentary, Art. 31, §5; ibid., Art. 36, §1.
[50] E.g., Crawford, Third Report, 52. See also *Rainbow Warrior*, (1990) 20 RIAA 215, 272–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:41 Page Number: 488

breach of an international obligation. As is stated in the commentary, satisfaction is 'rather exceptional' and 'the remedy for those injuries, not financially assessable, which amount to an affront to the State'.[51] It would not be logical to require 'full reparation for ... injury' including 'legal injury' where none of the available forms of reparation can address that type of damage.[52] Second, if injury did include 'legal injury' due to the mere fact of breach, then what the ARSIWA defines as a 'State other than an injured State' would suffer 'injury', a terminological inconsistency. This point was made by the United Kingdom, which stated:

> The Chairman of the Drafting Committee has stated that '"[m]oral" damage could be taken to include not only pain and suffering, but also the broader notion of injury, which some might call "legal injury" ... to States'. It is not clear what is meant by 'legal injury', but it is possible that the term may be understood to include that type of legal injury which is suffered by each party to a treaty by virtue only of the fact that the treaty is violated by another party. Such an interpretation would entail a conflation of the categories of 'injured State' (draft art. 43) and 'interested State' (draft art. 49) ... [I]f the distinction between injured and interested States is to be retained, draft article 31 will need to be re-examined in the light of the definition of the 'injured State' in draft article 43, and in the light of the definition of damage implicit in draft article 37.[53]

The failure of the ILC to recognize 'legal injury' within the Article 31 concept of injury has been criticized by some. For example, it has been said:

> No remedy is, then, provided for breaches of international obligations where no material or moral damage has occurred, so the somewhat paradoxical conclusion would be that, after directly announcing in Article 1 that injury is not a necessary condition to generate responsibility, the subsequent articles inexorably require injury (material or moral) in order for responsibility to arise. That is equivalent to saying that there is no responsibility without injury (material or moral), which flies in the face of Article 1 ...[54]

[51] ARSIWA Commentary, Art. 37, §§1, 3. See also ibid., Art. 31, §5.

[52] See also Barboza, in Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 7, 9.

[53] ILC Ybk 2001/II(1), 58–9. See also ILC Ybk 2000/II(2), 32: 'The concept of damage was also considered indispensable by some members if the essential distinction was to be drawn between a State suffering direct injury on the basis of which it could invoke article [31], and one that, in the framework of *erga omnes* obligations or as a member of the international community, merely had a legal interest in cessation of the internationally wrongful act.'

[54] Barboza (2005), 9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:42 Page Number: 489

This is not correct. The absence of material or moral damage does not mean that no responsibility arises. It merely means that there is no damage for which reparation is due. Responsibility still arises where there is only 'legal injury', but the consequences of such responsibility are limited to the obligation of cessation and the provision of assurances and guarantees of non-repetition, if appropriate.[55]

Under Article 48, a 'State other than an injured State' is entitled to invoke the responsibility of a responsible state if: (i) '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'[56] (an obligation *erga omnes partes*), or (ii) 'the obligation breached is owed to the international community as a whole'[57] (an obligation *erga omnes*). Several commentators have suggested that 'State[s] other than an injured State' suffer 'legal injury' where an obligation *erga omnes* or *erga omnes partes* is breached. Thus Wyler and Papaux state:

> From the point of view of responsibility, any breach of an 'integral' obligation creates a legal injury to every State in the international community ... The fact that [Article 48] may in certain respects be problematic – in particular due to the distinction drawn between the categories of 'injured States' and 'States other than an injured State' ... – does not affect, so it seems, the reality of the legal injury suffered by *all* States.[58]

Stern states that 'all breaches of international law create a legal injury suffered by those to whom the obligation breached is owed (whether a single State, a group of States or the international community as a whole)'.[59] Even though one might take issue with describing the effect on 'State[s] other than an injured State' as 'injury', such states clearly are legally affected by and interested in breaches of obligations *erga omnes* and *erga omnes partes*.[60] Pursuant to Article 48(2)(a), such states may seek cessation and assurances and guarantees of non-repetition in their own interest (or rather in the interest of the group or the international community).

Such breaches should not be referred to as causing 'legal injury'. Although a convenient shorthand, it is accurate to say in full that what is at issue is the breach of an obligation which has not caused material or

[55] ARSIWA, Art. 30. [56] ARSIWA, Art. 48(1)(a). [57] ARSIWA, Art. 48(1)(b).
[58] Wyler and Papaux, in Crawford, Pellet and Olleson (2010) 623, 627 (emphasis in original).
[59] Stern, in Crawford, Pellet and Olleson (2010) 193, 198.
[60] See Chapter 11, and especially the discussion of *Belgium* v. *Senegal*, ICJ, 20 July 2012.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:42 Page Number: 490

moral damage. Stern, for one, argues that the terminology 'legal injury' is appropriate and that 'State[s] other than an injured State' should in fact also be considered 'injured States'. She argues:

> It is at the least curious that some States may invoke the responsibility of another State even if they are not injured. If a State is the beneficiary of an obligation which is violated, it is difficult to see why it should not be considered to be an injured State ... [I]t seems that all States able to invoke international responsibility should be considered to be injured States; if that is not the case, what is the justification for the fact that they may have a cause of action against the author of the internationally wrongful act?[61]

This use of the word 'injury' conflicts with its natural meaning: harm, material or moral, suffered by the victim as obligee or beneficiary of the obligation breached.[62] More importantly, it is not correct to say that only a state which is injured may invoke the responsibility of a responsible state. That view is redolent of the outdated bilateral conception of relations between states. Such an understanding of interstate relations is captured in Special Rapporteur Ago's statements, rooted in earlier theories of responsibility, especially that of Anzilotti, that there is always a 'correlation between a legal obligation on the one hand and a subjective right on the other' and that it is 'perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others'.[63]

International law was slow to develop a notion of 'public interest standing' in areas where the law does not have as its purpose the creation of synallagmatic rights and obligations.[64] This can be seen from the International Court's decision in the second phase of the *South West Africa* cases. The Court there held, on the casting vote of the president, that Ethiopia and Liberia's claim regarding South Africa's administration of South West Africa (now Namibia) was inadmissible. The ostensible reason for this decision was that the claim did not involve subjective rights of the claimant states.[65] In the Court's subsequent

[61] Stern (2010) 193, 196–7. Stern still suggests that as 'injured States', what are now described as 'State[s] other than an injured State' would still only be entitled to invoke the obligation of cessation and the obligation to provide assurances and guarantees of non-repetition: ibid., 198–200.

[62] Crawford, (2002) 96 AJIL 874, 881.

[63] Ago, Second Report, ILC Ybk 1970/II, 192.

[64] See further Crawford, in Andenas (ed.), 2 *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000) 23, 24.

[65] *South West Africa,* Second Phase, ICJ Rep. 1966 p. 6, 28, 51. See further Crawford (2000), 24–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:42 Page Number: 491

'apology' in the *Barcelona Traction* case,[66] it recognized the existence of legal relationships beyond traditional bilateral relations. In an often cited paragraph, the Court drew a clear distinction between the individual rights of states and the legal interests of other states. It stated 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*.[67]

While the interpretation of the Court's judgment raises certain questions,[68] it is inappropriate to identify for all purposes responsibility with the subjective right of an injured state.[69] In the *South West Africa* cases, Ethiopia and Liberia were not themselves the beneficiaries of the right they sought to invoke. It was the subjective right of the people of South West Africa to have the territory administered on their behalf and in their interest which was at stake.[70] But this does not mean that Ethiopia and Liberia did not have what common lawyers call 'standing'.[71] What it does mean is that the legal relations between South Africa, the people of South West Africa and the claimant states (and generally the relations between states in the context of obligations of a collective or communitarian character) cannot be reduced to a bilateral form. It is necessary to distinguish between the primary beneficiary of an obligation (the right-holder directly affected by a breach of an international obligation) and those states with a legal interest in compliance with the obligation, irrespective of how or whether the breach has affected them, and which act in the broader public interest. According to the ARSIWA, it is only the former which are injured.[72] The distinction is both comprehensible and useful, whereas the portmanteau use of the term 'injury' confuses and obscures.

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[66] Tams (2005), xiii.
[67] *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep. 1970 p. 3, 32.
[68] See further Crawford (2000), 26–7. [69] See Crawford, (2001) 8 IJGLS 303, 319–21.
[70] Crawford, Third Report, 29–30. [71] See also Tams (2005), 196–7.
[72] See Chapter 11 for a discussion of how this is reflected in the ILC's rejection of Draft Articles, Art. 40 in favour of ARSIWA, Art. 42.

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:43 Page Number: 492

15.4 Questions of causation

15.4.1 An expanded rubric

Article 31(1) provides that a state is only under an obligation to make full reparation for injury 'caused' by its internationally wrongful act. The commentary explains that the character of the causal connection required is expressed at this general level on the ground that '[v]arious 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 . . . [T]he requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.'[73] The inquiry into whether injury is 'caused' by a wrongful act is not limited to an inquiry into factual causality, which is a necessary but not sufficient condition for reparation. The allocation of injury to a wrongful act is in principle a legal process. The inquiry therefore also includes consideration of whether injury is too 'remote' (or excluded based on criteria variously expressed in terms of lack of 'directness', 'foreseeability' or 'proximity').[74]

The ARSIWA have been criticized for not addressing the requirement of causation in more detail. For example, Stern states:

> [T]he most that can be said is that the ILC is particularly silent on causation. The only assertion is that the injury can only be repaired if it is 'caused by the internationally wrongful act'. Nothing more. It is therefore left to States and judges to give some content to the causal link which is necessary for international responsibility to arise.[75]

The ILC justified the fact that the issue of causal link has not been dealt with by saying that '[t]he need for a causal link was usually stated in primary rules'. Nevertheless, it is clear that this is not the case and that, even if in certain cases the primary rule gives rise to some causal link problems, it cannot be the same causation as the one which arises when the primary

[73] ARSIWA Commentary, Art. 31, §10.

[74] Ibid. For example, the UNCC held Iraq responsible for 'direct' loss: SC Res. 687 (1991), §16; the tribunal in the *Trail Smelter Case* held certain damage to be 'too indirect, remote, and uncertain': *Trail Smelter Case (United States, Canada)*, (1938 and 1941) 3 RIAA 1905, 1931; the US–Germany Mixed Claims Commission considered whether damage was a 'loss attributable to Germany's act as a proximate cause': Administrative Decision No. 2 (1923) 7 RIAA 23, 30. See further the cases cited in the footnotes to ARSIWA Commentary, Art. 31, §10. For a comparative account see Hart and Honoré, *Causation in the Law* (2nd edn, 1985).

[75] Despite the reference to 'to the causal link which is necessary for international responsibility to arise', Stern is discussing the causal link which is necessary between an internationally wrongful act and harm or damage.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:43 Page Number: 493

rule is breached. It is regrettable that the ILC did not clarify the difficult issues relating to the causal link.[76]

Although the Drafting Committee did state that '[t]he need for a causal link was usually stated in primary rules', the reason why the requirement of causation was not elaborated in more detail was because it is not possible to devise more specific criteria that are applicable across the wide range of primary obligations. As the Drafting Committee stated in the sentence immediately before the one quoted by Stern,

> The Drafting Committee had considered a number of suggestions for qualifying that causal link, but, in the end, it had taken the view that, since the requirements of a causal link were not necessarily the same in relation to every breach of an international obligation, it would not be prudent or even accurate to use a qualifier.[77]

This is undeniably correct. Shelton recognizes that '[c]ausation is a complex issue in every legal system, where the extent of liability for remote events and the consequences of intervening causes may vary considerably from one area of the law to another'.[78] She adds that:

> [a] general statement of obligation to make reparation for harm caused masks many difficult legal issues that probably could not be adequately answered by a single set of articles, because the principles are intended to apply to every breach of an international obligation regardless of the source of the obligation or nature of the breach.[79]

The Eritrea–Ethiopia Claims Commission sought to articulate a more specific causation requirement. It concluded:

> [T]he Commission concludes that the necessary connection is best characterized through the commonly used nomenclature of 'proximate cause.' In assessing whether this test is met, and whether the chain or causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity. Accordingly, it will be given considerable weight in assessing whether particular damages are compensable.[80]

[76] Stern (2010) 563, 569–70.
[77] ILC Ybk 2000(1), 388. See also Crawford, Third Report, 19; ARSIWA Commentary, Art. 31, §10.
[78] Shelton, (2002) 96 AJIL 833, 846. [79] Ibid., 833 n. 2.
[80] *Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability*, (2007) 26 RIAA 10, 15.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:44 Page Number: 494

Although containing an additional adjective, the Claims Commission's formulation of the causation requirement does not add anything beyond the meaning of 'caused' elaborated by the ILC in the commentary. The generic character of the Claims Commission's chosen formulation is indicated by the fact that it was able to apply it in relation to all the various violations of international law it had to consider. It seems that the Claims Commission itself attached relatively little importance to its chosen formulation. It acknowledged that 'in many situations, the choice of verbal formula to describe the necessary degree of connection will result in no difference in outcomes',[81] and this is as true of 'proximate cause' as it is of other phrases.

15.4.2 Mitigation of damage and reparation

An integral aspect of causality is the question of mitigation of damage.[82] The commentary explains that '[a]lthough often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility'.[83] It was for this reason that a provision on the issue of mitigation of damage was not included in the ARSIWA, although the issue is addressed in the commentary.[84] The commentary states that 'a failure to mitigate by the injured party may preclude recovery to that extent'.[85] In other words, damage which occurs due to an injured state's failure to act reasonably to mitigate its loss is not 'caused' by the responsible state's wrongful conduct. This is true even for a wholly innocent victim of wrongful conduct.[86] As is stated by the International Court in the *Gabčíkovo-Nagymaros* case,

> Slovakia ... 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.[87]

[81] Ibid., 15 (para 14). [82] Wittich, 'Compensation', (2008) MPEPIL, §20.
[83] ARSIWA Commentary, Art. 31, §11.
[84] ILC Ybk 2000/I, 392 (Chairman of the Drafting Committee).
[85] ARSIWA Commentary, Art. 31, §11. [86] Ibid.
[87] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 55. See also the *Naulilaa* case, in which Portugal's failure to quell an uprising caused by Germany was taken into consideration in determining the extent of the damage in respect of which compensation was due: *Responsabilité de l'Allemagne en raison des actes commis*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:44 Page Number: 495

The point is that the wrongfulness of conduct is not precluded merely because it is taken for the purpose of mitigating damage. But the Court can be seen to have accepted that the failure of an injured party to mitigate damage may preclude recovery to that extent.[88]

The principle has since been recognized by the Eritrea–Ethiopia Claims Commission. Ethiopia alleged that Eritrea failed to mitigate the damage it suffered as it expended money on a temporary hospital, rather than building a new one from the outset.[89] The Claims Commission rejected this argument on the facts, stating that 'the Commission cannot fault Eritrea for spending ERN 2 million to provide health services urgently needed by a large community'.[90]

15.4.3 Concurrent causes

15.4.3.1 The applicable principles

The issue of concurrent causes was raised by Special Rapporteur Arangio-Ruiz. He proposed a provision which read: 'Whenever the damage in question is partly due to causes other than the internationally wrongful act ... the compensation shall be reduced accordingly.'[91] This position was rejected by the Drafting Committee, which stated that 'the wrongdoing State should be liable for all the harm caused, irrespective of the role which external causes might have played in aggravating the harm. In its opinion, that type of situation did not call for a specific provision ... and should simply be covered in the commentary'.[92] Despite this, the Draft Articles Commentary later adopted stated:

> Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases ... to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects ...[93]

postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne), (1930) 2 RIAA 1035, 1076.

88 Higgins (2010), 540.

89 *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 554.

90 Ibid., 555.

91 Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 56.

92 ILC Ybk 1992/I, 217 (Chairman of the Drafting Committee). As discussed below, the Drafting Committee did not reject the relevance of the contributory negligence of the injured State: ibid., 217 (Chairman of the Drafting Committee).

93 Draft Articles Commentary, Art. 44, §13.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:44 Page Number: 496

The ARSIWA now clearly take the position advocated by the Drafting Committee. The commentary states that '[a]lthough, 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.'[94]

The position taken in the ARSIWA is borne out by the case law,[95] for example the *Corfu Channel* case. That case concerned Albania's failure to warn the United Kingdom of the presence of mines in Albania's territorial waters, which resulted in damage to the United Kingdom's ships. Notwithstanding the fact that the mines had been laid by a third state, the United Kingdom was able to recover the full amount of its claim from Albania.[96] Similarly, when laying down the general principles to govern the recovery of compensation before the UN Compensation Commission, the Governing Council stated that '[w]here, for example, the full extent of the loss, damage or injury arose as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it should be compensated notwithstanding the fact that it may also be attributable to the trade embargo and related measures.'[97] The position taken in the ARSIWA is consistent with the way the issue of concurrent causes is addressed in national legal systems.[98]

The commentary states that the same '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'.[99] The *Tehran Hostages* case provides an example of the former situation. The International Court held that while the continued occupation to the embassy was attributable to Iran,[100] and Iran was responsible for failing to protect the embassy and its personnel,[101] the students' initial seizure of the premises was not attributable to Iran.[102] But there was no reduction in the reparation due from Iran in the light of the acts of the private individuals. The Court held that 'Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events'.[103]

[94] ARSIWA Commentary, Art. 31, §12. [95] Crawford, Third Report, 19.
[96] *Corfu Channel case*, ICJ Rep. 1949 p. 4, 23.
[97] UNCC Governing Council, Decision No. 9, 6 March 1992, UN Doc. S/AC.26/1992/9, §6.
[98] Crawford, Third Report, 20. [99] ARSIWA Commentary, Art. 31, §12.
[100] *United States Diplomatic and Consular Staff in Tehran*, ICJ Rep. 1980, p. 3, 35.
[101] Ibid., 32–3. [102] Ibid., 30. [103] Ibid., 45.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:45 Page Number: 497

Consideration of a concurrent cause in the form of a natural event can be found in the jurisprudence of the Eritrea–Ethiopia Claims Commission. In relation to Ethiopia's claims concerning internally displaced persons, the Claims Commission held:

> A further complication is that some areas in Tigray were plagued at relevant times both by war and by drought, and both afflictions caused displacement. The evidence did not distinguish between persons who left their homes on account of the war, and those who left for other reasons. However, it was clear that the war was by far the most significant cause of internal displacement, and the Commission has not taken drought into account in seeking to assess the numbers of persons displaced on account of the *jus ad bellum* violation.[104]

This statement is narrower than the position taken by the International Court in the *Corfu Channel* case in that the Claims Commission relied on the fact that the war was not just a cause but the more significant cause of displacement.

There is an exception to the general rule concerning concurrent causes: where an 'identifiable element of injury can properly be allocated to one of several concurrently operating causes alone'.[105] The inability to allocate identifiable elements of injury to particular causes is evident in the examples already mentioned: in the *Corfu Channel* case, the conduct of both Albania and the third state contributed to the same damage, the damage to the United Kingdom's ships; in the *Tehran Hostages* case the simultaneous seizure of the embassy by the private individuals and Iran's failure to protect the embassy contributed to the United States' loss; in the situation considered by the Eritrea–Ethiopia Claims Commission, the individuals in question left their homes due to the effects of both war and drought. But in relation to another claim, the Commission stated:

> Ethiopia occupied Tserona Town for nearly nine of the twelve months between May 31, 2000 and June 2001 when the damage was assessed ... Ethiopia is not liable for damages to the town caused by combat or for looting and stripping of buildings that occurred either before or after its occupation of the town ...
>
> Assessing relative responsibility for the looting and stripping of the town is difficult, not least because some damage resulted from combat operations and its population was absent during the relevant period, including two or three months after Ethiopian forces withdrew. Given this, and considering the evidence as a

[104] *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 733.

[105] ARSIWA Commentary, Art. 31, §13. See also the *Zafiro* case: *Earnshaw* v. *US*, (1925) 6 RIAA 160, 164–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:45 Page Number: 498

whole, the Commission finds that Ethiopia is liable for seventy-five percent of the damage caused by looting and stripping in Tserona Town.[106]

Here, Ethiopia's conduct and the conduct of private individuals were temporally distinct and caused separate damage.

It is important to note that the issue of concurrent causes is distinct from the issue of a plurality of responsible States (i.e. cases where more than one state is responsible for the same internationally wrongful act), an issue addressed in Article 47.[107]

15.4.3.2 Hard cases

The International Court was confronted with the problem of concurrent causes in the *Bosnian Genocide* case. After finding that Serbia breached its obligation to prevent genocide, the Court stated:

> [The] question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought.[108]

The decision highlights the distinction between causation in the context of a primary obligation and in the context of damages. Before making its finding on causation, the Court stated:

> To make [the finding that Serbia failed to comply with its obligation to prevent genocide], the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because ... the obligation to prevent genocide places a State under a duty to act which is not

[106] *Partial Award: Central Front: Eritrea's Claims 2, 4, 6, 7, 8 & 22*, (2004) 26 RIAA 115, 138–9, 139. Also referred to in *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 544.

[107] For a discussion of situations involving a plurality of responsible states as a matter of substance, see Chapter 10. On issues of procedure, see Chapter 20.

[108] *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 234.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:45 Page Number: 499

dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome . . .

The Court cannot however leave it at that. Since it now has to rule on the claim for reparation . . . the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct.[109]

While it is correct that the tests of causation applicable to establish a breach of a primary obligation and to establish the damage for which reparation is due are distinct, the Court's approach to the latter test has been criticized. The test the Court adopted was a 'but for' test: it asked would the genocide have occurred 'but for' Serbia's failure to fulfil its obligation, and answered in the negative. That a wrongful act must be a *conditio sine qua non* for the occurrence of damage is said to be 'undisputed'.[110] However, in many situations, damage resulting from an internationally wrongful act will be caused by the combined action of several actors or factors. In such circumstances, often no one contribution can be said to be indispensible such that the international wrong would not have occurred 'but for' it.[111] As Gattini states, 'To say that the genocide would have been committed anyway is not equivalent to saying that the genocide would have been committed with the same modalities . . . [T]he fact that Serbia's omission was not the *only* cause does not mean that it was *no* cause at all.'[112] Dissatisfaction with the 'but for' test in domestic law is also well known.[113]

On the other hand, given the general principle that reparation is not to be reduced in cases of concurrent causes, the Court might have found it difficult to hold Serbia to have 'caused' the genocide, with the consequence that it would have been under an obligation to provide reparation in relation to the entirety of the damage. The Court took the middle ground by making a declaration by way of satisfaction.

It has been suggested that the making of that declaration created an inconsistency: while the Court held that no compensation was due as no damage had been caused by Serbia's wrongful omission, the conclusion that satisfaction should be given is predicated on damage *having* been caused.[114] According to this view Serbia's conduct cannot have been

[109] *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 233–4. [110] Wittich (2008), §17.
[111] See McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012), 138.
[112] Gattini, (2007) 18 EJIL 695, 710. [113] See, e.g., Hart and Honoré (1985), 122–8.
[114] Milanović, (2007) 18 EJIL 669, 690.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:46 Page Number: 500

causally connected to the moral damage arising from the genocide but not to the material damage arising from the very same event. But Serbian responsibility was for failure to prevent, and this failure could be connected to the genocide without having been directly or sufficiently causative of it.

15.4.4 Contribution to the injury

The issue of contribution concerns situations dealt with in national systems under such rubrics as 'contributory negligence', 'comparative fault' and 'faute de la victime'.[115] Throughout the twentieth century, different views were expressed as to the consequences that flowed where an injured state contributed to its injury: some considered that it constituted a circumstance precluding wrongfulness, others that it merely affected the assessment of damage for which reparation was due.[116] The latter view is taken in the ARSIWA,[117] with Article 39 providing that '[i]n 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.'

The ARSIWA have been criticized for recognizing that there is a reduction of reparation in cases of contribution, but not in cases of concurrent causes. It has been said:

> It is not clear why only the contribution to the injury of the injured State or any person in relation to whom reparation is sought is taken into account. In order to examine the causal link properly, it would have been necessary to take into account the possible contribution to the injury of all actions ... such as ... the action of a third party State which contributes to the final injury.[118]

But the reason why reparation is reduced in cases of contribution has nothing to do with concurrent causation: it has to do with equity and fairness as between the responsible state and the injured state.[119]

[115] ARSIWA Commentary, Art. 39, §1.
[116] See Moutier-Lopet (2010), 639–40. Special Rapporteur García Amador had suggested that an 'act or omission shall not be imputable to the State if it was provoked by some fault on the part of the injured alien himself': García Amador, Sixth Report, ILC Ybk 1961/II, 48.
[117] See also ILC Ybk 2000/I, 392 (Chairman of the Drafting Committee); ILC Ybk 2000/II(2), 42–3.
[118] Stern (2010) 563, 570.
[119] ILC Ybk 2000/I, 183 (Crawford); ARSIWA Commentary, Art. 39, §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:46 Page Number: 501

The Article represents progressive development of the law, at least to the extent that it deals with contribution by states (as opposed to individuals on whose behalf a state might make a claim).[120] Nonetheless, it can be justified.

The principle of contribution to injury and that of mitigation of damages are closely related and a clear distinction between them is at times hard to make.[121] Both concern situations in which an injured state suffers greater damage due to its own act or omission. The difference is that mitigation of damage concerns conduct after damage has occurred, whereas contribution concerns conduct which occurs at the time of the breach or the original infliction of damage.[122] For example, in *LaGrand*, the International Court considered Germany's delay in commencing proceedings as having contributed to the injury it suffered due to the United States' breach of the provisional measures order. It did not consider Germany's delay in the context of the United States' breaches of Article 36 of the Vienna Convention on Consular Relations[123] as contributing to the damage flowing from those injuries (a failure to mitigate damage).[124]

Article 39 states that a contribution to injury is only relevant if it is 'wilful or negligent'. The expression 'wilful or negligent action or omission' was taken from the Convention on the International Liability for Damage caused by Space Objects.[125] Special Rapporteur Arangio-Ruiz had originally used the phrase 'contributory negligence',[126] but it was necessary to move away from an expression borrowed from the common law.[127] While there is no requirement in Article 39 that negligence be 'gross' or 'serious', the effect that any negligence has on the determination of reparation will depend on the degree to which it contributed to the injury and the circumstances of the case.[128] Article 39 has been criticized for being limited to 'wilful or negligent' conduct. It has been

[120] Crawford, Third Report, ILC Ybk 2000/II(1), 61. [121] Wittich (2008), §40.
[122] Ibid. [123] 24 April 1963, 596 UNTS 261.
[124] *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466, 486–7, 508.
[125] 29 March 1972, 961 UNTS 187; ILC Ybk 1992/I, 217.
[126] Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 56.
[127] ILC Ybk 1992/I, 217 (Chairman of the Drafting Committee). The common law expression was considered inappropriate in that it 'lent itself to a restrictive interpretation excluding deliberate acts or omissions': ibid., 217.
[128] ARSIWA Commentary, Art. 39, §5. Where damage is entirely attributable to the conduct of an injured state and not at all to the conduct of a responsible state, the better interpretation is that the damage is not 'caused' by the conduct of the responsible state as required by Art. 31: ibid., §5 n. 660.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:47 Page Number: 502

said that the 'idea of fault is introduced here, even though it has no role in the theory of international responsibility, to determine the quantum of damages'.[129] Such comments misrepresent the ARSIWA's approach to fault. The position taken is that there is no requirement of fault *beyond* that required by the relevant primary rule. It is not the case that fault has no role in the theory of international responsibility. For example, state 'intention' may be relevant to the justifications and excuses contained within Articles 20 to 25.[130]

Although Special Rapporteur Arangio-Ruiz originally suggested that the relevance of contribution be limited to the context of compensation,[131] the Drafting Committee considered that the issue could arise equally in relation to other forms of reparation, so Article 39 was made of general application.[132] It is true that the case law largely concerns contribution in relation to compensation, but situations can easily be envisaged in which contribution could arise in the context of restitution. For example, if a state-owned ship were unlawfully detained by another state and, while under detention, sustained damage due solely to the negligence of the captain, the responsible state would be required merely to return the ship in its damaged condition.[133]

As Article 39 states, it is not only contribution by an injured State that is relevant, but also contribution by 'any person or entity in relation to whom reparation is sought'. This refers not only to situations in which a diplomatic protection claim is brought but 'also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party'.[134] In *Diallo*, the ICJ took into account the possible role played by Diallo himself in the injury that he suffered. Among other things, Guinea sought compensation for the loss of the personal property located in Diallo's apartment following his expulsion from the Democratic Republic of the Congo. The Court stated:

> There is, however, uncertainty about what happened to the property listed on the inventory. Guinea does not point to any evidence that Mr. Diallo attempted to transport or to dispose of the property in the apartment, and there is no evidence before the Court that the DRC barred him from doing so. The DRC states that it did not take possession of the apartment and that it did not evict Mr. Diallo from the apartment. Mr. Diallo himself stated in 2008 that the company from which

[129] Stern (2010) 563, 570. [130] See further Chapters 2 and 9.
[131] Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 56.
[132] ILC Ybk 1992/I, 217 (Chairman of the Drafting Committee); ARSIWA Commentary, Art. 39, §4.
[133] ARSIWA Commentary, Art. 39, §4. [134] ARSIWA Commentary, Art. 39, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:47 Page Number: 503

the apartment was leased took possession of it soon after his expulsion and that, as a result, he had lost all of his personal effects. Therefore, taken as a whole, Guinea has failed to prove the extent of the loss of Mr. Diallo's personal property listed on the inventory and the extent to which any such loss was caused by the DRC's unlawful conduct.[135]

The Court here clearly recognized the relevance of Diallo's own conduct in relation to the loss he allegedly suffered. But this is best seen as a situation in which the loss in question was entirely due to the conduct of the victim or a third party, a situation captured by the causation requirement in Article 31(1).[136]

15.5 Plurality of injured states

The Draft Articles did not address situations in which the breach of an international obligation involves multiple responsible states or multiple injured states.[137] Clearly, more than one state may be injured by the breach of an international obligation. This situation is now dealt with in Article 46, which 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.' An example of a case in which multiple states each invoked the responsibility of a responsible state is the *Nuclear Test* cases. In those cases, Australia and New Zealand alleged that France, *inter alia*, had violated the right of all states to be free from atmospheric nuclear weapons testing.[138]

Not only is it possible for responsibility to be invoked by multiple injured states, responsibility could also be invoked by an injured state and by one or more states 'other than an injured State'.[139] As a 'State other than an injured State' can only seek reparation in the interest of the injured State,[140] issues concerning the apportionment of reparation can only arise in situations in which responsibility is invoked by multiple injured states.

[135] *Ahmadou Sadio Diallo (Guinea v. DRC)*, ICJ, Compensation, 19 June 2012, §31.
[136] ARSIWA Commentary, Art. 39, §5 n. 660; Crawford, Third Report, 62.
[137] Crawford, Third Report, 72.
[138] *Nuclear Tests (New Zealand v. France)*, ICJ Rep. 1974 p. 457; *Nuclear Tests (Australia v. France)*, ICJ Rep. 1974 p. 253. See also *SS Wimbledon*, (1923) PCIJ Ser. A No. 1; *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Preliminary Objections, ICJ Rep. 1959 p. 127; *Aerial Incident of 27 July 1955 (UK v. Bulgaria)*, ICJ Rep. 1959 p. 264; *Aerial Incident of 27 July 1955 (US v. Bulgaria)*, ICJ Rep. 1960, p. 146.
[139] See Chapter 19. [140] ARSIWA, Art. 48(2)(b).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:47 Page Number: 504

While each injured state may invoke the responsibility of the responsible state, each can only recover reparation for the damage that it itself has suffered. In the *Nuclear Test* cases, for example, New Zealand 'reserve [d] the right to hold the French Government responsible for any damage or losses incurred *by New Zealand or the Pacific Islands for which New Zealand has a responsibility*.'[141] The primary concern is situations in which there is payment of compensation to multiple injured states. The commentary specifically states that '[w]here there is more than 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.'[142]

The flip side of the coin is that a responsible state cannot be required to provide compensation to various injured states which in total exceeds the damage caused. This follows from the basic principle of full reparation: a responsible state is only required to provide reparation for injury caused by its wrongful act. Although the Court in *Aerial Incident of 27 July 1955* ultimately held that it did not have jurisdiction over Israel's claim, in oral argument the agent for Israel acknowledged that 'the Bulgarian Government is entitled to protection against having to pay double damages', in the light of the claims also brought by the United Kingdom and the United States.[143] As this example indicates, where there are multiple injured states issues can arise concerning the co-ordination of their claims.[144]

Article 46 is concerned with situations in which multiple states are injured by the '*same* internationally wrongful act'.[145] As defined in Article 2, an internationally wrongful act involves '*a* breach of *an* international obligation of the State'.[146] That is, Article 46 is only concerned with situations in which multiple states are injured by the breach of one international obligation, necessarily an obligations owed to a group of states collectively or to the international community as a whole

[141] *Nuclear Tests (New Zealand v. France)*, Memorial on Jurisdiction and Admissibility, Annex XIII (emphasis added).

[142] ARSIWA Commentary, Art. 46, §4.

[143] *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Preliminary Objections, Oral Hearings, 26 March 1959, 534 (Rosenne). It also stated in its memorial that '[o]ne of the primary reasons for establishing co-ordination [with the US and UK] 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. It is a well-known rule of law that the defendant State cannot be asked or compelled to pay reparation due in respect of damage twice over': *Aerial Incident 27 July 1955 (Israel v. Bulgaria)*, Memorial of Israel, §103. On the rule against double recovery, see further Chapter 20.

[144] On the issue of election in the context of multiple injured states, see Chapter 17.

[145] ARSIWA, Art. 46 (emphasis added).

[146] ARSIWA, Art. 2(b) (emphasis added).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 15 Title Name: CRAWFORD
Date:18/3/13 Time:12:14:48 Page Number: 505

(obligations *erga omnes* and *erga omnes partes*).[147] In situations in which one act breaches multiple bilateral obligations, there is more than one internationally wrongful act. The limited scope of Article 46 is explicable on the basis that it is only in relation to the situations dealt with that it is necessary to specify that each injured state has the right to invoke responsibility. Nonetheless, the principles discussed in the commentary concerning the division of reparation are equally applicable in situations where responsibility is invoked by multiple states injured by conduct breaching multiple bilateral obligations, being based as they are on the principle of full reparation.

[147] See also Huesa Vinaixa, in Crawford, Pellet and Olleson (2010) 949, 949–50. See ARSIWA, Art. 48(1) regarding obligations *erga omnes* and *erga omnes partes*.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:27 Page Number: 506

16 Remedies

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16.1 The link between reparation and remedies

The provisions of Part II of the ARSIWA are formulated in terms of the obligations of responsible states. In many national legal systems, equivalent provisions would more naturally be expressed in terms of the powers of the court with respect to remedies, and the International Court uses the term 'remedies' (French: *remèdes*) without hesitation. This approach is more difficult in general international law, a system in which there is no *a priori* right to a court and where the particular consequences of responsibility in a given situation will usually be resolved outside any judicial context.[1] Nonetheless, restitution, compensation and satisfaction cover a field which might be described as 'judicial remedies'.[2] The ARSIWA identify restitution, compensation and satisfaction as the three ways in which the obligation to provide full reparation may be fulfilled. The first section of this chapter discusses the relationship between these forms of reparation. Each of them is then explored in more detail; a final section deals with the issue of compensatory interest.

16.1.1 The available forms of reparation

After espousing the basic principle of full reparation,[3] the Permanent Court in the *Chorzów Factory* case went on to state:

> 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

[1] Crawford, Third Report, 13.
[2] For example, Gray (1987); Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005).
[3] See Chapter 15.

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:27 Page Number: 507

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.[4]

In addition to the two forms of reparation recognized by the Permanent Court – restitution and compensation – the availability of satisfaction is well established in international law.[5] As is stated by the tribunal in the *Rainbow Warrior* case, '[t]here 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 obligation'.[6] Article 34 of the ARSIWA introduces these various forms of reparation. It states: '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.'

In the Draft Articles, reparation was expressed to be a right of an injured state. It was stated that the 'injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation'.[7] On second reading, the article was reformulated as an obligation of the responsible state. One reason was to account for cases in which there is a plurality of injured states.[8] Second, and more fundamentally, the change was necessary to reflect the fact that the obligation of reparation arises automatically on the commission of the internationally wrongful act, rather than being contingent on a demand or protest by any injured state.[9] While the individual articles dealing with restitution, compensation and satisfaction are expressed as obligations (for example, a responsible state is 'under an obligation to make restitution'),[10] the commentary explains that the 'forms of reparation ... 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'.[11]

It is clear from the wording of this article that full reparation may require only one form of reparation or a combination of them. The ARSIWA appear to establish a hierarchy between the different forms of

[4] *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 47. [5] ARSIWA Commentary, Art. 37, §4.
[6] *Rainbow Warrior (New Zealand/France)*, (1990) 20 RIAA 215, 272–3.
[7] Draft Articles, Art. 42(1).
[8] Crawford, Third Report, 17; ARSIWA Commentary, Art. 31, §4. On the apportionment of reparation in situations involving a plurality of injured states, see Chapter 15.
[9] Crawford, Third Report, 18; ARSIWA Commentary, Art. 31, §4. [10] ARSIWA, Art. 35.
[11] ARSIWA Commentary, Art. 34, §6. See also Crawford, Third Report, 39.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:28 Page Number: 508

reparation, with restitution at the pinnacle as the primary form of reparation. A responsible state is under an obligation to compensate for damage caused only 'insofar as such damage is not made good by restitution' and to give satisfaction for injury caused only 'insofar as it cannot be made good by restitution or compensation'.[12] However, this apparent hierarchy is not unqualified.

16.1.2 The right of election

First, an injured state normally has the right to elect the form that reparation will take. Article 43(2)(b) states that the 'injured State may specify in particular ... what form reparation should take in accordance with the provisions of Part Two'. Although the Draft Articles did not contain an equivalent provision, a right of election was implicit by virtue of the fact that the various forms of reparation were treated as rights of the injured state, which it could choose to invoke or not.[13]

The commentary gives two examples of situations in which states have exercised their right of election.[14] In *Chorzów Factory*, Germany sought compensation rather than the return of the factory in question.[15] In *Great Belt*,[16] Finland accepted compensation in settlement of its claim, instead of the deconstruction of the bridge built by Denmark over the Great Belt which it had sought in its Application.[17] More recently, the International Court in *Diallo* appeared to be influenced by Guinea's election of compensation in determining that it was the appropriate form of reparation. The Court stated:

> In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.[18]

[12] ARSIWA, Arts. 36(1), 37(1).
[13] Crawford, Third Report, 40. For example, the draft article dealing with restitution stated that an 'injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind': Draft Articles, Art. 43.
[14] ARSIWA Commentary, Art. 43, §6.
[15] The Permanent Court referred to Germany having 'abandoned its original claim for the restitution of the factory': *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9, 17.
[16] *Passage through the Great Belt (Finland v. Denmark)*, Order, ICJ Rep. 1992 p. 348.
[17] Koskenniemi, (1996) 27 ODIL 255, 255.
[18] *Ahmadou Sadio Diallo (Guinea v. DRC)*, ICJ, 30 November 2010, §161.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:28 Page Number: 509

However, the effect of Guinea's election should not be overstated. In its later decision on compensation, the Court noted that it was uncertain what had happened to Diallo's personal property:[19] the prospective unavailability of restitution may have influenced the Court's earlier decision that compensation was appropriate. The right of election is dealt with in more detail in Chapter 19.

16.1.3 A hierarchy of reparation?

Special Rapporteur Arangio-Ruiz forcefully defended the primacy of restitution.[20] On the second reading, the ILC debated whether the primacy of restitution should be retained, particularly in the light of the general predominance of compensation in the practice of states and tribunals.[21] As is evident from the discussion above, the ILC decided that the primacy of restitution should be retained. One reason for this decision was the dictum of the Permanent Court in the *Chorzów Factory* case: that the appropriate remedy will be '[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear'.[22] Restitution is also the form of reparation which most closely conforms to the general principle that a responsible state is obliged to wipe out the consequences of its wrongful act by re-establishing the situation that would have existed had the act not been committed.[23] Although not reflected in the commentary, there was also concern that states would otherwise be able to avoid their international obligations by offering payment in lieu.[24]

While maintaining the notional primacy of restitution, the ARSIWA do adopt a more flexible approach to the issue by including the right of election and also by recognizing that there are circumstances in which restitution will not be warranted. Article 35 provides that a state is only

[19] *Ahmadou Sadio Diallo (Guinea v. DRC)*, Compensation, ICJ, 19 June 2012, §31.

[20] ILC Ybk 2000/I, 172 (Crawford). See also Arangio-Ruiz, Preliminary Report, ILC Ybk 1988/II(1), 37–8.

[21] Crawford, Third Report, 43, 45; ILC Ybk 2000/II(2), 37. The predominance of compensation in the practice of states and tribunals is explicable on the basis of the limitations on the primacy of restitution recognized in the ARSIWA: ILC Ybk 2000/II(2), 37.

[22] *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 47. See also ibid., 48. See also ARSIWA Commentary, Art. 35, §3.

[23] ARSIWA Commentary, Art. 35, §3. As stated in the *Factory at Chorzów*, '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': *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 47.

[24] Crawford, Third Report, 45; ILC Ybk 2000/II(2), 34.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:28 Page Number: 510

under an obligation to provide restitution 'to the extent that [it]: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'. As Gray remarks,

> [T]he Commentary to the ILC Articles takes pains to adopt a flexible approach, with the result that it effectively limits the significance of the principle of the primacy of restitution and reflects the rarity of restitution in practice . . . The ILC takes a realistic approach and, despite its commitment to primacy, repeatedly concedes that restitution is often impossible or unavailable, or that its value to the injured State is so reduced that other forms of reparation take priority.[25]

Despite this flexibility, the ARSIWA still provide clear guidance regarding the principles to apply in determining what the appropriate form of reparation will be in a given situation.

16.2 Restitution

16.2.1 The basic principle

Article 35 provides:

> 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.

As is clear from the wording of the article, restitution involves the re-establishment of the *status quo ante*, that is, the situation that existed 'before the wrongful act was committed'. It does not involve the establishment or re-establishment of the situation that *would* have existed had the wrongful act not been committed. The understanding that restitution requires the establishment of the *status quo ante* was already taken in the Draft Articles.[26] During the second reading, there was debate regarding whether that understanding properly represented the objective of restitution.[27] Those who took the view that it did not relied on a statement of the Permanent Court in the *Chorzów Factory* case: that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all

[25] Gray (2010), 589–90. [26] Draft Articles, Art. 43. [27] ILC Ybk 2000/II(2), 37.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:29 Page Number: 511

probability, have existed if that act had not been committed'.[28] The Court there was clearly describing the general obligation of full reparation,[29] an obligation which encompasses not only restitution but other forms of reparation, such as compensation.[30] Restitution, as merely one available form of reparation, requires only the re-establishment of the *status quo ante*. Items such as lost profits or lost expectations may be compensable but they are not part of the process of restitution as such.

16.2.2 The forms of restitution

As the commentary states, restitution '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'.[31] It includes both material and juridical restitution.

Material restitution may include the return or restoration of territory, individuals or property.[32] One instance in which the International Court made an order for restitution was in the *Temple* case. That case concerned a dispute regarding whether the Temple of Preah Vihear was located in territory over which Cambodia or Thailand has sovereignty. One of Cambodia's submissions, which the Court referred to as 'concerning restitution',[33] was that the Court 'adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned'.[34] After finding that the Temple is situated in Cambodian territory, the Court ordered that 'Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's ... Submission'.[35] In the *Wall* Advisory Opinion the Court stated that Israel is obliged by way of restitution to 'return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory', to the extent that it would not be materially impossible.[36]

[28] *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 47. [29] ILC Ybk 2000/II(2), 43.
[30] ARSIWA Commentary, Art. 35, §2. [31] ARSIWA Commentary, Art. 35, §5.
[32] Ibid. See also the cases referred to in ARSIWA Commentary, Art. 35, §5 nn. 529–32.
[33] *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Rep. 1962 p. 6, 36. [34] Ibid., 11.
[35] Ibid., 37. See also ARSIWA Commentary, Art. 35, §5, stating that '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', and the cases referred to in fn. 537.
[36] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Rep. 2004 p. 136, 198.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:29 Page Number: 512

Often, the result of restitution will be indistinguishable from that of cessation.[37] In some cases the International Court has ordered the return or restoration of territory, individuals or property in the context of the preliminary obligation of cessation, although the same conduct would have been required by way of restitution. For example, in the *Tehran Hostages* case the International Court ordered that Iran terminate the detention of the US diplomatic and consular staff by way of cessation.[38] Similarly, in the *Temple* case the Court ordered that the Thai forces withdraw from Cambodian territory by way of cessation.[39]

Juridical restitution involves the modification of a legal situation.[40] This can be a modification within the legal system of the responsible state – for example, the revocation of a provision of national law enacted in violation of international law. The modification required could also be one in the responsible state's relations with the injured state. In the *Arrest Warrant* case, for example, the International Court ordered by way of restitution that Belgium cancel the arrest warrant issued against the then Foreign Minister of the Democratic Republic of the Congo.[41] As with material restitution, the International Court has also required that there be modification of a legal situation in the context of the preliminary obligation of cessation. In *Germany* v. *Italy* the Court ordered that the Italian domestic court decisions infringing Germany's jurisdictional immunity cease to have effect.[42]

16.2.3 Limitations on the availability of restitution

16.2.3.1 Material impossibility

Article 35 states that restitution is only required 'to the extent that [it] is not materially impossible'.[43] It is clear from this formulation that restitution may be only partly excluded. There are few examples of cases in

[37] See Chapter 14.

[38] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 44–5. The ICJ later held separately that Iran was under an obligation to make reparation to the United States: ibid., 41–2, 45.

[39] *Temple*, ICJ Rep. 1962 p. 6, 36. Only after this did the ICJ go on to deal with Cambodia's submission 'relating to restitution': ibid., 36. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Rep. 2002 p. 303, 451–2.

[40] ARSIWA Commentary, Art. 35, §5. See also the cases referred to in ARSIWA Commentary, Art. 35, §5 nn. 533–5.

[41] *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, ICJ Rep. 2002 p. 3, 32.

[42] *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, ICJ, 3 February 2012, §137. See further Chapter 14.

[43] ARSIWA, Art. 35(a).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:29 Page Number: 513

which courts and tribunals have held that restitution is materially impossible. This may be explicable on the basis that in such cases the claimant state, recognizing the facts, has simply elected to seek compensation. One case in which the issue is mentioned in passing is the *Bosnian Genocide* case. In that case, the International Court held that Serbia had violated its obligations to prevent and punish genocide under the Genocide Convention.[44] The Court noted that '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 . . .'.[45] Another possible example is the pending case of *Costa Rica* v. *Nicaragua*. Costa Rica has alleged that Nicaragua felled trees on Costa Rican territory which were more than 200 years old.[46] If this allegation were found to be true, restitution of 200-year-old trees would be materially impossible.

Cases in which restitution is 'materially impossible' encompass situations in which property is permanently lost or destroyed,[47] although material impossibility covers a broader range of situations, as can be seen from the *Forests of Central Rhodope* case. That case concerned a claim on behalf of Greek nationals in relation to the wrongful taking of forests by Bulgaria. Restitution was held to be materially impossible for a combination of reasons: as the claim was only brought on behalf of some of those who had had an interest in the forestry operations, it would have been inappropriate to order the return of the forests in their entirety; the forests were not in the same condition as at the time of their taking, which was of relevance given that the rights had been expressed as a right to the stumpage of a fixed amount of wood; furthermore, since the time of the taking, third parties had acquired rights to the forests.[48] It should be noted that restitution is not materially impossible merely because of legal or practical difficulties.[49] As Article 32 makes clear, a state 'may not rely on the provisions of its internal law as justification for failure to comply with its obligations'.

[44] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 233.

[46] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Oral Proceedings, 11 January 2011, CR 2011/1, 30 (Ugalde).

[47] ARSIWA Commentary, Art. 35, §8.

[48] *Affaire des forêts du Rhodope central (fond) (Grèce contre Bulgarie)*, (1933) 3 RIAA 1405, 1432.

[49] ARSIWA Commentary, Art. 35, §8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:30 Page Number: 514

16.2.3.2 Disproportionate burden

Restitution is also not required to the extent that it involves 'a burden out of all proportion to the benefit deriving from restitution instead of compensation'.[50] Although the *Great Belt* case was ultimately settled, in the provisional measures phase of the case Denmark argued that 'if the Court ruled in favour of Finland on the merits, any claim by Finland could not be dealt with by an order for restitution, but could only be satisfied by damages inasmuch as restitution in kind would be excessively onerous'.[51] The dispute concerned a bridge being built by Denmark over the Great Belt which would impede the passage of Finnish vessels, but only fully assembled drill ships and oil rigs.

It is quite common for the disproportionality of restitution to be raised in cases concerning a breach of a procedural obligation. In *Pulp Mills* the International Court held that Uruguay had breached procedural obligations relating to the construction of a mill on the River Uruguay. Argentina submitted that restitution in the form of the mill being dismantled was the appropriate form of reparation.[52] Uruguay argued that this would have involved a 'striking disproportion between the gravity of the consequences of the wrongful act of which it is accused and those of the remedy claimed'.[53] When describing the customary international law on reparation, the Court stated 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'.[54] The Court concluded:

> [T]he procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation ... As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.[55]

Thus where the obligation breached is procedural in character – that is, where the same substantive result could and probably would have

[50] ARSIWA, Art. 35(b).
[51] *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, ICJ Rep. 1991 p. 12, 19.
[52] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Rep. 2010 p. 14, 102.
[53] Ibid., 103. [54] Ibid. [55] Ibid., 104.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:30 Page Number: 515

been arrived at had the relevant procedures been followed – it may well be the case that restitution would be disproportionate. As the commentary states,

> [I]n 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.[56]

The International Court's decision in *Avena* can also be seen in this light. The case concerned the United States' breach of obligations under the Vienna Convention on Consular Relations.[57] The International Court held, among other things, that the United States had breached Article 36(1)(b) of the Convention by failing to notify Mexican nationals of their rights under that provision.[58] Mexico alleged that restitution in the form of the annulment of the convictions and sentences of the nationals concerned was the appropriate remedy.[59] Accepting instead the United States' submission, the Court held that 'the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice'.[60] As the Court explained, 'it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them'.[61]

16.2.4 A flexible approach

The International Court has left parties considerable freedom to determine the specific modality for effecting restitution. For example, in the *Arrest Warrant* case the Court held that 'Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated'.[62] The same can be

[56] ARSIWA Commentary, Art. 34, §3.
[57] Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261.
[58] *Avena and Other Mexican Nationals (Mexico v. US)*, ICJ Rep. 2004 p. 12, 71.
[59] Ibid., 58. [60] Ibid., 60. [61] Ibid. [62] *Arrest Warrant*, ICJ Rep. 2002 p. 3, 33.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:30 Page Number: 516

said of the Court's order in *Germany* v. *Italy*. In that case the Court held that by way of restitution Italy was required to reverse the effects produced by the decisions of its courts which violated Germany's jurisdictional immunity. The Court elaborated that 'the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect'.[63]

This flexibility was also evident in relation to the remedy the Court ordered in *Avena*. As to the United States' obligation to permit 'review and reconsideration' of the convictions and sentences of the Mexican nationals in question, the Court explained:

> In stating in its judgment in the *LaGrand* case that 'the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence', the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States.[64]

Given the recurring disputes concerning the United States' observance of its Article 36 obligations,[65] the Court did provide some clarification regarding what is required of the United States. The Court stated that the review and reconsideration must be 'effective' and should occur in judicial proceedings.[66] It also observed that by virtue of the way in which the US domestic law 'procedural default rule' is applied, individuals can be barred from raising a violation of their Convention rights before a court and that clemency proceedings alone would not appear to provide appropriate review and reconsideration.[67] Despite these qualifications, the United States is still left with considerable freedom to determine how to fulfil its obligation.

16.3 Compensation

16.3.1 The basic principle

As noted already, restitution may be inadequate for full reparation (for example, where property is wrongfully seized and there is additional material damage), or unavailable where one of the exceptions in Article

[63] *Jurisdictional Immunities*, ICJ, 3 February 2012, §137.
[64] *Avena*, ICJ Rep. 2004 p. 12, 62 (emphasis added by the Court in *Avena*).
[65] *Vienna Convention on Consular Relations (Paraguay v. US)*, Order, ICJ Rep. 1998 p. 426; *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466.
[66] *Avena*, ICJ Rep. 2004 p. 12, 65–6. [67] Ibid., 63, 66.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:31 Page Number: 517

35 applies or where restitution is validly waived by the injured state. Article 36 states:

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.

On both first reading and second reading, the ILC debated using the terms 'moral damage', 'material injury' and 'non-material injury' in Articles 36 and 37.[68] The formulation chosen was that compensation be expressed to be payable in relation to 'financially assessable damage', as stated in Article 36(2), with satisfaction being the appropriate remedy for non-financially assessable damage.[69] 'Financially assessable damage' is any damage which is capable of being evaluated in financial terms.[70] This excludes compensation for moral damage to a state.[71] However, it includes moral damage to nationals where a state claims on their behalf by way of diplomatic protection. This means that financially assessable damage can not only include material losses of nationals, such as the loss of earnings, but also non-material losses, such as the loss of loved ones and pain and suffering.[72]

The commentary gives a large number of examples of situations in which compensation has been paid across a wide range of disputes, including in relation to damage to ships and aircraft,[73] attacks on diplomatic premises,[74] environmental damage[75] and damage to nationals.[76]

[68] Draft Articles Commentary, Art. 45, §§3–5; Crawford, Third Report, 54; ILC Ybk 2000/II(2), 39–41, 43. On the issue of material and moral damage, see Chapter 15.
[69] ILC Ybk 2000/I, 390–1 (Chairman of the Drafting Committee); ARSIWA Commentary, Art. 37, §3.
[70] ARSIWA Commentary, Art. 36, §5.
[71] ARSIWA Commentary, Art. 36, §1.
[72] ARSIWA Commentary, Art. 36, §16.
[73] For example, *Corfu Channel (UK v. Albania)*, Compensation, ICJ Rep. 1949 p. 244; *M/V Saiga (No. 2)*, (1999) 120 ILR 143. See further ARSIWA Commentary, Art. 36, §§9–11 and the cases referred to therein.
[74] For example, the agreement made between the United States and China following the bombing of the Chinese embassy in Belgrade in 1999: S. D. Murphy (ed.), 'Contemporary practice of the United States relating to international law', (2000) 94 AJIL 102, 127. See further ARSIWA Commentary, Art. 36, §12 and the cases referred to therein.
[75] For example, the *Trail Smelter Case*, (1938 and 1941) 3 RIAA 1905. See further ARSIWA Commentary, Art. 36, §13–15 and the cases referred to therein.
[76] For example, the *Lusitania Cases*, (1923) 7 RIAA 32. See further ARSIWA Commentary, Art. 36, §§ 16–20 and the cases referred to therein.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:31 Page Number: 518

16.3.2 The practice of the Permanent and International Courts

Perhaps surprisingly the Permanent Court and the International Court have very rarely awarded compensation.[77] It has been suggested that this is because '[m]any sovereign interests do not lend themselves to quantification',[78] but this is neither here nor there. To the extent that the infringement of a sovereign interest does not give rise to financially assessable damage, but only moral damage to the state, compensation is not the appropriate remedy. It seems rather that the Court is averse to awarding compensation.

At the time of the second reading, damages had been sought in approximately one third of the cases commenced before the Permanent Court and the International Court.[79] In at least two cases in which compensation has been sought, the International Court has held that the form of reparation should be determined by the Court only failing an agreement by the parties.[80] The Court has also employed other techniques to avoid determining the quantum of compensation due. In the *Gabčíkovo-Nagymaros* case, after determining that both Slovakia and Hungary were entitled to compensation the Court stated that '[g]iven the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counterclaims'.[81] In *Cameroon* v. *Nigeria*, despite the fact that Cameroon alleged that it had suffered material damage,[82] the Court held that 'by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed'.[83]

The International Court did order that compensation be paid in the *Corfu Channel* case, the first case it heard.[84] However, it was not until 2010 that the Court held for a second time that compensation was

[77] *SS Wimbledon*, (1923) PCIJ Ser. A No. 1; *Corfu Channel*, Compensation, ICJ Rep. 1949 p. 244; *Diallo*, ICJ, 30 November 2010.
[78] Barker, in Crawford, Pellet and Olleson (2010) 599, 603.
[79] Crawford, Third Report, 48.
[80] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 149; *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 281.
[81] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 81.
[82] *Cameroon* v. *Nigeria*, ICJ Rep. 2002 p. 303, 317. [83] Ibid., 452.
[84] *Corfu Channel*, Compensation, ICJ Rep. 1949 p. 244, 250.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:32 Page Number: 519

payable, in the diplomatic protection case of *Diallo*.[85] The Court did not set the amount of compensation due, but left the matter to be resolved by the parties at Guinea's request.[86] It was only when the parties failed to reach agreement within the six-month time limit specified by the Court that it was required to determine the quantum of compensation due.[87]

16.3.3 Quantification of damage

Other bodies have developed substantial case law regarding compensation,[88] including the Iran–US Claims Tribunal,[89] international human rights bodies,[90] investment tribunals,[91] and the International Tribunal for the Law of the Sea.[92] The appropriate heads of compensable damage and the principles of assessment to be applied in quantification will vary depending on the primary obligation in question and the facts of the case.[93] While these issues cannot be comprehensively addressed, the two awards of compensation by the International Court can be considered by way of example.

The *Corfu Channel* case concerned damage suffered by UK ships from mines in Albanian territorial waters. The Court entrusted the evaluation of the United Kingdom's claim for compensation to appointed experts.[94] Compensation was awarded in relation to each of the three heads of damage sought by the United Kingdom. First, for the destruction of the *Saumarez*, the Court awarded the replacement cost of the vessel at its time of loss (£700,087). Although the experts estimated that the replacement value was greater than that submitted by the United Kingdom, the Court could not award more than the amount claimed by the United Kingdom.[95] Second, the Court awarded the £93,812 claimed by the United Kingdom for damage to the *Volage*. Although the experts determined that a lesser amount was due, the Court considered that the

[85] *Diallo*, ICJ, 30 November 2010, §165(7).
[86] *Diallo*, ICJ, 30 November 2010, §§162, 165(8).
[87] *Diallo*, Compensation, ICJ, 19 June 2012.
[88] See generally Barker (2010), 604–10. In relation to compensation for the infringement of property rights see ARSIWA Commentary, Art. 36, §§20–26.
[89] See Pellonpää, in Lillich and Magraw (eds.), *The Iran–United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 185; Stewart, in ibid. 325.
[90] See Shelton (2005), ch. 9.
[91] See Marboe, *Calculation of Compensation and Damages in International Investment Law* (2009), chs. 3, 5.
[92] See *M/V Saiga (No. 2)*, (1999) 120 ILR 143, 198–201.
[93] ARSIWA Commentary, Art. 36, §7.
[94] *Corfu Channel (UK v. Albania)*, Order, ICJ Rep. 1949 p. 237.
[95] *Corfu Channel*, Compensation, ICJ Rep. 1949 p. 244, 249.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:32 Page Number: 520

United Kingdom's figure was reasonable and well founded in the light of necessary approximations made by the experts.[96] Third, the Court awarded £50,048 in relation to payments made by the United Kingdom in respect of the deaths of and injury to naval personnel and for expenditure which was substantiated in documents submitted by the United Kingdom.[97]

Diallo concerned a claim brought by Guinea in relation to the arbitrary arrest, detention and expulsion of its national from the Democratic Republic of the Congo. Guinea sought three heads of damage in relation to those of its claims upheld by the Court.[98] In relation to non-material damage, the Court awarded Guinea US$85,000.[99] Despite the absence of any evidence of the non-material injury suffered by Diallo, the Court concluded that the 'inevitable consequence' of the wrongful acts of the Democratic Republic of the Congo would have been significant psychological suffering and loss of reputation.[100] In determining the quantum due, the Court relied on decisions of various tribunals and human rights courts indicating that the quantification of non-material harm should be based on 'equitable considerations'.[101] The other two heads of damage sought related to material damage: loss of remuneration and loss of property. While the Court accepted that compensation can be payable for remuneration lost while in detention, and appeared willing to accept that compensation can be payable for remuneration lost following expulsion if it is not purely speculative,[102] it found the losses alleged to be unsubstantiated.[103] In relation to the furnishings lost from Diallo's apartment, the Court did award US$10,000. While Guinea did not establish that the loss of this property was caused by the Democratic Republic of the Congo,[104] the Court awarded this amount, again based on 'equitable considerations', in consideration of the amount Diallo would have nonetheless had to pay to transport his property out of the country.[105]

The quantum of compensation awarded by the International Court is low in the light of the fact that Guinea had sought US$7,310,148.[106] But

[96] Ibid. [97] Ibid., 249–50.

[98] *Diallo*, Compensation, ICJ, 19 June 2012, §10. The fourth head of damage sought by Guinea related to a claim held to be inadmissible: ibid., §53.

[99] Ibid., §25. [100] Ibid., §21. [101] Ibid., §24. [102] Ibid., §§40, 49.

[103] Ibid., §§46, 49. [104] Ibid., §31.

[105] Ibid., §33. The Court rejected claims regarding the loss of high-value items from the apartment and the loss of money in bank accounts as unsubstantiated: ibid., §§34–5.

[106] $250,000 in respect of non-material damage, $80,000 in respect of income lost while Diallo was in custody, $6,430,148 in respect of income lost following Diallo's expulsion from the DRC and $550,000 in respect of lost assets: ibid., §§10, 37.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:32 Page Number: 521

this is understandable given Guinea's complete failure to substantiate the alleged losses.[107] As to how the value of US$85,000 was arrived at, presumably the Court relied on the fact that Diallo was detained for seventy-two days without any due process or explanation, was then arbitrarily expelled from the state in which he had lived for over thirty years, that the expulsion was designed to prevent Diallo pursuing litigation against the state, and there had been a considerable delay, the events in question having occurred more than sixteen years previously.[108]

Judge Greenwood was of the view that a smaller sum should have been awarded.[109] In his Declaration, Judge Greenwood considered international human rights law jurisprudence, including the European decision of *Lupsa* v. *Romania* in which €15,000 (the equivalent of US$19,000 at the time) was considered equitable compensation for the moral and material damage suffered by a man who was unlawfully expelled from Romania, where he had resided for fourteen years.[110] The *M/V Saiga (No. 2)* could also be cited. In that case, US$17,750 was awarded in respect of the wrongful detention of the ship's captain for a period of 123 days and US$76,000 in respect of the wrongful detention of the ship's crew.[111] As detailed in an Annex to the decision, US$3,300 was awarded in respect of the majority of the crew members, who were detained for periods ranging from 20 to 123 days.[112]

Given this context, the Court's award of compensation for non-material damage can be considered reasonable, although it is regrettable that the Court did not explain its calculation. As Judge Greenwood stated,

> What is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded. Moreover, those principles must be

[107] As Judge Greenwood stated, 'Guinea has produced evidence regarding the finances of both Mr. Diallo and the two companies but it is evidence which undermines, rather than sustains, its claim. Equitable principles should not be used to make good the shortcomings in a claimant's case by being substituted for evidence which could have been produced if it actually existed: equity is not alchemy': *Diallo*, Compensation, ICJ, 19 June 2012, Declaration of Judge Greenwood, §5.

[108] Ibid., §10.

[109] Ibid., §11.

[110] Ibid., §9, referring to *Lupsa* v. *Romania*, [2006] ECtHR 10337/04.

[111] *M/V Saiga (No. 2)*, (1999) 120 ILR 143, 168, 201. For historical examples of compensation paid for wrongful arrest and detention, see Shelton (2005), 72–3.

[112] *M/V Saiga (No. 2)*, (1999) 120 ILR 143, 168 and Annex. US$1,700 was awarded in respect of two of the crew members who were injured and so released after four days.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:33 Page Number: 522

capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of this case, but by comparison with other cases.[113]

16.3.4 Loss of profits

Article 36(2) recognizes that compensation for loss of profits may be appropriate in certain cases. A distinction can be drawn between two types of profits: profits that were anticipated to accrue prior to the date of judgment and those anticipated to accrue after that date. In relation to the former, compensation may be sought both where there has been interference with a claimant's title to their property, such as occurred in the *Chorzów Factory* case,[114] and in situations where there has merely been temporary loss of use of property, such as in *S.D. Myers* v. *Canada*.[115] Where there is no interference with title, damages are justified to compensation for loss of income that the claimant was entitled to by virtue of undisturbed ownership.[116] Although less clearly articulated, in situations in which title is unlawfully taken, damages can be justified on the basis of the claimant's continuing beneficial interest in the property.[117]

More complicated is the award of damages in relation to profits anticipated after the date of judgment. Generally, such damages will not be justified, as following judgment the income-producing property in question will have been restored, either by way of restitution or compensation. However, claims for future lost profits have been upheld in the context of contractually protected interests,[118] such as occurred in *LIAMCO* v. *Libya*.[119] The damages awarded related to a concession contract held by LIAMCO for petroleum exploration and production, which was to run until 1988 but was nationalized in the early 1970s. Naturally,

[113] *Diallo*, Compensation, ICJ, 19 June 2012, Declaration of Judge Greenwood, §7.

[114] The case concerned the unlawful taking of the factory in question. Although the case was ultimately settled, the Permanent Court earlier decided to hold an expert enquiry into the appropriate quantum of compensation to be paid considering, among other things, any profit that would have accrued from the time of the taking of the factory to the date of the Court's judgment: *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 51–3.

[115] *S.D. Myers Inc*. v. *Canada*, Second Partial Award, (2002) 8 ICSID Reports 124, 137. The case concerned Canada's interference in S. D. Myer's investment in closing the United States–Canada border to the movement of polychlorinated biphenyl, a hazardous waste which the claimant company remediated. For the tribunal's complex calculation to the quantum of lost profits, see ibid., 159–70.

[116] ARSIWA Commentary, Art. 36, §29. [117] ARSIWA Commentary, Art. 36, §30.

[118] ARSIWA Commentary, Art. 36, §31.

[119] *Libyan American Oil Company* v. *Libya*, (1977) 62 ILR 140.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:33 Page Number: 523

a future income stream will only be compensated up to the time when the contractually protected interest ends.[120] Thus damages for future lost profits would not be appropriate if, and from the time that, the contract under which the protected interest existed were lawfully terminated.[121]

As Article 36 indicates, compensation for loss of profits will only be warranted if that loss is 'established'. While this must always be proved, it is of particular concern in relation to future lost profits. The commentary elaborates:

> [L]ost 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. 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. This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[122]

In *Asian Agricultural Products*, the claim for loss of profits of a newly established business was rejected due to a lack of evidence and of established earnings.[123] The tribunal held that it was necessary that profits be 'reasonably anticipated' and 'probabl[e] and not merely possible'.[124] Not only must loss of profits be 'established', but, consistent with the principle of full reparation in Article 31, the loss must be shown to have been 'caused' by the internationally wrongful act.[125]

16.3.5 Punitive damages

The notion of 'punitive damages' derives from the common law and involves the payment of damages in addition to those corresponding to actual losses suffered, in circumstances where a defendant has acted with recklessness, malice or deceit, or otherwise reprehensibly.[126] Punitive damages are intended to punish the defendant and thereby deter

[120] ARSIWA Commentary, Art. 36, §31.
[121] As occurred, for example, in *Sylvania Technical Systems* v. *Iran*, (1985) 8 Iran–US CTR 298, 319.
[122] ARSIWA Commentary, Art. 36, §27.
[123] *Asian Agricultural Products* v. *Sri Lanka*, (1990) 4 ICSID Reports 250. [124] Ibid., 292.
[125] ARSIWA Commentary, Art. 36, §32. [126] Wittich (2010), 667.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:33 Page Number: 524

blameworthy conduct.[127] The ARSIWA generally do not allow for the award of punitive damages. The commentary states that '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'.[128]

During both the first and second readings the issue of punitive damages also arose in the context of Article 37, dealing with satisfaction. The position taken in the Draft Articles was equivocal. Special Rapporteur Arangio-Ruiz originally suggested an article that provided that possible forms of satisfaction include 'nominal or punitive damages'.[129] The Draft Article actually adopted referred to the possibility 'in cases of gross infringement of the rights of the injured State' of 'damages reflecting the gravity of the infringement'.[130] The Drafting Committee explained that the provision was intended to deal

> with what was known in common law as 'exemplary damages', in other words, damages on an increased scale awarded to the injured party over and above the actual loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. The purpose of that type of remedy was to set an example.[131]

It has been suggested that what the Drafting Committee really had in mind was aggravated rather than punitive damages.[132] In any case, on second reading the ILC unequivocally took the position that punitive damages are not a generally available form of satisfaction.[133] The commentary now states that 'satisfaction is not intended to be punitive in character, nor does it include punitive damages'.[134]

However, the position taken in relation to serious breaches of obligations owed to the international community as a whole was somewhat different. After acknowledging that there is no authority and very little justification for the award of punitive damages in the absence of a special

[127] Several common law jurisdictions distinguish between punitive damages and aggravated damages. While aggravated damages are also awarded due to reprehensible conduct on the part of the wrongdoing party, they are still compensatory in nature in that they address moral damage: Shelton (2005), 39–40; Wittich (2010), 667–8.
[128] ARSIWA Commentary, Art. 36, §4.
[129] Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 56.
[130] Draft Articles, Art. 45(2)(c).
[131] ILC Ybk 1992/I, 221 (Chairman of the Drafting Committee).
[132] Wittich (2010), 673; Crawford, Third Report, 56.
[133] Crawford, Third Report, 56; ILC Ybk 2000/I, 391 (Chairman of the Drafting Committee).
[134] ARSIWA Commentary, Art. 37, §8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:34 Page Number: 525

regime for their imposition,[135] it was suggested that a regime could be established in relation to these breaches.[136] The ILC rejected that punitive damages could be awarded, even in circumstances concerning serious breaches of obligations owed to the international community as a whole. Although the Drafting Committee suggested retaining the possibility of 'damages reflecting the gravity of the breach',[137] that expression was also later deleted, even though there was general agreement that that phrase was not to be equated with punitive damages.[138] This decision, fully in accord with the comments of governments, shows the unwillingness to introduce into the field of state responsibility anything punitive in character.

Article 41 as adopted leaves space for the possibility that such consequences could be accepted in the future. Paragraph 3 provides that the consequences stated in the Article are 'without prejudice to ... such further consequences that a breach to which this Chapter applies may entail under international law'. As the commentary states,

> 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.[139]

According to Wittich there is 'not a single case in contemporary practice in which an international court or tribunal has awarded punitive damages'.[140] In a number of cases, courts and tribunals have found states to have committed serious breaches of their international obligations, but that fact can be seen to have played no role in their determinations of reparation due.[141]

[135] For example, another rule providing for punitive damages may apply by way of *lex specialis*, or the parties to a particular dispute might consent to an international court or tribunal having power to award punitive damages.

[136] Crawford, Third Report, 56. See also ibid., 107, 108.

[137] ILC Ybk 2000/I, 393 (Chairman of the Drafting Committee),

[138] Crawford, Third Report, 12; ILC Ybk 2001/I, 104–5, 108 (Chairman of the Drafting Committee).

[139] ARSIWA Commentary, Art. 41, §14.

[140] Wittich (2010), 671. See also Crawford, Third Report, 56; Jørgensen, (1997) 68 BYIL 247, 266.

[141] For example, *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 227, where the International Court held Uganda to have committed a 'grave violation of the prohibition on the use of force'. See further Wittich (2010), 671.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:34 Page Number: 526

In other cases, international courts and tribunals have explicitly denounced the relevance of punitive considerations. In *Letelier* v. *Chile* a US district court held that the plaintiffs were entitled to approximately US$5 million, including $2 million by way of punitive damages, for the assassination in the United States of Orlando Letelier, an opponent of the then military regime.[142] Chile did not make any payment and the amount due was subsequently determined by a Chile–US International Commission without reference to punitive damages.[143] In his Separate Concurring Opinion, Commissioner Orrego Vicuña stated: 'It should . . . be reiterated that international law has not accepted as one of its principles the concept of punitive damages.'[144] In *Velásquez Rodríguez*, the Inter-American Court of Human Rights stated that the principle of punitive damages 'is not applicable in international law at this time'.[145] The European Court of Human Rights 'has consistently rejected claims for punitive damages'.[146] Pecuniary awards out of proportion to compensable damage can be explained on the basis that they are properly characterized as an award of satisfaction to make good moral damage.[147]

Shelton argues that punitive damages should nonetheless be recognized

> where the conduct clearly warrants a severe response. In particular, where there is clear evidence of a pattern of gross and systematic violations deliberately committed by the government, international tribunals concerned about impunity must consider enhancing awards or looking to non-monetary remedies. It is important that governments not continue to violate human rights after paying nominal or low compensatory damages to victims . . . Fundamentally the question of punitive or exemplary damages is one of utility. Several justifications can be given for their use: punishment, deterrence . . . The purpose is to reprove a state for its conduct and deter it from similar actions in the future.[148]

But the overwhelmingly negative reaction to the ILC's modest proposal for 'damages reflecting the gravity of the breach' shows that the idea of punitive damages under international law is currently unsustainable.

[142] *Letelier* v. *Chile*, (1980) 488 F Supp. 665, relevant extract reported at 88 ILR 747, 747–8.
[143] *Re Letelier and Moffitt*, (1992) 88 ILR 727, 735–7. The Commission concluded that $2,611,892 was owed. Chile did not admit liability but agreed to make an *ex gratia* payment equal to the amount that would have been due had liability been established, to facilitate the normalization of relations: ibid., 730.
[144] Ibid., 741.
[145] *Velásquez Rodríguez Case*, Compensation, (1989) 95 ILR 232, 316.
[146] *Varnava and Others* v. *Turkey*, [2009] ECtHR 16064/90, §223. See further Wittich (2010), 671–2; Shelton (2005), 360.
[147] For example, *Rainbow Warrior*, (1990) 20 RIAA 215, 224. See further Wittich (2010), 672.
[148] Shelton (2005), 366–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:34 Page Number: 527

16.4 Satisfaction

16.4.1 The basic principle

Article 37 provides:

> (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 acknowledgment 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.

Satisfaction is the remedy 'for those injuries, not financially assessable, which amount to an affront to the State',[149] in other words moral damage to a state. The commentary notes that satisfaction is not a standard form of reparation, but is 'rather exceptional'.[150] It is only where damage 'cannot be made good by restitution or compensation' that satisfaction may be required.

The commentary gives examples of various international obligations, the breach of which has been considered to warrant satisfaction. These include insults to the symbols of a state, such as the national flag,[151] violations of sovereignty or territorial integrity,[152] attacks on ships or aircraft,[153] ill-treatment or deliberate attacks on heads of state, government, diplomatic or consular representatives and other protected persons,[154] and violations of the premises of embassies, consulates and residences of members of diplomatic missions.[155]

16.4.2 Forms of satisfaction

Paragraph 2 gives a non-exhaustive list of forms satisfaction might take: 'an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality'. These forms of satisfaction are

[149] ARSIWA Commentary, Art. 37, §3. [150] ARSIWA Commentary, Art. 37, §1.
[151] Citing the *Magee* case (1874) in Whiteman, 1 *Damages in International Law* (1937–1943), 64–5. See further ARSIWA Commentary, Art. 37, §4 n. 615.
[152] Citing *Rainbow Warrior*, (1990) 20 RIAA 215.
[153] Citing the attack against a Soviet aircraft transporting Soviet leader Leonid Brezhnev by French fighter planes in 1961 in 65 RGDIP 603. See further ARSIWA Commentary, Art. 37, §4 n. 617.
[154] Citing Przetacznik, (1974) 78 RGDIP 919, 951.
[155] Citing the attack by demonstrators in 1851 on the Spanish consulate in New Orleans in Moore, 6 *A Digest of International Law* (1906), 811–19. See further ARSIWA Commentary, Art. 37, §4 n. 619.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:35 Page Number: 528

frequently seen in state practice. For example, when Colombian Black Hawk helicopters and warplanes allegedly strayed into Ecuadorian territory in 2006, the Colombian Defence Ministry apologized for any unintentional incursion.[156]

The examples listed in paragraph 2 are not intended to reflect any hierarchy or preference.[157] Satisfaction may take many other forms and the 'appropriate form ... will depend on the circumstances and cannot be prescribed in advance'.[158] Satisfaction may be generally defined as any measure which a responsible state is bound to take apart from restitution or compensation.[159] Examples given in the commentary include due inquiry into the causes of an accident resulting in harm or injury,[160] a trust fund to manage compensation payments in the interests of the beneficiaries and disciplinary or penal action against individuals whose conduct caused an internationally wrongful act.[161] Assurances and guarantees of non-repetition may also amount to a form of satisfaction.[162]

It is also possible for satisfaction to consist of a monetary payment.[163] The payment of money by way of satisfaction serves a purpose distinct from any money paid by way of compensation: the former is paid to make good material damage and moral damage to nationals, the latter is paid in relation to moral damage to the state.[164] In the *Rainbow Warrior* affair, the Secretary-General of the UN decided that France should pay New Zealand US$7 million.[165] This amount far exceeded the actual damage suffered and was plainly awarded by way of satisfaction.[166] Another example is the award in *I'm Alone*. The arbitration related to the sinking of a Canadian vessel by the US coastguard. The arbitrators held that while no compensation was payable in respect of the loss of the ship and the cargo, 'that as a material amend in respect of the wrong the

[156] 'Colombian apology for "incursion"', BBC News, 3 February 2006, available at news.bbc.co.uk/1/hi/world/americas/4676664.stm.
[157] ARSIWA Commentary, Art. 37, §5. [158] Ibid. [159] *Brownlie's Principles*, 574.
[160] Citing Myers, 'Navy to convene a public inquiry on sub accident', *New York Times*, 18 February 2001, available at www.nytimes.com, concerning an inquiry convened into the collision between a US submarine and a Japanese fishing vessel, the *Ehime Maru*.
[161] Citing the killing in Palestine in 1948 of Count Bernadotte, in relation to which there was a request for action against the guilty individuals in Whiteman (1963–73), 742–3. See further ARSIWA Commentary, Art. 37, §5 n. 622.
[162] ARSIWA Commentary, Art. 37, §5. For assurances and guarantees of non-repetition, see Chapter 14.
[163] ARSIWA Commentary, Art. 37, §5. [164] ARSIWA Commentary, Art. 36, §4.
[165] *Rainbow Warrior*, (1990) 20 RIAA 215, 224. [166] Crawford, Third Report, 52.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:35 Page Number: 529

United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly'.[167]

Other forms of satisfaction are found in the *Rainbow Warrior* affair. In his ruling, the Secretary-General ordered that the 'Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "Rainbow Warrior" by French service agents'.[168] He also determined that the two French agents concerned 'should be transferred to a French military facility on an isolated island outside of [*sic*] Europe for a period of three years'.[169] In the subsequent arbitral proceedings concerning France's breach of the Secretary-General's ruling, the tribunal recommended that New Zealand and France 'set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to US Dollars 2 million to that fund'.[170] This was in addition to the tribunal's finding that its declaration of France's liability constituted appropriate satisfaction.[171]

16.4.3 Judicial declarations

Although such declarations of wrongfulness by competent courts and tribunals are one of the most common forms of satisfaction, a declaration is not listed in paragraph 2 as one of the possible forms satisfaction might take. There are two reasons for this omission.

The first relates to the fact that the ARSIWA were not designed primarily as a set of rules to be applied in disputes resolved by formal adjudication. They are expressed in terms of the legal relations of states and not in terms of the powers or jurisdiction of tribunals. A state cannot grant or offer a declaration in respect of itself; this can only be done by a competent third party.[172] Second, any court or tribunal has the authority to determine the lawfulness of conduct properly before it and make a declaration of its findings as a necessary part of determining the case. A declaration may be made by a court or tribunal merely as a preliminary step on the way to its decision on the appropriate form of any reparation, even if it decides that no further remedy is necessary.[173]

[167] *SS I'm Alone*, (1935) 3 RIAA 1609, 1618. [168] *Rainbow Warrior*, (1990) 20 RIAA 215, 224.
[169] Ibid., 224. [170] Ibid., 274–5. [171] Ibid., 273.
[172] Crawford, Third Report, 55. See also ARSIWA Commentary, Art. 37, §6.
[173] ARSIWA Commentary, Art. 37, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:36 Page Number: 530

In numerous cases the International Court has considered that a declaration of wrongfulness has constituted an appropriate form of satisfaction.[174] In the *Corfu Channel* case the International Court stated that

> to 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.[175]

In some cases, the Court has determined that a declaration was the sole appropriate remedy. In the *Bosnian Genocide* case, for example, the Court held that restitution was not possible[176] and compensation not appropriate,[177] and made declarations by way of satisfaction.[178] The *Arrest Warrant* case is an example of a case in which the Court awarded satisfaction in addition to restitution. It stated:

> The Court has already concluded that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo ... The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo ...
>
> In the present case, 'the situation which would, in all probability, have existed if [the illegal act] had not been committed' cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law ... The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.[179]

The Court could instead have held that restitution was a necessary remedy and then considered whether satisfaction was required in addition. The Court's declaration seems rather to have been merely a preliminary finding made by it which was necessary for the determination of the case.

16.4.4 Limitations on the availability of satisfaction

The final paragraph of Article 37 requires that satisfaction not take a form humiliating to the responsible state. This provision was included to

[174] For example, *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4, 35; *Bosnian Genocide*, ICJ 2007 p. 43, 234–5; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Rep. 2008 p. 177, 245; *Pulp Mills*, ICJ Rep. 2010 p. 14, 102; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, ICJ, 5 December 2011, §169.

[175] *Corfu Channel*, ICJ Rep. 1949 p. 4, 35. [176] *Bosnian Genocide*, ICJ 2007 p. 43, 233.

[177] Ibid., 234. [178] Ibid., 234–5. See also *Pulp Mills*, ICJ Rep. 2010 p. 14, 102, 104.

[179] *Arrest Warrant*, ICJ Rep. 2002 p. 3, 31–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:36 Page Number: 531

address concerns regarding historical examples of demands for satisfaction that were humiliating.[180] One example given by Special Rapporteur Arangio-Ruiz was the Boxer uprising in China in 1900.[181] That event caused, among other things, the 'death of the German Ambassador to China, the looting of several foreign legations, the killing of the chancellor of the Japanese legation and of other foreign citizens, as well as the wounding of other foreign nationals and the profanation of foreign cemeteries'. The joint note sent to the Chinese government by the states concerned included 'extremely vexatious requests, such as the negotiation of new and more favourable commercial agreements'.[182]

Paragraph 3 also requires that satisfaction 'not be out of proportion to the injury'. Again, this requirement is little discussed in practice. It has been suggested that the requirement is directed to situations in which satisfaction takes the form of a monetary payment.

16.5 Interest

16.5.1 The basic principle

Whenever compensation is due, the question arises whether interest should be paid and the appropriate rate, mode of calculation and starting date. Interest is particularly important where the final resolution of a dispute is delayed for any considerable time. Although Special Rapporteur Arangio-Ruiz had envisaged an entire article dedicated to the issue of interest, as adopted the Draft Article dealing with compensation stated only that 'compensation ... may include interest':[183] the Drafting Committee considered that it would be too difficult to arrive at specific rules on interest and that a general principle couched in quite flexible terms was preferable.[184] The Draft Articles certainly did not stint in that regard: they stated no 'general principle' of any kind, but merely referred to a possibility.[185] On second reading a separate article on interest was endorsed for the ARSIWA without difficulty. This is appropriate given that, though an aspect of compensation,

[180] ARSIWA Commentary, Art. 37, §8.
[181] Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 37. Another example given is the demand by the Conference of Ambassadors against Greece in the Tellini affair in 1923: ibid., 37–8.
[182] Ibid., 37. [183] Draft Articles, Art. 44(2).
[184] ILC Ybk 1992/I, 220 (Chairman of the Drafting Committee).
[185] Crawford, Third Report, 57.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:36 Page Number: 532

interest is treated as a separate element of damages in practice.[186] Article 38 of the ARSIWA states:

> (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 on which the principal sum should have been paid until the date the obligation to pay is fulfilled.

The commentary emphasizes, as stated in Article 38(1), that interest may be payable on compensation but only where this is necessary to ensure full reparation. It states:

> Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case ... 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 ...[187]

On the issue of interest, the Eritrea–Ethiopia Claims Commissions stated:

> [T]he Commission has decided, in the exceptional circumstances presented by these claims, not to calculate and award interest on the amounts awarded to either Party.
>
> The Commission has particularly taken into account the fact that the Parties' claims, and the amounts awarded in respect of those claims, are broadly similar. Accordingly, this is a rare case in which interest on the compensation awarded would not materially alter the Parties' economic positions following the timely payment by each of the amounts due the other. Further, the amounts awarded in many cases reflect estimates and approximations, not precise calculations resting upon clear evidence. Like some other commissions, the Commission believes that this element of approximation reinforces the decision against awarding interest. Finally, the Commission notes that these proceedings have taken several years, reflecting the magnitude and complexity of the task. Both Parties have been diligent, and the period required does not reflect a lack of cooperation on the part of either. Accordingly, there is no need for pre-award interest to protect either Party from prejudice resulting from dilatory conduct by the other.[188]

The specific reason why an award of interest is necessary to ensure full reparation will depend on the case. The most commonly cited reason for awarding interest is to compensate the claimant for loss of the ability to

[186] Ibid., 60. [187] ARSIWA Commentary, Art. 38, §1.
[188] *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 531; *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 658–9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:37 Page Number: 533

benefit from use of the principal sum.[189] Other reasons are also evident, such as the need to protect against diminution in the value of the principal sum due to inflation,[190] and as a measure of lost profits.[191] Some orders relating to interest are properly seen as forming part of the damages awarded by way of compensation, for example where damages are awarded for interest costs actually incurred by a claimant.[192]

16.5.2 Pre-judgment and post-judgment interest distinguished

It is necessary to distinguish between pre-judgment (compensatory) interest and post-judgment (moratory) interest. Pre-judgment interest is awarded in relation to damage valued as at a date before the date of judgment (though it may run until a date after the date of judgment). Post-judgment interest may be payable if there is a delay in the payment of the sum awarded in the judgment.[193] Article 38 only deals with pre-judgment interest;[194] post-judgment interest is a matter for the procedure of the relevant court or tribunal.

The better interpretation of the jurisprudence of the Permanent Court and the International Court is that they have never awarded pre-judgment interest.[195] In the *Wimbledon* case, the Permanent Court awarded simple interest at a rate of 6 per cent. The Court stated:

> As regards the rate of interest, the Court considers that in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6% claimed is fair; this interest, however, should run, not from the day of the arriva1 of the 'Wimbledon' at the entrance to the Kiel Canal, as claimed by the applicants, but from the date of the present judgment, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.[196]

[189] Lauterpacht and Nevill, in Crawford, Pellet and Olleson (2010) 613, 616; Nevill, (2007) 78 BYIL 255, 278–9.
[190] Nevill (2007), 279.
[191] Lauterpacht and Nevill (2010), 616. Where compensation is awarded for loss of profits, an award of interest over the same period would amount to double recovery. However, an award of interest may be appropriate for interest that would have been earned on the profits themselves: ARSIWA Commentary, Art. 36, §33; ARSIWA Commentary, Art. 38, §11.
[192] Lauterpacht and Nevill (2010), 616.
[193] Ibid., 617.
[194] ARSIWA Commentary, Art. 38, §12.
[195] The question of interest was not raised in the *Corfu Channel*, Compensation, ICJ Rep. 1949 p. 244.
[196] *Wimbledon*, (1923) PCIJ Ser. A No. 1, 32.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:37 Page Number: 534

It is clear that the Court was only dealing with interest that would be due should Germany delay in paying the sum awarded. In *Diallo*, the International Court determined that simple interest of 6 per cent was again payable and specifically referred to this award as being 'post-judgment interest'.[197] The Court did not address the issue of pre-judgment interest, notwithstanding that the events in question had occurred some fourteen years previously and that Guinea had sought interest to 'take account of the effects of any currency depreciation that has occurred since the injurious act was committed'.[198]

16.5.3 The period for which interest is payable

The commentary explains:

> 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, date on which payment should have been made, date of claim or demand) ... There is no uniform approach, internationally ... [T]he 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.[199]

It has been said that the formulation 'date when the principal sum should have been paid' is 'wide enough to embrace date of breach or loss or date of demand'.[200] Although it is true that this formulation has a certain degree of flexibility, in theory the decisive date is the date on which damage occurs, which could be later than the date of breach.[201] It is only once damage occurs that the obligation to pay compensation arises and, logically, the obligation to pay interest on that compensation.

An injured state is only entitled to interest on such compensation if it is 'quantified *as at an earlier date* than the date of the settlement of, or judgment or award concerning, the claim'.[202] This is a departure from the position the Permanent Court took in *Wimbledon*. In that case, despite the fact that the damages in question were valued as at the date of loss,[203] the Court determined that interest was only payable from the

[197] *Diallo*, Compensation, ICJ, 19 June 2012, §56.
[198] *Diallo*, Memorial of the Republic of Guinea: Compensation, 6 December 2011, §§14–15, 69. See the DRC's reply at *Diallo*, Counter-Memorial of the Democratic Republic of the Congo: Compensation, 21 February 2012, Section IV.
[199] ARSIWA Commentary, Art. 38, §10. [200] Nevill (2007), 262.
[201] ILC Ybk 2000/I, 206 (Crawford).
[202] ARSIWA Commentary, Art. 38, §2 (emphasis added).
[203] *Wimbledon*, (1923) PCIJ Ser. A No. 1, 31.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:37 Page Number: 535

date of judgment as 'the moment when the amount of the sum due has been fixed and the obligation to pay has been established'.[204] The *Wimbledon* position was not principled. It would have permitted a responsible state to avoid paying interest in any case in which it disputed the existence of the obligation to pay.[205] It is now only moral damages that are considered not to be payable until the date of judgment.[206] For example, while the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)* awarded pre-judgment interest in relation to the material losses suffered by Saint Vincent and the Grenadines, it awarded only post-judgment interest in respect of the moral damage to its nationals.[207]

As Article 38 states, interest runs until the date on which the obligation to pay is fulfilled. This approach to pre-judgment interest can be seen in the practice of the Iran–US Claims Tribunal and in decisions of investment tribunals.[208] In *PSEG* v. *Turkey*, decided in 2007, the tribunal held that 'interest shall run on the total amount awarded, from August 1, 1998 ... until payment of the Award. There is accordingly no need for a separate or different determination of the post Award interest.'[209] Tribunals have also awarded pre-judgment interest until the date of judgment only (and post-judgment interest thereafter on the total sum awarded).[210] This deviation from the position stated in Article 38 is explicable based on the procedural rules of the relevant tribunals. For example, the European Court of Human Rights has an explicit power to

[204] Ibid., 32. [205] Nevill (2007), 285.

[206] Ibid., 285. See also Lauterpacht and Nevill (2010), 617.

[207] *M/V Saiga (No. 2)*, (1999) 120 ILR 143, 200–1. If a court or tribunal did quantify moral damages as at a date earlier than that of judgment, then pre-judgment interest should equally be due. As stated by Brownlie, '[i]t is sometimes stated that in the case of personal injuries, death, and mistreatment of various kinds, interest should not be awarded in excess of the more or less arbitrary pecuniary satisfaction awarded in such cases. This formulation of the position is difficult to follow. If in principle true compensation includes interest on the compensation (as due at the time of injury or death), the fact that the sum awarded is in some sense "unliquidated" or arbitrary is not incompatible with the payment of interest on the compensation. The fact that the "lump sum" awarded includes interest, notionally so to speak, does not contradict the *principle* that compensation should include interest on the damages as at the time of injury': Brownlie (1983), 228.

[208] Nevill (2007), 333.

[209] *PSEG* v. *Turkey*, ICSID Case ARB/02/5, 19 January 2007, §351. See also, for example, *CME* v. *Czech Republic*, Final Award on Damages, (2003) 9 ICSID Reports 264, 411.

[210] Nevill (2007), 333. In some cases the post-judgment interest rate is the same as the pre-judgment interest rate, such that the obligation to pay pre-judgment interest is effectively subsumed within the obligation to pay post-judgment interest. See for example, *Siemens* v. *Argentina*, (2007) 14 ICSID Reports 518, 602–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:38 Page Number: 536

award post-judgment interest,[211] and it is the practice of the Court to award post-judgment interest on the total sum awarded, with pre-judgment interest only being awarded to the date of judgment.[212]

16.5.4 The rate of interest and mode of calculation

Article 38 merely states that the interest rate and mode of calculation shall be set so as to 'ensure full reparation'. The appropriate interest rate in a particular case will depend on a range of factors, such as the nature of the claim, the facts of the case, any contractually agreed rate of interest and prevailing commercial rates.

According to Lauterpacht and Nevill, in the nineteenth century and for most of the twentieth century, rates awarded generally varied between 4 per cent and 8 per cent. For the most part tribunals did not explain their selection of rate, but where they did prevailing rates were considered persuasive.[213] In *Wimbledon* and *Diallo* the Permanent Court and the International Court, respectively, awarded post-judgment interest at a rate of 6 per cent simple interest, with reference to prevailing interest rates.[214] The International Tribunal for the Law of the Sea in the *M/V Saiga* awarded pre-judgment interest at the rate of 6 per cent simple interest on the various heads of compensation awarded, except for the head related to oil discharged from the *Saiga* while it was detained, for which a rate of 8 per cent was awarded.[215] The Tribunal only briefly explained that

> the Tribunal has set an interest rate of 6% in respect of the award of compensation. In determining this rate, account has been taken, *inter alia*, of commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located. A higher rate of 8% is adopted in respect of the value of the gas oil to include loss of profit.[216]

European Union courts used a rate of 'in general 6% per annum in the judgments in the period up to the mid-late 1980s, then 8% in judgments

[211] European Court of Human Rights, Rules of Court, Rule 75(3). The current version of the Rules is available from www.echr.coe.int/ECHR/Homepage_EN.

[212] Nevill (2007), 333–4. [213] Lauterpacht and Nevill (2010), 621.

[214] *Wimbledon*, (1923) PCIJ Ser. A No. 1, 32; *Diallo*, Compensation, ICJ, 19 June 2012, §56. In *Diallo*, the ICJ stated that 'post-judgment interest on the principle sum due will accrue as from 1 September 2012 at an annual rate of 6 per cent. This rate has been fixed taking into account the prevailing interest rates on the international market and the importance of prompt compliance': ibid., §56.

[215] *M/V Saiga (No. 2)*, (1999) 120 ILR 143, 200–1.

[216] *M/V Saiga (No. 2)*, (1999) 120 ILR 143, 200.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:38 Page Number: 537

up to the introduction of the euro into financial markets on 1 January 1999'.[217] It was even suggested in 1972 that a rate of 6 per cent simple interest be adopted as a general rule when the law of state responsibility was codified.[218]

Writing in 1943, Whiteman stated that there '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'.[219] This statement was relied on, for example, by the Iran–US Claims Tribunal,[220] which consistently denied claims for compound interest, including where a claimant had suffered losses through compound interest charges.[221] The commentary took the position that although the award of compound interest had been supported by some tribunals, the 'general view of courts and tribunals has been against the award of compound interest'.[222] However, the ARSIWA left the issue open by providing that the 'mode of calculation' of interest should be set so as to ensure full reparation.

Since 2001, compound interest has been awarded increasingly, particularly in investment arbitrations.[223] According to Lauterpacht and Nevill writing in 2010, there is now an 'identifiable trend towards

[217] Nevill (2007), 291.

[218] Subilia, *L'allocation d'intérêts dans la jurisprudence internationale* (1972), 160–3, cited in Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 29 fn. 228. It was suggested that this general rule be accompanied by the possibility that each state be given the opportunity to prove that the damage was greater and hence obtain a higher rate: ibid.

[219] Whiteman, 3 (1937–43), 1997.

[220] For example, *RJ Reynolds Tobacco Company* v. *Iran*, (1984) 7 Iran–US CTR 181, 191.

[221] Crawford, Third Report, 59.

[222] ARSIWA Commentary, Art. 38, §8.

[223] In addition to the cases listed at Nevill (2007), 311 fns. 323–4, compound interest has since been awarded in *BG Group* v. *Argentina*, 24 December 2007, §467(5); *Continental Casualty* v. *Argentina*, ICSID Case ARB/03/9, 5 September 2008, §§313–5; *VivendiUniversal* v. *Argentina*, ICSID Case ARB/97/3, Second Award, 20 August 2007, §11.1(vi); *Rumeli Telekom* v. *Kazakhstan*, ICSID Case ARB/05/16, 29 July 2008, §818; *National Grid* v. *Argentina*, 3 November 2008, §294; *Siag* v. *Egypt*, ICSID Case ARB/05/15, 1 June 2009, §631(VI)(a); *Kardassopoulos* v. *Georgia*, ICSID Case ARB/05/18, 3 March 2010, §693(g); *Chevron* v. *Ecuador*, PCA, Partial Award on the Merits, 30 March 2010, §555; *Funnekotter* v. *Zimbabwe*, ICSID Case ARB/05/6, 22 April 2009, §148(3); *Sistem Mühendislik* v. *Kyrgyz Republic*, ICSID Case ARB(AF)/06/1, 9 September 2009, §194, 196; *Alpha Projektholding* v. *Ukraine*, ICSID Case ARB/07/16, 8 November 2010, §514; *Bau* v. *Thailand*, 1 July 2009, §16.1; *Gemplus* v. *Mexico*, ICSID Case ARB(AF)/04/3, 16 June 2010, §16.27; *Impregilo* v. *Argentina*, ICSID Case ARB/07/17, 21 June 2011, §386(E); *Railroad Development* v. *Guatemala*, ICSID Case ARB/07/23, 29 June 2012, §283(4); *Unglaube* v. *Costa Rica*, ICSID Case ARB/08/1, 16 May 2012, §325; *EDF* v. *Argentina*, ICSID Case ARB/03/23, 11 June 2012, §III; *Renta 4* v. *Russia*, SCC Case 24/2007, 20 July 2012, §226; *Swisslion DOO Skopje* v. *Macedonia*, ICSID Case ARB/09/16, 6 July 2012, §359; all available at www.italaw.com.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 16 Title Name: CRAWFORD
Date:16/3/13 Time:10:56:39 Page Number: 538

acknowledging that the objective of providing a deprived party with a sum approaching the full reparation required by law necessarily involves . . . compounding as the best approximation of the loss suffered by the deprived party'.[224] This possibly states the point too generally. As Lauterpacht and Nevill acknowledge at another point, '[s]ince the early 2000s the balance of investment treaty tribunal practice has shifted towards awarding compound interest where requested by the claimant, but not invariably. There are very few examples of compound interest awards in other international judicial practice.'[225]

There seems no reason in principle why the awarding of compound interest should be limited to the context of investment treaty tribunal practice.[226] Awards of compound interest are presumably more frequent in investment treaty tribunal practice due to the high occurrence of claims concerning the deprivation of commercial property which would have produced income that would have accumulated, or offset money borrowed, at a compound interest rate – clear cases in which compound interest is necessary to ensure full reparation.[227]

[224] Lauterpacht and Nevill (2010), 621. [225] Ibid., 620.
[226] See also Nevill (2007), 317–29.
[227] As the Tribunal stated in *Kardassopoulos* v. *Georgia*, '[w]hen the question is, what amount has the Claimant lost by being wrongly denied payment of a sum on a certain date in the past, in circumstances where the Claimant could have invested an equivalent sum, or could only have borrowed an equivalent sum, on terms of compound interest, the award of compound interest is appropriate': *Kardassopoulos* v. *Georgia*, ICSID Case ARB/05/18, 3 March 2010, §664.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-VI Title Name: CRAWFORD
Date:13/3/13 Time:17:28:46 Page Number: 539

Part VI

The implementation of responsibility

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: PartTitle-VI Title Name: CRAWFORD
Date:13/3/13 Time:17:28:46 Page Number: 540

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:39 Page Number: 541

17 The claims process

17.1 Entitlement to claim

Part III of ARSIWA deals with the *mise-en-oeuvre* of state responsibility, its implementation: in other words, what states faced with a breach of an international obligation by another state or states may do about it.[1] These articles on implementation of responsibility cover the entitlement of other states to invoke the international responsibility of the responsible state, and certain modalities of such invocation.[2] The matter should be approached in the awareness that although reflection on the implementation of international responsibility can provide an overview of the relevant questions, it gives only uncertain and equivocal answers as to how international law can respond.

Chapter I of Part III, the most important addition to the Articles in the transition from first to second reading, is concerned with the invocation of the responsibility of a state. Although not defined in ARSIWA, in this context 'invocation of responsibility' refers to a formal process of claim against a state or states.[3] It means that the state invoking responsibility had the right to expect the responsible state to behave in a certain manner, and that the requisite conditions for making a claim regarding its alleged failure to do so are satisfied.[4] It does not affect informal diplomatic exchanges between states for the purpose of raising concerns and resolving conflicts.[5] Nor is ARSIWA concerned with the implementation of any international responsibility that may arise on the part of non-state actors such as international organizations, corporations or individuals.

[1] ARSIWA Commentary, Pt III. [2] Ibid., Pt III, Ch. I, §1.
[3] ARSIWA Commentary, Art. 42, §2.
[4] Gaja, in Crawford, Pellet and Olleson (2010) 941, 941.
[5] See ARSIWA Commentary, Art. 42, §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:39 Page Number: 542

This chapter examines the entitlement to claim, the process of claim, and instances when a potential claimant may lose the right to invoke responsibility. The related issue of countermeasures, covered in ARSIWA Part III, Chapter II, is addressed in Chapter 21.

The first question is whether the intending claimant has standing to invoke the responsibility of the responsible state or states. The traditional theory was that only states whose subjective rights had been violated could invoke responsibility;[6] as the International Court put it in 1970, 'only the party to whom an international obligation is due can bring a claim in respect of its breach'.[7] As finally adopted, ARSIWA makes a clear distinction between injured states (Article 42) and states other than injured states (Article 48) for the purposes of establishing entitlement to claim.[8] Issues can also arise over whether other injured parties or other entities may have standing to bring a claim.

17.1.1 The injured state

The notion of the 'injured state' is central to the question of entitlement to claim.[9] An injured state as defined has the right to resort to all the means of redress contemplated in ARSIWA, both judicial and extra-judicial.[10] The concept was not included in the first-reading text of Part I, but frequent references to it in the commentary indicated that the ILC and governments recognized its importance from an early stage in the drafting process.[11] Identifying the injured state was seen as 'vital in the allocation of certain privileges [and] to legitimizing subsequent acts which would otherwise be wrongful'; it was seen as perhaps the most significant aspect of the ILC's work on state responsibility.[12]

The matter was the subject of extensive debate within the ILC[13] before a definition was eventually proposed by Special Rapporteur Riphagen in

[6] Sachariew, (1988) 35 NILR 273, 274.

[7] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 174, 181–2; *Barcelona Traction, Light & Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Rep. 1970 p. 3, 32.

[8] Cf. Gaja (2010) 941, 941, 957. For further discussion see Chapter 3.

[9] See ibid., 941.

[10] ARSIWA Commentary, Art. 42, §3.

[11] See ILC Ybk 1973/II, 174–6.

[12] Comments of Singapore, UN Doc. A/CN.4/488/Add.3, 2.

[13] See Riphagen, Third Report, ILC Ybk 1982/II(1), 36–9; Riphagen, Fourth Report, ILC Ybk 1983/II(1), esp. 13–15 (where a distinction is drawn between the State having an interest affected and the State 'party to the breach') and 21–3 (where the general distinctions and the rights an injured State is entitled to invoke in the different situations are listed). For the debate, see ILC Ybk 1982/I, 230–6 (1736th meeting), and ILC Ybk 1983/I, 103–4, 127–38 (1772nd, 1777th and 1780th meetings).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:40 Page Number: 543

1984.[14] The definition identified the injured state or states by reference to four distinct categories of internationally wrongful act, according to the underlying right infringed or obligation breached. Following some changes, Draft Article 5 was provisionally adopted by the ILC in 1985,[15] forming the basis for Draft Article 40 adopted on first reading in 1996:

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 State party 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;

[14] ILC Ybk 1984/II(2), 100–2; see further ILC Ybk 1985/II(1), 5–8, for his renewed proposition in the form of Draft Articles, Pt II, Art. 5 together with commentary.

[15] For the amended text and commentary, see ILC Ybk 1985/II(2), 25–7. One major change which attracted some criticism was to frame the provision in terms of rights infringed, rather than obligations breached. See ILC Ybk 1985/I, 311 (Sinclair).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:40 Page Number: 544

(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.

Draft Article 40 played a pivotal role as a hinge between Part I, framed in terms of the internationally wrongful act of a state, and Part II, framed in terms of the rights and entitlements of the injured state. Unfortunately, it was seriously flawed, and governments expressed considerable concern about numerous aspects of the drafting when it was reviewed for second reading.[16] Although not expressed to be exhaustive, it was long and unwieldy. Its treatment of multilateral obligations was particularly problematic, as it appeared to reduce them all to an artificial bilateral right/obligation relationship. Further, the definition made no distinction between states which were the primary victims of an injury, and states which had a wider or collective interest in performance of the obligation but which were not themselves directly affected by the wrongful act – it aggregated what should have been disaggregated. As a result, a breach of an obligation owed to the international community as a whole, or the commission of an international crime,[17] would result in all other states being classified as individually 'injured' and trigger their equal entitlement to invoke responsibility. The consequences of such broad classifications were not adequately addressed in later provisions of the Draft Articles.

Again, there was a range of views on what was required in order to remedy the flaws in Draft Article 40, although there was no doubt that reference to the meaning of 'injured state' should be kept.[18] In the end, Part II of the Draft Articles adopted on first reading was substantially restructured, being divided into two new parts dealing with the content of state responsibility and the implementation of responsibility respectively. Draft Article 40 was replaced by two articles that separated

[16] See e.g. ILC Ybk 1998/II(1), 138–44. For further analysis of Draft Articles, Art. 40 see Crawford, Third Report, 29–32.

[17] International crimes of state were the subject of Draft Articles, Art. 19, but this provision and the concept did not survive the second reading. See Chapter 3.

[18] See e.g. Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session prepared by the Secretariat, UN Doc. A/CN.4/496, 19 for a summary of views.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:40 Page Number: 545

invocation of responsibility by injured states from invocation by other states.[19] In its final adopted form, ARSIWA Article 42 sets out three scenarios in which a state may be classified as entitled to invoke responsibility as an 'injured' 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.

There are clear parallels between the structure of Article 42 and that of Article 60 of the Vienna Convention on the Law of Treaties[20] (VCLT) on the termination or suspension of a treaty as a consequence of its breach, although the scope and purpose of the two provisions are not identical.[21] The term 'injured' itself and the related concepts of 'injury' and 'damage' are not defined in ARSIWA, as this is the domain of primary rules of international law rather than the secondary rules of responsibility. Further, ARSIWA recognize that in some cases more than one state might satisfy the definition in Article 42 in connection with the same wrongful act. Article 46 makes it clear that when there is a plurality of injured states, each will have an independent entitlement to invoke responsibility.[22] There is no obligation of co-ordination or co-operation between multiple injured states.

In most cases it should be relatively straightforward to determine whether performance of an obligation was owed to the state individually in terms of Article 42(a).[23] The obvious example, mirrored in Article 60(1) VCLT, would be an obligation owed under a classic bilateral treaty, but it is by no means the only example. Another might be a unilateral commitment made by one state to another state. Other cases might involve multilateral treaties or general rules under which certain

[19] See Crawford, Fourth Report, 8, 10–11 on the new Draft Articles, Arts. 43 and 49.
[20] 22 May 1969, 1155 UNTS 331. [21] See ARSIWA Commentary, Art. 42, §§4–5.
[22] See ARSIWA Commentary, Art. 46; Huesa Vinaixa (2010). See further Chapter 20.
[23] See Riphagen, Fourth Report, ILC Ybk 1983/II(1), 21.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:41 Page Number: 546

obligations become particularized depending on the facts of the situation – such as obligations of a receiving state towards a sending state in the context of diplomatic relations, or individual obligations as between riparian states under a regime for the use of an international river.[24] In short, 'individually' does not mean 'exclusively'. It simply means that in the circumstances, performance of the particular obligation must have been owed to that specific state, regardless of whether it may have also been owed to other states either simultaneously or under different circumstances.[25] The recognition that multilateral treaties may create bundles of what are essentially bilateral relations distinguishes the scope of Article 42(a) ARSIWA from that of Article 60(1) VCLT, the latter being limited to bilateral treaties alone.

Article 42(b) then deals expressly with obligations owed to a group of states or the international community as a whole. The provision differentiates two scenarios in which a state party to such obligations may be described as 'injured' for the purposes of invoking responsibility, as distinct from any entitlement to claim that all states parties to such obligations might have under Article 48.

First, Article 42(b)(i) concerns so-called 'specially affected states', reflecting Article 60(2)(b) VCLT. It may be that one particular state is the primary victim of a wrongful act, or the primary obligee of an obligation owed to a wider group of states. For example, the obligation not to use force in interstate relations enshrined in Article 2(4) of the UN Charter applies to the international community as a whole, but a specific act of aggression will always be perpetrated against a specific state or states, and will have its most significant adverse impact on the target state. In such cases that specially affected state should have access to the full range of remedies open to an 'injured state', whether or not it may be said to have had an individual right to the performance of the obligation under Article 42(a).[26] But not every obligation in the collective interest will have a primary victim – for example it will be difficult to prove that any one state suffered a special adverse impact from a third state's breach of an obligation not to release chlorofluorocarbons (CFCs) into the atmosphere. Hence the need to differentiate between the rights of specially affected states and those with a wider, more diffuse interest in performance of the obligation.

[24] For further examples and analysis see ARSIWA Commentary, Art. 42, §§6–10; Gaja (2010) 941, 943–4.
[25] See ARSIWA Commentary, Art. 42, §6.
[26] See ARSIWA Commentary, Art. 42, §§11–12.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:41 Page Number: 547

Second, Article 42(b)(ii) deals with what may be referred to as 'integral obligations' – obligations that operate on an all-or-nothing basis.[27] This narrow but important category of obligations is analogous to those recognized in Article 60(2)(c) VCLT.[28] It refers to obligations of such a character that a breach affects per se all other states to which the obligation is owed. It is sometimes misunderstood as referring simply to obligations in the general interest, such as human rights obligations, but the concept is more nuanced than that: the category is limited to obligations whose breach threatens the structure of the whole regime.[29] It can be illustrated by reference to the obligations of states parties to the 1959 Antarctic Treaty to refrain from asserting new claims to territorial sovereignty over Antarctica while the treaty is in force.[30] All parties clearly have an interest in the performance of this obligation, and their own position would be affected by any change to the status quo.[31] Other examples could include disarmament treaties, or certain regimes for the protection of the environment. While it is usually the case that these interdependent obligations arise under multilateral treaties, Article 42(b)(ii), like the rest of ARSIWA, applies to all obligations regardless of their origin or character.[32] In this regard Article 42(b)(ii) goes further than Article 60(2)(c) VCLT. The point is that conformity with the obligations is required by all parties for the success of the regime, and if one state breaches its obligations all other states must be individually entitled to respond, even if they may not have suffered any material injury or especially adverse impact.

The prominence of Article 42 within Chapter I of Part III emphasizes that the invocation of responsibility is primarily an entitlement of the injured state. However, in *Barcelona Traction* the Court clearly distinguished between the individual rights of states and the legal interests of several or all other states not directly affected by the breach of an obligation,[33]

[27] See e.g. Sachariew, (1988) 35 NILR 273; Crawford, (2006) 319 Hague *Recueil* 325, 439–41; ARSIWA Commentary, Art. 42, §§13–15; Gaja (2010) 941, 944–6.

[28] VCLT, Art. 60(2)(c) refers to a treaty which is 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 under the treaty'.

[29] This is not the case with treaty obligations for the protection of the human person, because a breach by one state does not entitle other states to suspend their own obligations; see VCLT, Art. 60(5).

[30] 1 December 1959, 402 UNTS 71. Art. IV(2).

[31] See ARSIWA Commentary, Art. 42, §14; Gaja, in Crawford, Pellet and Olleson (2010) 945.

[32] See ARSIWA and Commentary, Art. 12.

[33] *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3, 32–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:41 Page Number: 548

suggesting that in some cases other states may also have an entitlement to claim. Before moving on to consider the standing of states other than injured states under ARSIWA Article 48, however, it is necessary to discuss the position of other injured parties that are not covered by the definition of 'injured state' in Article 42.

17.1.2 Other injured parties

There is no doubt that states may owe primary obligations to non-state entities such as international organizations, corporations and individuals. Such actors may be – and frequently are – directly and materially affected by the internationally wrongful act of a state. This is implicitly recognized by ARSIWA; the articles are of broad application, and Part I covers all international obligations of states.[34] It does not exclude obligations owed to non-state subjects from the definitions of 'internationally wrongful act' and 'breach of an international obligation'.[35]

However, the question of who may invoke responsibility for a breach is separate from establishing the occurrence of the breach in the first place.[36] When it comes to addressing the content of the international responsibility of a state, there is an acknowledged discrepancy between the scope of Part I and that of Part II. Part II does not deal with the secondary rights and permissible responses of injured parties that are not states. Article 33(2) limits the scope of the secondary obligations arising as a consequence of an internationally wrongful act by a state:

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.

This provision was inserted in order to advert to the discrepancy in scope between Parts I and II and to prevent any inferences from being drawn about secondary obligations owed to non-state actors from the provisions on secondary obligations owed to states. Correspondingly,

[34] See e.g. ARSIWA Commentary, Art. 1, §5; Art. 28, §3.
[35] See ARSIWA Arts. 2 and 12 respectively. [36] See ARSIWA Commentary, Art. 2, §8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:42 Page Number: 549

the limitation in Article 33(1) and the saving clause in Article 33(2) apply *mutatis mutandis* to the provisions on implementation in Part III.[37]

If the law of implementation of state responsibility by injured and other states remains under-developed, then the law of implementation by entities other than states is embryonic. It would not have been appropriate for ARSIWA to address this terrain at such an early stage in its development; nor do the articles deal with difficult questions about the relationship between claims of responsibility asserted by states and claims of the non-state victims arising from the same conduct. But ARSIWA's silence on the implementation of responsibility by non-states does not mean that such entities will never have standing to claim against a state in response to its internationally wrongful act. Rather, it will be the relevant primary obligations that will determine whether or not a non-state party has any entitlement to claim in the particular circumstances, for example by initiating a complaint under human rights treaty monitoring mechanisms, or invoking bilateral investment treaty provisions that permit recourse to arbitration.[38] Article 33(2) recognizes the possibility that non-state entities may have standing to invoke primary obligations directly against the responsible state, and those rights are preserved even though Article 33(1) excludes secondary obligations owed to non-states from the scope of ARSIWA.[39]

17.1.3 Concerned states or other entities

When an internationally wrongful act arises from the breach of a multilateral obligation, other states and entities besides those that have been directly 'injured' may also wish to implement responsibility, not only for themselves but in the collective interest. One of the flaws of Draft Article 40 was that it equated the position of injured states with the position of other states, not themselves victims, which have a legal interest in compliance with the obligation because it is owed to them as well. This problem was addressed in the final version of ARSIWA by replacing Draft Article 40 with two complementary Articles, 42 and 48. Article 48 gives effect to the Court's dictum in *Barcelona Traction*,[40] providing as follows:

[37] ARSIWA Commentary, Pt II, Ch. I, §2; Art. 33, §4. [38] Ibid., Art. 33, §4.
[39] Ibid., Pt III, Ch. I, §1.
[40] *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3, 32–3. See further Gaja, in Crawford, Pellet and Olleson (2010) 957.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:42 Page Number: 550

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.

Once again, invocation of responsibility in this context entails something more than raising concerns in a diplomatic setting; third states not directly affected by an internationally wrongful act might well choose to take informal steps to remind the responsible state of its obligations, but those interactions are not regulated by the ARSIWA. Just as secondary obligations owed to injured non-state parties are excluded from the scope of ARSIWA Parts II and III, so are secondary obligations owed to non-state parties that have not themselves been injured but who wish to invoke responsibility in a wider interest. Again, the position of these parties is preserved by Article 33(2) and they will have to rely on any primary obligations that provide them with an entitlement to claim.

Depending on the circumstances, many or even all states could be entitled to invoke responsibility in reliance on this provision, but there is no obligation to act together or co-operate in making a claim.[41] Paragraph 1 of Article 48 defines the categories of obligations whose

[41] This is clear from the use of the words 'any state' in Art. 48(1) and (2); see ARSIWA Commentary, Art. 48, §4. There is some suggestion that the lack of any need for a collective or third-party decision as to when a breach has arisen could be dangerous, in terms of the potential for vigilantism on the part of states, but this is balanced to some extent by the limits to countermeasures under Art. 54: see Brown Weiss, (2002) 96 AJIL 798, 805.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:42 Page Number: 551

breach gives states other than injured states the right to invoke responsibility. The first category, in Article 48(1)(a), is sometimes referred to under the rubric of obligations *erga omnes partes*. It encompasses obligations established between a group of states for some collective interest of the group, and the state invoking responsibility must be a member of that group.[42] The limitation to a collective interest 'of the group' was inserted to address states' concerns over the potential breadth of the term 'collective interest', although there is nothing to prevent groups of states undertaking obligations for the benefit of a wider group or community.[43] There is no requirement that the obligation be 'expressly stipulated' to be in the collective interest as there was in Draft Article 40(2)(f). The category in Article 48(1)(b) reflects what the International Court described as obligations *erga omnes* in the *Barcelona Traction* judgment, but ARSIWA avoids using the Latin term itself and retains the expression 'the international community as a whole'.[44] All states are by definition members of this community and no further qualification is necessary to establish standing.

Paragraph 2, in providing an exhaustive list of the categories of claim that states may make under Article 48, highlights that the entitlement to invoke responsibility under this provision is ancillary or secondary to the entitlement of injured states under Article 42. A state invoking responsibility under Article 48 has no right to claim reparation for itself. Rather, its entitlement to claim is limited to seeking cessation and assurances and guarantees of non-repetition, and seeking reparation in the interest of the injured state or entity.[45] Further, while the consent of an injured state would preclude the wrongfulness of the breach under ARSIWA Article 20, the consent of a third state with an interest in performance would have no such effect in respect of an act of which another state was the primary victim.

International law has been slow to recognize any concept of 'public interest standing' as it is understood in municipal systems, and the articulation of a form of this concept in Article 48 marks an important step forward. Relations between states were traditionally seen as bilateral, and even when states began concluding multilateral treaties in the

[42] See ARSIWA Commentary, Art. 48, §§6–7.
[43] Ibid; Crawford, (2006) 319 Hague *Recueil* 325, 449–50.
[44] ARSIWA Commentary, Art. 48, §§8–10. See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, §§68–9, and see also Vaurs-Chaumette, in Crawford, Pellet and Olleson (2010) 1023.
[45] See further Vaurs-Chaumette (2010), 1027.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:43 Page Number: 552

second half of the eighteenth century, these arguably tended to create bundles of bilateral obligations rather than truly multilateral obligations. The understanding was that in order to have standing to claim against another state, the claimant state must have suffered a violation of its own individual rights, and the system has not been well adapted to cope with relationships that depart from the traditional synallagmatic rights/duties model.

The case most in point is the 1966 decision of the International Court in the *South West Africa* cases in which, on President Spender's casting vote, the Court denied Ethiopia and Liberia the ability to claim against South Africa in the interest of the peoples of the mandated territory, despite having upheld jurisdiction four years earlier.[46] The Court effectively adhered to a narrow bilateral conception of 'injury' as the default rule, even for interpreting treaties protecting a wider public interest. The landmark dictum in *Barcelona Traction* in 1970 can be interpreted as a repudiation of that position by the Court, in response to the outcry that ensued after *Second South West Africa*. A decision on the question of public interest standing was not necessary in the circumstances of *Barcelona Traction*, but by distinguishing between cases involving violations of individual rights in the context of diplomatic protection and cases in which the obligations breached were of an *erga omnes* character, the Court paved the way for the development of Article 48.[47]

Like Article 53 VCLT on peremptory norms, Article 48 emerged not as a codification of established practice, but to provide a basic framework for the further development of the law. Suggestions that the provision should be limited to cover serious breaches only (that is, breaches that by virtue of their gravity put the collective interest at risk), or even just serious breaches of peremptory norms as covered in ARSIWA Part II, Chapter III,[48] did not survive the drafting process.

Article 48 was expressly mentioned by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, to support the

[46] See *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, ICJ Rep. 1966 p. 6; cf. *South West Africa*, Preliminary Objections, ICJ Rep. 1962 p. 319.

[47] Since *Barcelona Traction* the Court has referred to obligations *erga omnes* in this sense in several cases, e.g. *East Timor (Portugal v. Australia)*, ICJ Rep. 1995 p. 90, 102; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Rep. 1996 p. 595, 616; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136, 199–200; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, Jurisdiction and Admissibility, ICJ Rep. 2006 p. 6, 31–2.

[48] ILC Ybk 2001/II(1), 80.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:43 Page Number: 553

argument that standing to claim compensation for damage to the seabed, ocean floor and subsoil might be read into the International Sea-Bed Authority's duty to act on behalf of mankind, pursuant to Article 137(2) of the United Nations Convention on the Law of the Sea.[49] Nonetheless, it is unlikely that the provision will be relied on frequently. Most substantive multilateral issues are regulated by multilateral treaties which contain their own (usually generous) provisions for invocation, as for example under the WTO Agreements.[50] But as a baseline rule, Article 48 strikes an appropriate balance between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes.

17.2 The process of claim

Once entitlement to claim is established, the next concern becomes the process of claim itself. Responsibility arises automatically by operation of law when a state commits an internationally wrongful act, but on a practical level, an injured or otherwise interested state must respond if it intends to invoke that responsibility and seek redress.[51] Originally, Part III of the Draft Articles as adopted on first reading provided for a hierarchical system of dispute settlement. When a dispute 'regarding the interpretation or application of the present articles' arose, the parties were to enter into negotiations to settle it amicably, failing which any party could initiate conciliation, failing which the parties could resort to voluntary arbitration; but if one state had taken countermeasures against another, the latter state was entitled to submit the matter straight to arbitration.[52] There were serious difficulties with this regime, however.[53] Not least of these was that incorporating a system of binding dispute resolution relied on an implicit assumption that the Draft Articles would form the precursor for a multilateral treaty on state responsibility; instead, it was decided to keep them in the form of a non-binding instrument pending further discussion in the

[49] 10 December 1982, 1833 UNTS 3. See *Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No. 17, 1 February 2011, 53–4.

[50] See *EC – Bananas III*, 25 September 1997, WT/DS27/AB/R, §135: 'a Member has broad discretion in deciding whether to bring a case against another Member under the DSU'.

[51] ARSIWA Commentary, Art. 43, §2.

[52] For an analysis of this provision, which would have privileged the responsible state, see Chapter 3. On countermeasures generally, see further Chapter 21.

[53] See generally Crawford, Fourth Report, 4–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:43 Page Number: 554

General Assembly.[54] Ultimately the idea of including any express provision for dispute settlement in the articles – whether compulsory or optional – was discarded.

While the specific dispute settlement mechanism originally proposed did not survive the second reading, the ARSIWA nonetheless retains general relevance for certain aspects of the process of claim. In terms of the formal requirements for invocation of responsibility, Article 43(1) provides that an injured state which invokes the responsibility of another state shall give notice of its claim to that state.[55] The provisions of Article 43 refer only to the injured state, as defined in Article 42, but they are equally applicable to claims by other states relying on Article 48.[56] In essence, ARSIWA sets out the minimum requirements for notification, so that the situation is brought to the attention of the responsible state, giving it an opportunity to know the allegations against it and take appropriate steps to cease the breach and provide redress. There is no requirement that notice be given in writing. The provision does not imply that the normal response to a breach would be to file a statement of claim, when in reality quiet diplomacy may well be more effective in many cases.[57] Instead, the form and modalities of notification are left to the states involved, and will largely be dictated by the particular circumstances of the breach and any primary obligations in respect of dispute settlement.[58]

ARSIWA's flexible approach is consistent with the position that the International Court has taken in respect of notification of claims.[59] In *Certain Phosphate Lands in Nauru*, for example, the Court was prepared to find that Australia was aware of Nauru's claim as a result of certain communications which fell short of formal diplomatic correspondence, and in circumstances where there was a delay of fourteen years between

[54] On the paradoxical 'influence amid controversy' of the articles, despite their adoption as an ILC text rather than a multilateral treaty, see Caron (2002).

[55] On the formal requirements see generally ARSIWA Commentary, Art. 43. See further Peel, in Crawford, Pellet and Olleson (2010) 1029.

[56] See Art. 48(3); ARSIWA Commentary, Art. 48, §14.

[57] On diplomacy as a procedure for the peaceful settlement of disputes, see Waibel (2010).

[58] For example, VCLT, Art. 65 provides a specific procedure of notification and subsequent steps in case of invalidity, termination, withdrawal from or suspension of the operation of a treaty. See Villiger (2009), 799–815; Corten and Klein (eds.), 1 *The Vienna Convention on the Law of Treaties: A Commentary* (2011), 1483–508. For discussion of a range of specific regimes of responsibility see essays by Marks and Azizi, Rivier, Costa, Gherari, Gomula, Nègre, Douglas, Müller, Petrović and Thouvenin in Crawford, Pellet and Olleson (2010) 725–875.

[59] See further Peel (2010), 1030–1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:44 Page Number: 555

Australia making its position known and the first formal notification in writing of Nauru's response.[60] While whether Australia did in fact have notice was clearly important for the Court, it took a pragmatic approach that emphasized substance over form. This must be correct as a matter of principle.

Article 43(2) states that the injured state (or *mutatis mutandis* a state claiming under Article 48) may specify the conduct required to cease a continuing wrongful act and/or what form reparation should take. There is no obligation on the claimant to do so, but it is normal that this would be done, and it may help to facilitate resolution of the dispute. On the other hand, any specification by the injured state would not be binding on the responsible state. The injured state can only demand that the responsible state comply with its obligations; it cannot define the legal consequences of the wrongful act.[61] Thus although Article 43(2)(b) recognizes the general right of an injured state to choose its preferred form of reparation – for example, compensation instead of restitution[62] – the right is not framed as absolute.[63] The choices of the injured state might have consequences for other interested parties, particularly in circumstances where the breach is ongoing. In some cases agreement between the two states concerned as to compensation or another form of reparation would be insufficient to resolve the wider situation, for example where third parties have an interest in continued performance of obligations incumbent on either the injured or responsible state.[64] Finally, where the state invoking responsibility is not an injured state but another state asserting a collective interest in reliance on Article 48, the choices of what it may claim will be limited by Article 48(2).[65] In practice, it has been very rare for states other than injured states to claim performance of the obligation of reparation,[66] and this aspect of Article 48(2) is probably to be regarded as progressive development.

[60] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Rep. 1992 p. 240, 254–5; ARSIWA Commentary, Art. 43, §4.

[61] See ARSIWA Commentary, Art. 43, §5; Peel, in Crawford, Pellet and Olleson (2010) 1029, 1031–2.

[62] See e.g. *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9; *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, ICJ Rep. 1991 p. 12 (which was resolved by settlement: see Koskenniemi, (1992) 38 AFDI 905, 940).

[63] On choice of the mode of reparation see further Peel (2010), 1032–3; Chapter 17.

[64] ARSIWA Commentary, Art. 43, §6.

[65] See the discussion of permissible responses in Crawford, Third Report, 36–7.

[66] Gaja (2010) 957, 962.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:44 Page Number: 556

A further element of the process of claim is the basic question of admissibility. It is not ARSIWA's function to deal with the jurisdiction of international courts and tribunals, or specific issues as to the admissibility of cases brought before them. However, certain matters that are treated as questions of jurisdiction or admissibility before tribunals amount to fundamental conditions for invoking the responsibility of a state. ARSIWA Article 44 addresses two such conditions under the heading 'Admissibility of claims'.

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.

It is clear from the language of this provision that Article 44 is only relevant to admissibility where one of the rules in question is 'applicable' to the claim. Neither paragraph purports to lay down the specific content or scope of the rules, or the exceptions to those rules.[67] They will be discussed in the context of diplomatic protection in Chapter 19.

Beyond these broad considerations, ARSIWA does not directly govern the process of claim in matters of state responsibility. This is in keeping with the purpose of the articles, which is not to provide primary content but rather to define the conditions for establishing the international responsibility of states as a matter of secondary obligation, and for the invocation of that responsibility by states. A variety of processes may be applicable in any given case, depending on the choices of the parties involved and the character of the relevant primary obligations.[68] The procedural details and requirements will be governed by those primary obligations and will also depend on the forum chosen for resolution of the dispute. For example, in the International Court the process of claim is governed by the Statute and Rules.[69] Where no specific dispute settlement

[67] See ARSIWA Commentary, Art. 44.

[68] For discussion of a range of specific regimes of responsibility see essays by Marks and Azizi, Rivier, Costa, Gherari, Gomula, Nègre, Douglas, Müller, Petrović and Thouvenin in Crawford, Pellet and Olleson (2010), 725–875. For discussion of different procedures for the peaceful settlement of disputes see essays by Waibel, Susani, Coulée and Cottereau in ibid., 1085–1126.

[69] See generally Rosenne, 3 *The Law and Practice of the International Court, 1920–2005* (2006).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:44 Page Number: 557

mechanism and procedure is stipulated by the treaty or other source of obligations, claims under different voluntary mechanisms may be possible in accordance with the principle of free choice of means stated in Article 33 of the UN Charter. Claims will proceed differently depending on whether the claimant is an injured state or a state relying on a wider collective interest, or indeed a non-state entity whose entitlement to claim is beyond the scope of ARSIWA. Where obligations to the community as a whole are involved, this may also influence how the process develops: Judge Weeramantry, in his separate opinion in *Gabčíkovo-Nagymaros*, expressed the view that the Court's traditional adversarial *inter partes* procedures might be inadequate for dealing with allegations of breaches involving important obligations *erga omnes*, such as 'momentous environmental issues' with consequences spreading beyond the immediate litigants.[70]

17.3 Loss of the right to invoke responsibility

Part II of the first reading draft of ARSIWA was framed in a manner which assumed that not just the secondary relationship of responsibility but all consequences of that legal relationship naturally flowed from the commission of an internationally wrongful act. On this view, there was no room for choice on the part of the states concerned, and countermeasures would be as much a part of the secondary legal relation as reparation. But that is not the case: the reality is that the subsequent conduct of the states involved may have an important effect on the legal consequences of a wrongful act, with implications for the claimant, the responsible state and others. This conduct could include a choice as to the preferred form of reparation, or it could lead to the loss of the right to claim altogether. To take a simple example, in the case of breach of a normal bilateral interstate obligation, it is open to the injured state in effect to forgive the breach, or to waive the right to invoke its consequences, or to elect to receive compensation rather than restitution, or to focus only on cessation and future performance.

Article 45 ARSIWA recognizes that in certain circumstances an injured or interested state[71] with notice of a breach may lose its right to invoke responsibility:

[70] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 117–18 (Vice-President Weeramantry).

[71] Although the language of Art. 45 is limited to injured states, it applies *mutatis mutandis* to states other than injured states pursuant to Art. 48(3); see ARSIWA Commentary, Art. 48, §14.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:45 Page Number: 558

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.[72]

This is similar to the provisions on loss of the right to invoke a ground for invalidating or terminating a treaty in the VCLT.[73] The focus is on conduct subsequent to the commission of the internationally wrongful act that affects the right to claim, as distinct from circumstances that prevent any right to claim from arising in the first place, the obvious example of the latter being prior consent.[74] Besides waiver and acquiescence, expressly mentioned in Article 45 ARSIWA, other questions of particular relevance to the loss of the right to invoke responsibility are lapse of time, adjudication and settlement, and the effects on related or derivative claims. The relation between some of these different but overlapping concepts and others (including for example estoppel and extinctive prescription) remains uncertain.

17.3.1 Waiver and acquiescence

Article 45 ARSIWA distinguishes valid waiver from valid acquiescence in the lapse of a claim. The determination of what constitutes validity in such circumstances falls to the primary obligations in question.[75] Waiver and acquiescence are concepts that directly affect the substance of a claim, not just matters of procedure; if proved, the right to claim ceases to exist.

Waiver amounts to 'the voluntary renunciation of a right or claim'.[76] It is a manifestation of consent – the injured state has waived the breach, or its consequences in terms of responsibility, after the commission of the internationally wrongful act.[77] Waiver may take the form of a unilateral act by a state, or it may arise during informal negotiations

[72] For the background to this provision see ILC Ybk 2000/II(2), 45, 48; ILC Ybk 2000/I, 395 (Chairman of the Drafting Committee).
[73] VCLT, Art. 45. On VCLT, Art. 45 see e.g. Villiger (2009), 572–9; Corten and Klein (2011), 1064–86.
[74] For circumstances precluding wrongfulness see ARSIWA, Pt I, Ch. V. See further Tams (2010), 1041.
[75] Issues of coercion, error or misrepresentation of facts may be relevant; see ARSIWA Commentary, Art. 45, §4.
[76] Tams (2010), 1036. [77] See ARSIWA Commentary, Art. 45, §2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:45 Page Number: 559

with the responsible state as part of a process of give and take; it may be recorded in a 'waiver clause' within the framework of a treaty, or it may be left as an informal arrangement. Where the waiver is not explicit, any conduct or statement from which waiver is inferred must be clear and unequivocal; any ambiguity is likely to be resolved in favour of the claimant rather than the responsible state. A state may be taken to have waived just part of its claim: for example, in the *Russian Indemnity* case, Russia's failure to mention interest or damages as part of its repeated demands for repayment of a debt from Turkey precluded it from subsequently claiming additional sums once it had accepted repayment of the principal sum.[78]

In *Certain Phosphate Lands in Nauru*, Australia alleged a 'two-fold waiver' on the part of Nauru in respect of Nauru's claim that Australia was responsible for rehabilitation of phosphate lands on the island, which were exploited during the time that Australia, New Zealand and the United Kingdom were responsible for administration of the territory. The first alleged waiver related to the period before Nauru's independence in 1968, the second to the period since. But neither Nauru's silence on the possibility of rehabilitation of the island at the time of independence, nor the lapse of time afterwards before Nauru reacted to Australia's assertion that the matter of rehabilitation would not be revisited, was deemed sufficient to amount to waiver of Nauru's claim.[79] It appears that the threshold for inferring waiver is high.

As for acquiescence, the provision emphasizes the conduct of the state as the determinant of whether or not the claim has lapsed. Thus the mere passage of time without a claim being resolved would not on its own amount to acquiescence.[80] The key is whether the state has failed to assert its claim over a period of time by remaining passive in circumstances where some sort of action on its part would have been expected.[81] Article 45 leaves a court with considerable flexibility to determine whether the right to claim has been extinguished.[82] It may be difficult to distinguish acquiescence from an implied waiver, and it is probably unnecessary to do so.[83]

Another complex relationship is that between acquiescence and estoppel or 'preclusion', described by Canada in the *Gulf of Maine* case as 'the

[78] *Russian Indemnity (Russia/Turkey)*, (1912) 11 RIAA 621.
[79] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 247.
[80] ARSIWA Commentary, Art. 45, §6. [81] Tams (2010), 1042–4.
[82] Brown Weiss (2002), 800. [83] Tams (2010), 1044.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:46 Page Number: 560

alter ego of acquiescence'.[84] Canada argued that acquiescence amounted to one state's tacit acceptance of a legal position represented by another state's conduct or assertion of rights through knowledge of that position and a failure to protest. The United States argued that the conditions for estoppel were stricter than for acquiescence: the party invoking estoppel must also show that it had relied on the other party's statements or conduct either to its own detriment or to the other's advantage. The chamber acknowledged that both concepts derive from fundamental principles of equity and good faith, and noted that 'according to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle'. Given that the same facts were relevant to both acquiescence and estoppel in the case before it, except as regards the existence of detriment, it found itself able to 'take the two concepts into consideration as different aspects of one and the same institution', and refrained from further debate as to the distinction between them.[85]

It is arguable that waiver and acquiescence are broad enough in scope to cover any circumstances giving rise to the subsequent loss of a right to invoke responsibility. However, the specific issue of lapse of time, central to Australia's arguments in *Certain Phosphate Lands in Nauru*, deserves closer examination.

17.3.2 Lapse of time

It was originally proposed that the provision on loss of the right to invoke responsibility in ARSIWA should include specific mention of lapse of time as one of the grounds for that loss. Lapse of time would have precluded a claim where

> [t]he claim is not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued.[86]

This provision was not adopted: in Article 45, lapse of time is not mentioned, still less 'extinctive prescription'. But either circumstance might be subsumed by waiver or acquiescence, depending on the facts.[87]

[84] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, ICJ Rep. 1984 p. 246, 304.

[85] Ibid., 305. See also Tams (2010), 1044–5. [86] Crawford, Third Report, 77.

[87] The ILC's commentary discusses lapse of time as the main example in the context of acquiescence under Art. 45(b): see ARSIWA Commentary, Art. 45, §§6–11. For a

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:46 Page Number: 561

As a general principle it has been accepted that delay might render a claim inadmissible, but when it will do so is rather more controversial and unsettled.[88]

Many of the judicial decisions on this question concern diplomatic protection claims pursued some or even many years after the incidents giving rise to them. As a first criterion, it is obviously accepted that a considerable period of time must have elapsed before delay could lead to the loss of a claimant's right to invoke responsibility. Occasionally, a specific time limit for bringing a claim will be prescribed in a treaty, similar to the manner in which domestic limitation periods may be imposed by statute; conversely, reliance on extinctive prescription may be expressly excluded by agreement. However, these special rules are unusual, particularly in the area of interstate complaints. As a matter of general international law there is no agreed time limit for bringing claims invoking state responsibility, and what is reasonable will vary considerably depending on the circumstances of each case.[89] Outstanding claims may subsist for many years, indeed decades.

This practice suggests that the question of delay in international law is not merely a procedural matter of applying strict time limits, but involves a balancing of all the circumstances. Indeed, passage of time alone is insufficient to bar a claim. As such, the common analogy with limitation periods prescribed under national law is misleading.[90] Rather, in the international context, the principle of extinctive prescription has only operated to bar a claim when it is found that the claimant's delay caused actual prejudice or procedural unfairness to the respondent. That is, the *raison d'être* of the principle is the avoidance of possible injustice to

discussion of the relationship between extinctive prescription, acquiescence and estoppel, leading to the conclusion that the omission of extinctive prescription from the wording of ARSIWA, Art. 45 was a useful clarification, see Tams (2010), 1047–8.

[88] See generally Pintor, (1955) 87 Hague *Recueil* 387, 438–48; Ibrahim, (1997) 83 Va LR 647; Tams (2010), 1045–8.

[89] 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. For example, in *Phosphate Lands in Nauru*, the International Court stated 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': *Phosphate Lands in Nauru*, Preliminary Objections, ICJ Rep. 1992, p. 240, 253–4. See further e.g. *Gentini*, (1903) 10 RIAA 551, 561; *Ambatielos*, (1956) 23 ILR 306, 314–17.

[90] Tams (2010), 1047.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:46 Page Number: 562

the respondent state.[91] Where no such harm or likely injustice can be shown, it is unlikely that a claim would be held inadmissible merely by reason of the passage of time.[92]

Factors including legitimate expectations and reliance are relevant to the question of extinctive prescription, just as they are to waiver and acquiescence. The approach to delay might also depend on whether the claimant state is the ultimate bearer of the rights, or is claiming on behalf of others. In the *Cayuga Indians* case, the tribunal held the claims for violation of rights of the Cayuga Indians to be admissible, notwithstanding considerable delays that were attributable to the British government.[93]

In *LaGrand*, Germany's claim was held to be admissible even though it was filed just twenty-seven hours before the scheduled execution by the United States of LaGrand, and some six years after the breach giving rise to the claim. No doubt it was highly relevant that the case raised issues connected with the right to life, and a stay of execution was indicated:[94] however, when the case reached the merits stage, the Court implied that Germany's delay in claiming would have precluded any award of damages, had damages been claimed.[95]

In the context of direct state-to-state claims, the International Court has taken a flexible approach to the question of lapse of time. In *Certain Phosphate Lands in Nauru*, the Court recognized that

> even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. [The Court] 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.[96]

In that case, the Court rejected Australia's argument that Nauru's claims were inadmissible by reason of the delay between notification of the claims and their eventual prosecution through the commencement of proceedings.

[91] *Gentini*, (1903) 10 RIAA 552, 558. See further *Stevenson*, (1903) 9 RIAA 385; *Ottoman Empire Lighthouses Concession (France/Greece)*, (1956) 12 RIAA 155, discussed in Tams (2010), 1047–8.

[92] See e.g. *Tagliaferro*, (1903) 10 RIAA 593; *Stevenson*, (1903) 9 RIAA 385.

[93] *Cayuga Indians*, (1926) 6 RIAA 189.

[94] See *LaGrand (Germany v. US)*, Provisional Measures, ICJ Rep. 1999 p. 9. In his separate opinion President Schwebel described the case as 'unprecedented', and although he did not dissent from the substance of the decision, he expressed strong reservations about the procedures followed both by the applicant and the Court; ibid., 21–2 (President Schwebel).

[95] *LaGrand*, ICJ Rep. p. 466, 508.

[96] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 253–4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:47 Page Number: 563

To summarize, a case will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged and tribunals have engaged in a flexible weighing of relevant circumstances, including, for example, the conduct of the respondent state and the importance of the right involved. The decisive factor is not the length of elapsed time in itself, but whether the respondent has suffered prejudice because it could have reasonably expected that the claim would no longer be pursued.[97]

17.3.3 Adjudication and settlement

Article 45 makes no express reference to adjudication or settlement as grounds for the loss of a right to invoke responsibility. However, once a claim has been adjudicated, the doctrine of *res iudicata* operates as a procedural bar that would prevent a claimant from bringing a further claim in relation to the same wrongful act.

As for settlement, it is clear that if an injured state accepts some form of reparation in full and final satisfaction of its claim, it no longer has a right to claim further reparation from the responsible state or states. This may be a better explanation of the outcome of the *Russian Indemnity* case, in which Russia's acceptance of settlement of the principal sum was treated as full and final, preventing it from pursuing the remainder of its claim.[98] For settlement to occur there must be action on the part of both states involved, or at least unequivocal acquiescence by one in the action of the other; unilateral action by one party is insufficient.

17.3.4 Effects on related or derivative claims

The rules on waiver and related concepts were developed to apply to bilateral rather than multilateral situations. In circumstances involving a plurality of states, the loss of a claimant's right to invoke responsibility, for whatever reason, may have an effect on related or derivative claims. For example, in circumstances where there are continuing obligations to a wider group of states, settlement between the two states directly involved in the claim may be insufficient to resolve matters fully.[99]

The starting point is the general principle that a waiver or settlement by one state can only affect the position of that state. This is the notion of

[97] ARSIWA Commentary, Art. 45, §11.
[98] *Russian Indemnity (Russia/Turkey)*, (1912) 11 RIAA 421, 446.
[99] ARSIWA Commentary, Art. 43, §6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:47 Page Number: 564

disposability: the waiver must be made by the bearer of the right which is being waived, and does not prevent other states from invoking responsibility.[100] However, an important distinction must be made between individually injured or specially affected states whose entitlement to claim is provided for in Article 42, and other states who assert a collective interest under Article 48. A valid waiver or settlement by an injured state, or all the injured states where there are more than one, may preclude states other than injured states from asserting claims for reparation, since these could only be made in the interest of the injured state which has lost its own right to invoke responsibility. On the other hand, a waiver or settlement by an individual state relying on Article 48 would not have the same effect, as that state's entitlement to claim is secondary to the entitlement of the injured state.[101]

When considering the loss of a right to invoke responsibility in the context of multilateral obligations, distinctions can be drawn between situations in which the wrongful act does not injure another state individually (for example when the victims of the breach are nationals or the environment of the responsible state itself), and situations in which there is a primary injured or specially affected state as well as others with an interest in performance. Tams argues that, in the first case, the claim would only be waived if all states with a right to claim under Article 48 agreed to the waiver; the waiver by any one of them could not extinguish the rights of the others. Conversely, in the second scenario, owing to the acknowledged primacy of the interests of individually injured or specially affected states, 'a valid waiver by the individually injured State would also extinguish all claims that "other interested States" have under article 48'.[102]

This second assertion raises difficulties. Certainly the state that has been injured or specially affected in its individual capacity may waive its right to claim compensation, or may forgo any demands for cessation. But it does not necessarily follow that such conduct on the part of the primary victim should extinguish all the rights to claim of all other states under Article 48. Tams comments that 'article 48 stipulates that "other interested States" may only invoke responsibility in the interest of the direct victim'. But Article 48 only qualifies the rights of states other than injured states in respect of Article 48(2)(b), which deals with reparation. Claims under Article 48(2)(a) invoking a right to cessation and

[100] Gaja (2010) 957, 963. [101] ARSIWA Commentary, Art. 45, §1.
[102] Tams (2010), 1041.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 17 Title Name: CRAWFORD
Date:15/3/13 Time:19:35:48 Page Number: 565

assurances and guarantees of non-repetition are not subject to any such qualification; that is the point of the public interest standing that has been developed in Article 48.

This is especially important when the wrongful act concerns a breach of a peremptory norm, as the commentary to Article 45 makes clear:

> 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.[103]

This reasoning accords with Article 26, which provides that none of the circumstances precluding wrongfulness in Part I, Chapter V, which include consent, can justify or excuse state conduct that violates peremptory norms. The question of limits on freedom to waive in this context can be analysed as a matter of disposability.

Another complicating factor arises when the breach affects the rights of private persons. In diplomatic protection cases, the claimant state is asserting its own rights vis-à-vis the respondent, and if it chooses to waive the claim or reaches a settlement, it may leave the private injured parties with no international remedy.[104] On the other hand, waiver by a private person would not bind the state.

Finally, it is clear that a waiver or settlement of the injured state's claim as against one responsible state does not absolve any other responsible states from their own independent responsibility.[105]

[103] ARSIWA Commentary, Art. 45, §4.

[104] Rights of private persons to claim against states directly in their own right, however, may not be waived by the state of nationality; see Tams (2010), 1039.

[105] ARSIWA, Art. 47. See further Chapter 10.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:05 Page Number: 566

18 Claims on behalf of others: diplomatic and functional protection

18.1 Introduction

Besides invoking responsibility as an injured state in terms of ARSIWA Article 42 or in reliance on the entitlement provided for in ARSIWA Article 48, international law recognizes that in certain circumstances states may also bring claims on behalf of natural and legal persons, through the institution of diplomatic protection of citizens abroad.[1] States have a right to require that other states respect international minimum standards for the treatment of their nationals abroad. Diplomatic protection is the procedure by which a state may invoke another state's responsibility for injury to the person or property of such nationals in breach of those standards – the traditional rationale being that an injury to a state's national indirectly injures the state itself.

Functional protection, on the other hand, refers to the right of international organizations to bring claims against states for injury to their agents. Although it is sometimes treated as analogous to the protection of nationals, functional protection is fundamentally different in that its purpose is to ensure the efficient functioning of the organization by upholding the security of its agents and its own independence.[2] As such

[1] See generally Borchard (1916); García Amador, (1958) 94 Hague *Recueil* 365, 426–42; Dugard, First Report, UN Doc. A/CN.4/506; First Report of the ILA Committee on Diplomatic Protection of Persons and Property, (2000) 69 ILA Rep. Conf. 604; Second Report of the ILA Committee on Diplomatic Protection of Persons and Property, (2002) 70 ILA Rep. Conf. 228; Final Report of the ILA Committee on Diplomatic Protection of Persons and Property, (2006) 72 ILA Rep. Conf. 353; Crawford, (2006) 31 S. Af. YIL 19; Amerasinghe (2008); Dugard (2010). Diplomatic protection is not to be confused with consular action; see Amerasinghe (2008), 45–6.

[2] García Amador (1958), 442–4; ADP Commentary, 23–4, §3; Amerasinghe (2008), 47–53; Benlolo Carabot and Ubéda-Saillard (2010).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:05 Page Number: 567

it is more closely related to states' right to claim for injuries suffered by their officials abroad than to diplomatic protection of private persons.[3]

This chapter examines the institution of diplomatic protection, starting with its evolving character and role, and moving on to the two fundamental requirements for its exercise: the nationality principle and the exhaustion of local remedies rule. It also considers the relationship between diplomatic protection and individual invocation of responsibility in different contexts, before briefly discussing the doctrine of functional protection in international law.

18.2 Diplomatic protection: an overview

The ILC has had an important role to play in the development and codification of the law of diplomatic protection.[4] Originally, the ILC included rules on diplomatic protection within the framework of the state responsibility project.[5] The first Special Rapporteur on State Responsibility, García Amador, drafted various provisions dealing with responsibility for injuries to aliens and their property.[6] One of these, a convoluted provision addressing the substance of the exhaustion of local remedies rule, remained in the text adopted at first reading. In 1996, however, the ILC decided that diplomatic protection was appropriate for study as a separate topic. On second reading of the articles on state responsibility the draft provision on local remedies was excised and a saving clause inserted instead, in recognition that ARSIWA was not the place for detailed discussion of the substantive rules of diplomatic protection,[7] but that certain aspects of those rules were inextricably connected to the implementation of state responsibility.[8]

Thus Article 44 ARSIWA, on the admissibility of claims, refers to the rules of nationality and exhaustion of local remedies without elaborating

[3] García Amador (1958), 442–3. See also Amerasinghe (2008), 46–7.

[4] See especially the seven reports of Dugard, Special Rapporteur on Diplomatic Protection (2001–6).

[5] For the background to the ILC's contribution see e.g. Crawford, (2006) 31 S. Af. YIL 19, 19–24; Amerasinghe (2008), 55–62.

[6] See García Amador, Third Report, ILC Ybk 1958/II, 47, 55–67 (Arts. 15–23); see further Müller (2010).

[7] To focus on the substantive law of state responsibility in the field of diplomatic protection was to give that area priority, as the study was concerned with secondary rules of responsibility and not primary rules: Crawford, (2002) 96 AJIL 874, 877.

[8] For the reasoning behind this change see Crawford, Second Report, 39–41. ARSIWA will continue to be relevant to diplomatic protection cases insofar as they concern questions of attribution, breach, reparation and other generally applicable provisions.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:06 Page Number: 568

on their content.[9] That content has now been supplied by the Draft Articles on Diplomatic Protection (ADP) adopted by the ILC in 2006, which set out the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised.[10] Some of the ADP involve a degree of progressive development of the law rather than codification.

18.2.1 The character and role of diplomatic protection

Diplomatic protection seeks to uphold international minimum standards for the treatment of aliens. As a general proposition there is no obligation on a state to allow foreign nationals access to its territory, but once it has done so and while those aliens remain within its territory or jurisdiction, the host state is bound to comply with those standards.[11] It is international law that governs whether a violation has taken place, with the primary rules on treatment of aliens covering a broad spectrum of matters in connection with both personal injury and injury to property.[12] According to the usual rules of state responsibility, the breach of such an obligation by the host state amounts to an internationally wrongful act incurring the responsibility of that state. Diplomatic protection provides the means by which the sending state can implement that responsibility and seek reparation for the injury.[13]

A working description of diplomatic protection as it is understood in international law[14] is provided in ADP Article 1:

Article 1
Definition and Scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or

[9] ARSIWA treats compliance with the rules as a fundamental condition for the invocation of responsibility, in circumstances in which they apply. See ARSIWA Commentary, Art. 44. For the development of the provision see further Crawford, Third Report, 65–6.

[10] ADP, 24, §2.

[11] *Barcelona Traction, Light & Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Rep. 1970 p. 3, 32.

[12] For discussion of the primary rules see e.g. Lillich, (1978) 161 Hague *Recueil* 329; Amerasinghe (2008), 37–44; *Brownlie's Principles*, Ch. 28.

[13] On remedies in the context of diplomatic protection, see Amerasinghe (2008), 282–328.

[14] Special Rapporteur Dugard emphasized that Article 1 did not purport to *define* diplomatic protection, but was a 'description of diplomatic protection as the term is understood in the language of international law'; see Dugard, First Report, ILC Ybk 2000/II(1), 217.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:06 Page Number: 569

legal person that is a national of the former State with a view to the implementation of such responsibility.[15]

The first point about diplomatic protection is that it involves an invocation of responsibility at interstate level. Its origins lie in the Vattelian idea that an injury to a person amounts to an indirect injury to that person's state of nationality.[16] The traditional view, formulated by the Permanent Court in *Mavrommatis*, is that a diplomatic protection claim amounts to an assertion of the state's own right 'to ensure, in the person of its subjects, respect for the rules of international law'.[17] Diplomatic protection was likewise described in *Nottebohm* as a measure 'for the defence of the rights of the State'.[18]

As international law has developed, Vattel's idea has to some extent been superseded by the understanding that a state invoking another state's responsibility for injury to its nationals effectively enforces the rights of those persons on their behalf, rather than its own rights;[19] as the International Court put it in 1959, the claimant state has 'adopted the cause of its national'.[20] Some have argued that diplomatic protection has been rendered obsolete by the increase in mechanisms for private persons to protect their own rights in certain fields of international law, notably human rights and investment protection, and that the artificial premise that the state is injured by an injury to its nationals should be discarded.[21]

Special Rapporteur Dugard accepted that the idea on which the institution of diplomatic protection is based may no longer be coherent, but he was 'more concerned with the utility of the traditional view than its soundness in logic' and argued for its continued recognition as a valuable and well-established instrument of customary international law.[22] It is too early to suggest that the increase in private remedies under international law has eliminated any continuing need for diplomatic protection; in many cases diplomatic protection will be the only tool

[15] The ICJ endorsed Draft Art. 1 as a statement of customary international law in *Ahmadou Sadio Diallo (Guinea v. DRC)*, Preliminary Objections, ICJ, 24 May 2007, §39.

[16] Vattel, *Le Droit des gens* (1758), Bk II, Ch. VI (Kapossy and Whatmore eds. 2008, 298ff.). See discussion in Amerasinghe (2008), 10–13; Dugard (2010), 1052.

[17] *Mavrommatis Palestine Concessions*, (1924) PCIJ Ser. A No. 2 p. 4, 12. For discussion of subsequent cases endorsing this view see Amerasinghe (2008), 63–5.

[18] *Nottebohm (Liechtenstein* v. *Guatemala)*, ICJ Rep. 1955 p. 4, 24.

[19] Dugard (2010), 1052.

[20] *Interhandel (Switzerland* v. *US)*, ICJ Rep. 1959 p. 6, 27.

[21] See Dugard, First Report, ILC Ybk 2000/II(1), 212–13; Crawford, (2006) 31 S. Af. YIL 19, 23; Amerasinghe (2008), 32–6; see further section 18.3 below.

[22] Dugard, First Report, ILC Ybk 2000/II(1), 222.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:06 Page Number: 570

available for upholding the rights of private persons.[23] Accordingly, the ILC has kept faith with the *Mavrommatis* principle in Article 1 by making it clear that the right to bring a diplomatic protection claim itself vests in the state, not the person. This is the case regardless of the differences of opinion over whose rights are asserted as a matter of the substance of the claim. Correspondingly, a national has no capacity to waive diplomatic protection, at least in advance.[24]

A related point is that a state's right of diplomatic protection is just that: a right or entitlement of the state, not an obligation. There has been some debate about whether or not there is a duty on states to protect their nationals abroad.[25] Vattel's original statement of the principle framed it in a manner that linked the vindication of the sending state's rights with a duty to protect its nationals abroad:

> Quiconque maltraite un citoyen offense indirectement l'Etat, qui doit protéger ce citoyen.[26]

Subsequent authorities did not take up the aspect of duty, however, and the general view was that if any duty existed it could only be a moral or political rather than a legal one.[27] In 1970 the International Court reaffirmed that diplomatic protection is a discretionary power, with the state to be viewed as 'the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease'.[28]

In his work as Special Rapporteur, Dugard made a case for providing *de lege ferenda* that there was a duty to exercise diplomatic protection (subject to some exceptions) on request by the injured person if the injury resulted from a grave breach of a peremptory norm and the injured person was unable to bring a claim for the injury before a competent international court or tribunal.[29] The ILC did not support this

[23] Ibid., 213–5.

[24] As such, Calvo clauses (requiring aliens to agree that they will not seek the protection of their national state if they suffer injury at the hands of the host state) are not legally effective in preventing the national state from exercising protection. See generally *North American Dredging Co. Case (US v. Mexico)*, (1926) 4 RIAA 29; García Amador, Third Report, ILC Ybk 1958/II, 57–9; García Amador (1958), 455–61; Graham, (1970) 6 Tex. ILF 289; ADP Commentary, Art. 14, §8; Amerasinghe (2008), 66, 191–211.

[25] See the discussion in García Amador, (1958) 94 Hague *Recueil* 365, 427–8; Dugard, First Report, A/CN.4/506, 22–34; Amerasinghe (2008), 78–90.

[26] 'Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen': Vattel (1758), Bk II, Ch. VI, §71 (298).

[27] See Borchard (1916), 29.

[28] *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3, 44.

[29] Dugard, First Report, ILC Ybk 2000/II(1), 220–6 (proposed Draft Arts. 3 and 4).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:07 Page Number: 571

approach, concluding that international law neither imposes a duty of diplomatic protection on the state nor gives the injured person an enforceable right to the exercise of diplomatic protection by the state of nationality.[30] Article 19 does recommend that states give due consideration to the possibility of exercising diplomatic protection, and to the views of the injured persons, but these are mere *voeux*:[31] the traditional position holds, and a state may choose not to exercise its right to diplomatic protection in any given case.

If the state chooses not to act, this will be without prejudice to any direct rights to claim redress for the injury that may be vested in the affected person or persons themselves.[32] This is an important point, as the separation of the state's right of action from any personal right of action enabled the ILC to sidestep the consequences of deciding who is the holder of the right to diplomatic protection.[33] On the other hand, if the state takes action to formally waive the right to claim – as distinct from simply choosing not to exercise diplomatic protection – this may abrogate altogether any separate derogable rights of the person, leaving them without an international remedy. Controversial examples have included the waivers in the 1951 Treaty of San Francisco between the Allied Powers and Japan after the Second World War, which expressly waived claims of the states concerned and those of their nationals,[34] and the waiver clause in the Algiers Accords establishing

[30] Dugard has expressed his 'great regret' that the proposal was rejected and described the decision as a '[m]issed opportunity' for the strengthening of human rights protection: see Dugard, (2005) 24 AYIL 75. 80.

[31] The commentary is confusing on this point, however; see ADP Commentary, Art. 19; Amerasinghe (2008), 85–90.

[32] ADP Commentary, Art. 16. [33] Crawford, (2006) 31 S. Af. YIL 19, 25.

[34] Treaty of Peace with Japan, 8 September 1951, 136 UNTS 45, Arts. 14(b) (waiver by Allied Powers), 19(a) (waiver by Japan). The Japanese courts held that Art. 19(a) had the effect of waiving all claims by Japanese nationals under the municipal law of Japan or the Allied Powers along with the Japan's right to exercise diplomatic protection: see e.g. *Horimoto* v. *State (Japan)*, (1959) 32 ILR 161; *Shimoda* v. *State (Japan)*, (1963) 32 ILR 626. In *Re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (ND Cal, 2000), a US court dismissed claims by US civilians and allied prisoners of war on the ground that under Art. 14(b) the Allied Powers had waived all claims arising out of actions by Japan or Japanese nationals or corporations taken in the course of the prosecution of the war. For other litigation in the US courts, see e.g. *Deutsch* v. *Turner Corp*, 324 F.3d 692 (9th Cir., 2003); *Saldajeno* v. *Ishihara Sangyo Kaisha, Ltd*, 540 US 821 (2003); *Suk Yoon Kim* v. *Ishikawajima Harima Heavy Industries*, 540 US 820 (2003); *Tenney* v. *Mitsui & Co*., 540 US 820 (2003); *Zhenhuan Ma* v. *Kajima Corp*, 540 US 820 (2003); *Mitsubishi Materials Corp* v. *Superior Court of Orange County*, 130 Cal. Rptr 2d 734 (2003). See further Tokudome and Tokudome, (2003) 21 UCLA Pac. Basin LJ 1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:07 Page Number: 572

the Iran–US Claims Tribunal, which suspended all relevant claims against Iran before US courts.[35]

There has been inconsistent interpretation of what means of implementation are encompassed by diplomatic protection. The authorities have tended to distinguish between 'diplomatic action' and 'judicial proceedings',[36] but the term 'diplomatic protection' has sometimes been used to embrace a wide variety of actions; Dugard lists consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, as a last resort, the use of force.[37] It may be recalled that until the beginning of the twentieth century the use of force to collect contract debts, although controversial, was a feature of state practice.[38] The 'diplomatic action or other means of peaceful settlement' formula used in ADP Article 1 is broad enough to cover most means of implementation, but, of course, the choice of means will be restricted by what is lawful, for example in accordance with the provisions on countermeasures in ARSIWA.[39] By recalling the pacific settlement obligation of states under the UN Charter,[40] Article 1 expressly rejects any suggestion that the use of force against another state for the protection of the intervening state's nationals could be recognized as lawful under the rubric of diplomatic protection.

Historically, there have been many examples of practice where states have used the protection of nationals abroad to justify military

[35] By Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 January 1981, §11, the United States agreed to 'bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national', or persons other than US nationals, arising out of the 1979 hostage crisis in Tehran. The related Declaration concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, established the Iran–US Claims Tribunal. The US Supreme Court rejected a challenge to the president's authority to suspend claims in the US courts: see *Dames and Moore* v. *Regan*, 453 US 654 (1981); referred to in *Dallal* v. *Bank Mellat*, [1986] QB 441, 448.

[36] *Panevezys-Saldutiskis Railway Co.*, (1939) PCIJ Ser. A/B No. 76, 16; *Nottebohm*, ICJ Rep. 1955 p. 4, 24.

[37] Dugard, First Report, ILC Ybk 2000/II(1), 217.

[38] Convention on Limitation of Employment of Force for Recovery of Contract Debts, 18 October 1907, 1 Bevans 607, concluded at the Second Hague Peace Conference, aimed to put an end to this practice, although it fell short of imposing obligatory arbitration. See further Scott, (1908) 2 AJIL 78.

[39] Dugard, First Report, ILC Ybk 2000/II(1), 217–8. See further ARSIWA, Arts. 49–54; Crawford, Second Report; ARSIWA Commentary, Pt III, Ch. II.

[40] Art. 33(1) provides that '[t]he parties to any dispute . . . shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:07 Page Number: 573

intervention as a form of self-defence. Dugard sought to recognize this reality by proposing a draft article which, in limited circumstances, treated forcible intervention for the protection of nationals abroad as an exception to the prohibition on the use of force as a legitimate means of diplomatic protection.[41] The ensuing debate in the ILC was divided between those who felt that a rule permitting or legitimizing the use of force in the context of diplomatic protection was dangerous and unacceptable, and those who felt that questions of the use of force fell beyond the scope of the diplomatic protection project. Either way it was clear that the proposal could not be retained.[42]

A final point is the stipulation that the person injured is a national of the state invoking responsibility. This flows from the *Mavrommatis* principle, as otherwise there would be no injury to the claimant state.[43] This fundamental requirement is addressed in the following section.

18.2.2 Title to protect: the nationality of claims

As a general rule, the state entitled to exercise diplomatic protection is the state of nationality.[44] If the person was not a national of the state claiming injury at the time of the injury, the state's claim will ordinarily not be admissible, because there was no actual violation of substantive law on the treatment of aliens vis-à-vis that state.

The rules for determining nationality differ depending on whether the person is a natural person or a legal person. ADP Article 4 provides the following definition of 'state of nationality' in respect of natural persons:

> *Article 4*
>
> *State of nationality of a natural person*
>
> For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner not inconsistent with international law.

Article 4 affirms the established position that the requirements for nationality of a natural person are generally to be determined by the law

[41] See Dugard, First Report, ILC Ybk 2000/II(1), 218–20 (Draft Art. 2 and commentary).
[42] See ILC Ybk 2002/II(2), 74–6. [43] Crawford, (2006) 31 S. Af. YIL 19, 22.
[44] This basic rule is reflected in ADP, Art. 3(1). As an exception, diplomatic protection may be provided in the case of stateless persons and refugees; see ADP, Arts. 3(2), 8; ADP Commentary, Art. 8. On the nationality principle see generally García Amador, Third Report, ILC Ybk 1958/II, 66–7; Leigh, (1971) 20 ICLQ 453; Dugard, First Report, ILC Ybk 2000/II(1), 239–46; Orrego Vicuña, (2002) 69 ILA Rep. Conf. 631; Forcese, (2005) 37 Geo. Wash. ILR 469; Crawford, (2006) 31 S. Af. YIL 19, 26–41; Amerasinghe (2008), 91–141; Dugard (2010), 1053–61.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:08 Page Number: 574

of each state.[45] The connecting factors most commonly – but not exclusively – relied on by states are birth (*jus soli*), descent (*jus sanguinis*) and naturalization.[46]

One aspect of nationality that has been controversial is whether or not international law also requires proof of a genuine or effective link between the individual and the state of nationality in order for that state to bring a diplomatic protection claim on behalf of the individual. Authority for this view is claimed to come from the *Nottebohm* case, in which the International Court decided that Liechtenstein could not extend diplomatic protection to a German individual who had acquired the nationality of Liechtenstein through naturalization, but who had had strong connections to Guatemala, the respondent state, for a period of over thirty-four years.[47] The better view, recognized in the commentary to Article 4, is that this case should not be seen as laying down a rule of general application.[48] It was unusual in that Mr Nottebohm's nationality link to Liechtenstein, the state claiming on his behalf, was seen as tenuous by comparison with his strong links to the respondent state. As such the *Nottebohm* finding was a relative one – the Court did not actually rule on the status of Mr Nottebohm's Liechtenstein nationality in the abstract.[49] Moreover, the case was much affected by the fact that Nottebohm evidently relinquished his German nationality in order to avoid the consequences of being considered an enemy alien when Guatemala declared war on Germany.[50] The judgment should be confined to the particular circumstances of the case and, although it may serve as a useful rule in such narrow cases,[51] the ILC

[45] A grant of nationality by a state would be open to challenge if it were inconsistent with international law. See *Nationality Decrees issued in Tunis and Morocco (French Zone)*, (1923) PCIJ Ser. B No. 4, 24; Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 13 April 1930, 179 LNTS 89, Art. 1; European Convention on Nationality, 6 November 1997, 2135 UNTS 213, Art. 3. International tribunals have jurisdiction to investigate nationality and verify for themselves the valid application of municipal law: see *Nottebohm*, ICJ Rep. 1955 p. 4, 52; *Flegenheimer*, (1958) 25 ILR 91.

[46] ADP Commentary, Art. 4, §§3–4; Dugard (2010), 1053.

[47] *Nottebohm*, ICJ Rep. 1955 p. 4.

[48] ADP Commentary, Art. 4, §5. See further Crawford, (2006) 31 S. Af. YIL 19, 27–9; Dugard (2010), 1053–5.

[49] Amerasinghe (2008), 93–5.

[50] Which it did on 12 December 1941, despite having declared neutrality on 4 September 1941. Nottebohm's application for Liechtenstein nationality, dated 9 October 1939, was thus made in the shadow of belligerency. Liechtenstein was neutral in the Second World War.

[51] I.e. where the person has no effective connection with the claimant state but does, by comparison, have a genuine link with the respondent; see Amerasinghe (2008), 113–16. But for a thoroughgoing defence of *Nottebohm* see *Brownlie's Principles*, ch. 23.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:08 Page Number: 575

proceeded on the view that there is no generally applicable genuine link requirement, in substitution for nationality under the law of the claimant state, for the diplomatic protection of natural persons.

Difficulties have also arisen when the individual in question is a national of more than one state.[52] For example, a person might acquire Australian nationality by birth, British nationality by descent, and New Zealand nationality through naturalization, without relinquishing any prior nationality (depending on the applicable domestic rules). If one of the states of nationality seeks to bring a diplomatic protection claim on his or her behalf, is it required to show that its nationality connection to that individual is stronger than that of any other state of nationality? There are different considerations depending on whether the respondent state is also a state of nationality. If it is not, then it is generally accepted that the respondent state cannot invoke the individual's dual nationality of an absent third state as a bar to the claim. In other words, 'a third Power is not entitled to contest the claim of one of the two Powers whose national is interested in the case by referring to the nationality of the other Power'.[53] This position is reflected in Article 6.[54]

On the other hand, if the proceedings would involve two states of nationality of the same individual, matters are more complicated. According to the International Court in 1949, the 'ordinary practice' was that one state of nationality could not bring a diplomatic protection claim against another state whose nationality the individual also possessed.[55] This exclusion of diplomatic protection was based on the sovereign equality of states; one state of nationality was not to be privileged against another.[56] But this practice was not universal, and it has generally given way to the principle that if the nationality of the claimant state is dominant relative to the nationality of the respondent state, the claim is not excluded.[57] The question of predominance, or which state of nationality carries the 'preponderance of effectiveness', will be assessed by balancing the strengths of each connection in the light of a number of different factors, elucidated in the jurisprudence of the Iran–US Claims

[52] See e.g. Forcese (2005). [53] *Salem*, (1923) 2 RIAA 1161, 1188.
[54] See ADP Commentary, Art. 6.
[55] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 174, 186. See also Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 13 April 1930, 179 LNTS 89, Art. 4.
[56] See e.g. *Salem*, (1923) 2 RIAA 1161, 1184; *Mergé*, (1955) 22 ILR 443, 454–5; *Flegenheimer*, (1958) 25 ILR 91, 103–4.
[57] See *Mergé*, (1955) 22 ILR 443, 455; *Case No. A/18*, (1984) 75 ILR 175.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:08 Page Number: 576

Tribunal in particular.[58] The principle that one state should not be unduly privileged over the other still applies where the connections of each are evenly matched. Article 7 is framed in a manner which shows that the right to claim against another state of nationality is an exception to the traditional rule excluding diplomatic protection in such cases.[59] On the whole, the ADP strike a sensible and pragmatic balance on an issue that has given rise to much conflict and litigation.

A further area of controversy relates to the time of determination of nationality, or what is known as the rule of continuous nationality.[60] There are three aspects to the rule: nationality at the time of the injury (the *dies a quo*), nationality at the time of presentation of the claim (the *dies ad quem*), and continuity between the two. It has traditionally been accepted that the *de cuius* must be a national of the claiming state both at the time of injury and at the time of official presentation of the claim.[61] There has been some uncertainty over whether continuity between those two points in time is also required, but on the whole this has not raised major concerns;[62] it has generally been accepted that the person must not have had the nationality of the respondent state during that time.[63]

The most controversial aspect has been the *dies ad quem*, with no clear state practice which could form the basis of a customary rule pointing to a single date.[64] Some have gone beyond the date of presentation of the claim and treated the principle of continuous nationality as a requirement right through to the resolution of the claim.[65] Others have argued that nationality at the time of injury should be sufficient, as the injustice that can be imposed if the original nationality is changed for reasons unrelated to the diplomatic protection claim, or for reasons beyond the

[58] See the discussion in Dugard (2010), 1056–7.

[59] Art. 7 provides: 'A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.' See ADP Commentary, Art. 7.

[60] See generally Leigh (1971), 456–9; Dugard, First Report, ILC Ybk 2000/II(1), 239–46; Amerasinghe (2008), 96–106; Dugard (2010), 1060–1.

[61] See e.g. *Kren*, (1955) 20 ILR 233.

[62] See the examples discussed in Amerasinghe (2008), 98–100, but cf. IDI Res. 1965/I (Warsaw), Art. 1(a), which does not expressly require continuity.

[63] Dugard, First Report, ILC Ybk 2000/II(1), 240, citing Jennings and Watts (eds.) (1992), 512; Amerasinghe (2008), 97, citing O'Connell, 2 *International Law* (1970), 1037.

[64] Amerasinghe (2008), 101.

[65] See e.g. *Loewen Group, Inc. and Raymond L Loewen* v. *US*, ICSID Case No. ARB(AF)/98/3, 26 June 2003 (in the context of continuous nationality of a corporation; for criticism see Paulsson, (2004) 20 Arb. Int. 213); García Amador, Third Report, ILC Ybk 1958/II, 66; Amerasinghe (2008), 97.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:09 Page Number: 577

person's control (such as state succession, marriage, etc), outweighs the relatively low risk of abuse through 'nationality shopping' for diplomatic protection purposes.[66] Once again, issues of logic and coherence arise: if the claim really is that of the state, why should it be lost because of the subsequent conduct, voluntary or involuntary, of the individual? In retrospect it is a pity that the ILC did not abandon Vattel and treat diplomatic protection as a pure matter of procedure. But, as Amerasinghe points out, the continuous nationality rule is 'a practical . . . rule, rather than being based on rigorous logic'.[67]

The ILC chose to retain the continuous nationality rule in its traditional form as the default position, albeit with a measure of progressive development:

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

However, Article 5(2) recognizes that exceptions may apply in certain circumstances, and paragraphs 3 and 4 prevent claims from being brought against a former state of nationality if the injury occurred while the person was a national of that state and not of the claimant state, or against a state whose nationality the person has acquired after the claim has been presented.[68]

As noted in Article 1, 'national' includes legal persons as well as natural persons. Part II, Chapter III of the ADP covers the nationality of legal persons, including provisions relating to continuous nationality, shareholder protection, and legal persons other than corporations.[69] In a number of respects these provisions are questionable, as will be seen.

Barcelona Traction remains the leading authority on questions of nationality in respect of corporations and their shareholders.[70] The company was incorporated in Canada, but 88 per cent of the

[66] Leigh (1971), 456; Dugard, First Report, ILC Ybk 2000/II(1), 240.

[67] Amerasinghe (2008), 97.

[68] ADP Commentary, Art. 5.

[69] ADP Commentary, Ch. III. On diplomatic protection of legal persons see generally Dinstein, in Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 505; Dugard, Fourth Report, ILC ILC Ybk 2003/II(1), 3–30; Amerasinghe (2008), 122–41; Lowe, in Crawford, Pellet and Olleson (2010) 1005.

[70] *Barcelona Traction*, Second Phase ICJ Rep. 1970 p. 3. See further Crawford, (2006) 31 S. Af. YIL 19, 36–7; Amerasinghe (2008), 122–30; Juratowitch, (2011) 81 BYIL 281.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:09 Page Number: 578

shareholders were Belgian. The International Court denied Belgium's attempt to extend protection to the company vis-à-vis Spain – a decision influenced to a large extent by public policy concerns, including the principle that shareholders must accept the risks inherent in investing in corporations operating abroad, and the desire to avoid multiple claims arising from injury to one company with shareholders of different and varying nationalities.[71]

The default rule, following *Barcelona Traction*, is that the nationality of a legal person is determined by its state of incorporation or registration, not the state of nationality of its shareholders.[72] It is generally only where the direct rights of shareholders are infringed (as distinct from the rights of the company) that the state of nationality of those shareholders can exercise diplomatic protection. This is no more than an application of the usual rules of diplomatic protection of natural or legal persons, who happen to be shareholders, rather than an exception to the general regime.[73]

The ILC Draft Articles sought to develop the rule of incorporation further by making an exception in cases where there is no sufficient connection between the company and its state of incorporation. After stating the usual rule, Article 9 goes on to provide:

> [W]hen the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the state of nationality.[74]

In effect, this amounts to an application of the *Nottebohm* genuine link criterion that the ILC itself rejected when determining the nationality of natural persons.[75] As such, *Nottebohm* can be seen as standing for 'the assertion that in referring to institutions of municipal law, international

[71] See Dugard (2010), 1057.

[72] *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3. See e.g. *Italy* v. *Cuba*, Final Award, 15 January 2008, available at www.italaw.com (French only), §§200–11; for criticism of the rigid application of the rule in the context of the case see the dissenting opinion of arbitrator Tanzi, §§31–6; Potestà, (2012) 106 AJIL 341, 344.

[73] It is generally a matter for municipal law to determine the distinction between rights of the company and direct rights of shareholders. See *Barcelona Traction*, Second Phase, ICJ Rep. 1970 p. 3, 33–4; *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §§49–67, esp. §64. For commentary on shareholder protection see Dugard, Fourth Report, ILC Ybk 2003/II (1), 3–30; ADP Commentary, Art. 12; Lowe (2010), 1012–6; Juratowitch (2011).

[74] See ADP Commentary, Art. 9; Amerasinghe (2008), 133–5.

[75] The Court in *Barcelona Traction* did not stipulate a genuine or effective link requirement for the nationality of corporations, but four of the judges in the majority did: see

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:09 Page Number: 579

law has a reserve power to guard against giving effect to ephemeral, abusive, and simulated creations'.[76] The formulation in Article 9 is problematic, however, in that the state of nationality may change as corporate control and its indicia change. This possibility makes the provisions on continuous nationality of corporations in Article 10 important,[77] but examples can be conceived where the operation of Articles 9 and 10 together will be insufficient to provide the protection that is intended.[78]

It is suggested that – while international law always retains a reserve power to prevent abuses of form – the dominant consideration with corporations is that both their existence is determined and the governing regulatory regime provided by the national law of the place of incorporation. There is no such thing as a private transnational corporation, simply a national corporation engaged in cross-border activities. Nor is there such a thing as an international corporate group, as distinct from an aggregate of linked corporations formed under the law of several states. Anything else is a recipe for autarchy, at a time when many of the world's economic problems are due to regulatory weakness and corporate excess.

The ADP also reflect other 'exceptions' to the general rule in *Barcelona Traction*. Some of these are true exceptions, or even manifestations of the proposition that corporate nationality derives from the law of the state of incorporation. Thus diplomatic protection may be exercised by the state of nationality of the shareholders where the company has ceased to exist or lost the capacity to act.[79] Much more problematic is the suggestion that the state(s) of nationality of the shareholders may step in where the respondent state is the state of incorporation: why should shareholders who have chosen to invest locally be *more* protected than those who invest in third-state corporations? Thus the exceptions in ADP Article 11

Barcelona Traction, Second Phase, ICJ Rep. 1970 p. 3, 80 (Judge Fitzmaurice), 186 (Judge Jessup), 254 (Judge Padilla Nervo), 281 (Judge Gros).

[76] *Brownlie's Principles*, 706. [77] ADP Commentary, Art. 10.

[78] E.g. a hypothetical company incorporated in State A, but with ownership, control and substantial business undertaken by nationals of State B in states B and C, would be a national of state B. However, if state A were to appoint a receiver, who would assume exclusive control of the company, and state B believed that the appointment breached international minimum standards, state B would have no right to exercise diplomatic protection, as the very act complained of would have deprived the company of its nationality of state B under the continuity rules in Draft Art. 10. See Crawford, (2006) 31 S. Af. YIL 19, 38–40.

[79] ADP Commentary, Art. 11. See further Amerasinghe (2008), 136–7; Dugard (2010), 1059–60.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:10 Page Number: 580

do not implement the dicta in *Barcelona Traction* and are both under- and over-inclusive. In cases where the wrongful act is implicated in the dissolution of the corporation, shareholders will have to rely on direct injury under Article 12, but there may be no direct injury. In cases where the corporation continues to exist and the law of the respondent state did not require local incorporation, diplomatic protection is altogether excluded. By contrast, where local incorporation was required by law any foreign shareholder may be protected, irrespective of the amount of its holding or of other measures which are or may be taken to vindicate the rights of the corporation.[80] Unsurprisingly, the Court in *Diallo* expressed scepticism as to whether these proposals reflect general international law.[81]

18.2.3 Exhaustion of local remedies

Along with nationality, the other fundamental requirement for admissibility of a diplomatic protection claim is that the injured person has exhausted all effective local remedies available in the host state.[82] The Permanent Court referred to this preliminary step in its statement of the diplomatic protection principle in *Mavrommatis*:

> 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.[83]

As the Court observed in the *Interhandel* case, the idea behind the rule is that 'the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system'.[84]

As with the rules on nationality of claims, the local remedies rule has developed largely out of respect for state sovereignty,[85] and it is

[80] It is a legitimate regulatory prerogative for a state to require certain businesses to be carried on through locally incorporated bodies (e.g. media, banking). See further Crawford, (2006) 31 S. Af. YIL 19, 39–41.

[81] *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §§91–3.

[82] See generally Fawcett (1954); García Amador (1958), 445–61; Mummery (1964); Cançado Trindade (1983); Crawford, Second Report, 39–41; Dugard, Second Report, ILC Ybk 2001/II(1), 97–114; Kokott, (2002) 69 ILA Rep. Conf. 606; Amerasinghe (2004); Paulsson (2005); Crawford and Grant, 'Local remedies, exhaustion of', (2007) MPEPIL; Amerasinghe (2008), 142–90; Dugard (2010), 1061–7.

[83] *Mavrommatis*, (1924) PCIJ Ser. A No. 2 p. 4, 12.

[84] *Interhandel*, Preliminary Objections, ICJ Rep. 1959 p. 6, 27.

[85] For more discussion of the function and character of the principle, and the interests behind it, see García Amador (1958), 445–9; Amerasinghe (2004), 56–64; Crawford, (2006) 31 S. Af. YIL 19, 41–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:10 Page Number: 581

recognized as an important and well-established principle of customary international law.[86] It is not a purely technical or rigid rule but rather has been applied 'with a considerable degree of elasticity'.[87]

It is clear that the remedies required to be exhausted are those legal remedies actually provided by the law of the host state.[88] The ILC has codified the customary rule in ADP Article 14(1), defining local remedies in paragraph (2) as follows:

> 'Local remedies' means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.[89]

Given that available local remedies will vary depending on the municipal law of the relevant state, Article 14 is intended as a broad statement of the main types of legal remedies that must be exhausted rather than an absolute rule.[90] In the case of judicial remedies, possibilities of appeal must be pursued as far as they can, in order to obtain a final decision.[91] As for administrative remedies, the injured person need only pursue those that will result in a binding outcome.[92] In its 2007 decision in *Diallo*, the Court further clarified which administrative remedies are covered by the rule, stating that

> administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings.[93]

Accordingly, the possibility open to Diallo of submitting a request to the Congolese Prime Minister for reconsideration of the decision to expel him from the DRC, in the hope that he would retract his decision as a matter of grace, was not a local remedy requiring to be exhausted before Guinea espoused his claim.[94]

The local remedies rule in Article 14 is subject to the exceptions set out in Article 15, which will be narrowly construed.[95] The first of these

[86] *Elettronica Sicula SpA (ELSI) (US v. Italy)*, ICJ Rep. 1989 p. 15, 42; *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §42.
[87] *Certain Norwegian Loans (France v. Norway)*, ICJ Rep. 1957 p. 9, 39 (Judge Lauterpacht).
[88] *Ambatielos*, (1956) 12 RIAA 91, 120. See further Dugard, Second Report, ILC Ybk 2001/II(1), 102–3.
[89] See ADP Commentary, Art. 14.
[90] Ibid., Art. 14, §5.
[91] *ELSI*, ICJ Rep. 1989 p. 15, 45–6.
[92] See ADP Commentary, Art. 14, §5.
[93] *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §47.
[94] Ibid.
[95] ADP Commentary, Art. 15; Crawford, (2006) 31 S. Af. YIL 19, 44–9; Amerasinghe (2008), 149–61.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:10 Page Number: 582

concerns the principle of effectiveness: in order to be covered by the rule, the local remedies must actually be reasonably available to the injured person, and must offer a reasonable possibility of effective redress.[96] In other words, there is no requirement to exhaust local remedies if it would be futile to do so because the municipal system will not provide an effective remedy, for example if the municipal courts would have no jurisdiction to decide the matter or a decision would simply amount to a repetition of an inadequate remedy already pursued.[97] Another important exception is where the state has waived the requirement that local remedies be exhausted;[98] this has become increasingly standard in the context of investment arbitration.[99]

ADP Article 15 lists three further situations in which local remedies do not need to be exhausted: when there is undue delay in the remedial process which is attributable to the state alleged to be responsible; where there was no relevant connection between the injured person and the state alleged to be responsible at the date of injury; and where the injured person is manifestly precluded from pursuing local remedies.[100]

To satisfy the requirement that local remedies have been 'exhausted', there must have been a final decision of the competent organ or authorities of the host state; otherwise, there could be doubt as to whether the wrongful act was the final expression of the conduct of that state such that it should be held internationally responsible.[101] The *Finnish Ships* arbitration set a strict test that required all contentions of fact and propositions of law raised before the international court to have been investigated and adjudicated upon by the domestic courts.[102] No doubt the failure to prove facts or law might mean that local remedies have not been effectively exhausted. But there is no requirement that the international basis of claim (in common law terminology, the cause of action)

[96] See *Finnish Ships Arbitration*, (1934) 3 RIAA 1479, 1494–1504; *Norwegian Loans*, ICJ Rep. 1957 p. 9, 39 (Judge Lauterpacht). See further ADP Commentary, §§2–4; Amerasinghe (2008), 151–7.

[97] See *Panevezys-Saldutiskis Railway Co.*, (1939) PCIJ Ser. A/B No. 76, 18. See further García Amador (1958), 445–9; Crawford, (2006) 31 S. Af. YIL 19, 44–5.

[98] ADP, Art. 15(e); see ADP Commentary, Art. 15, §§12–17; Crawford, (2006) 31 S. Af. YIL 19, 47–9; Amerasinghe (2008), 161–71.

[99] Under the ICSID Convention, Art. 26, second sentence, the presumption is that local remedies are not required. The same rule is applied in investment arbitration generally: see e.g. Schreuer, *The ICSID Convention: A Commentary* (2001), 338–96; Douglas (2009), 28–30.

[100] See ADP Commentary, Art. 15, §§1, 5–11; Amerasinghe (2008), 157–61.

[101] García Amador (1958), 449–51.

[102] *Finnish Ships Arbitration*, (1934) 3 RIAA 1479, 1502.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:11 Page Number: 583

should have been at stake in the domestic proceedings. If the local courts give a remedy it does not matter that it is not based on international law; if they fail to give a remedy, the fact that they purported to apply international law is likewise irrelevant.

The test in *Ambatielos* was also expressed in strict terms:

> It is the whole system of legal protection as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane.[103]

The tribunal held that the individual's failure to call a key witness at the trial meant that local remedies had not been exhausted, despite the fact that the failure was now irremediable. Since an approach incorporating 'the use of procedural facilities which municipal law makes available to litigants' might require an international tribunal to second-guess decisions made at trial by counsel experienced in the local system, only in a clear case should a 'procedural default' rule be applied.

In the *ELSI* case, the chamber defined the rule in a more relaxed manner as follows:

> [F]or an international claim 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.[104]

This formulation strikes an appropriate balance. The question is whether the substantial grievance has been presented to the local courts under whatever rubric is available there: if this is done without success, local remedies will have been exhausted.

The evidence supporting the essence of the claim will need to be produced during the process of exhausting local remedies, and a failure in the preparation or presentation of the claim at the domestic level cannot be remedied by subsequent resort to diplomatic protection.[105] The International Court reiterated the established position on the burden of proof in *Diallo* in 2007:

> [I]t is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies (see [*Elettronica Sicula SpA (ELSI) (US v. Italy)*, [1989] ICJ Rep. 15, 43–4]). It is for the respondent to convince the Court that

[103] (1956) 12 RIAA 119, 120. [104] *ELSI*, ICJ Rep. 1989 p. 15, 46.
[105] ADP Commentary, Art. 14, §§6–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:11 Page Number: 584

there were effective remedies in its domestic legal system that were not exhausted (see [ibid., 46]).[106]

While the existence and overall shape of the local remedies rule in the context of diplomatic protection are generally unquestioned, areas of uncertainty do remain. The ADP make no pronouncement on the long-debated question of whether the rule is substantive or procedural, for example.[107] Further, the rule requiring local remedies to be exhausted does not apply where the wrongful act has directly injured the claimant state,[108] but in some circumstances a 'mixed claim' will be brought in which it can be difficult to differentiate between direct injury to the state and indirect injury through its nationals for the purposes of ascertaining whether local remedies must be exhausted.[109] In such cases tribunals have employed a wide variety of tests to work out whether the claim is 'preponderantly' one of direct or indirect injury for assessing the applicability of the rule.[110]

18.3 Diplomatic protection and individual and state invocation

The rules on diplomatic protection can be regarded as having developed primarily for the protection of individual rights to personal integrity, property and due process – that is, areas now covered without distinction as to nationality by the international law of human rights.[111] In the early phase of development of international law, individual persons and corporations had no standing to invoke state responsibility. As such, the assumption (often referred to as a fiction) that injury to a national indirectly injured the state was necessary in order that responsibility could be invoked on their behalf and their rights enforced. Now the

[106] *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §44. See also *Norwegian Loans*, ICJ Rep. 1957 p. 9, 39 (Judge Lauterpacht).

[107] See e.g. Fawcett (1954); García Amador (1958), 447–9; Dugard (2010), 1066–7. The view that it is generally procedural is supported by the placement and formulation of ARSIWA, Art. 44(b), and see ARSIWA Commentary, Art. 44, §1, describing the exhaustion of local remedies and the nationality rule as 'conditions for invoking the responsibility of the state in the first place'; Crawford, Second Report, 39–41. Cf. Draft Articles, Art. 22.

[108] *Case concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, ICJ Rep. 2002 p. 3, 18.

[109] See e.g. *Interhandel*, ICJ Rep. 1959 p. 28; *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3; *ELSI*, ICJ Rep. 1989 p. 15, 43; *Avena and Other Mexican Nationals (Mexico v. USA)*, ICJ Rep. 2004 p. 12, 35–6.

[110] See Dugard, Second Report, ILC Ybk 2001/II(1), 104–6; ADP Art. 14(3); ADP Commentary, Art. 14, §§9–13; Wittich, (2000) 5 Austrian RIEL 121; Amerasinghe (2008), 172–90.

[111] Dugard, First Report, ILC Ybk 2000/II(1), 213–5; Amerasinghe (2008), 32–3, 76.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:11 Page Number: 585

position has changed significantly, with increasing mechanisms by which individuals and other non-state entities enjoy direct rights to pursue claims against their own and foreign states in these fields, without requiring espousal of their claim by their state of nationality.[112]

Developments in the sphere of dispute resolution between aliens and host states, as well as and because of dissatisfaction with the operation of some of the rules of diplomatic protection, have led to arguments that the institution is now obsolete.[113] But the reality is that remedies for private persons under international law remain *lex specialis*, and diplomatic protection still has a role to play, even if as a last resort.[114] What is the relationship between traditional diplomatic protection and these rights of individual invocation?

18.3.1 Human rights

Diplomatic protection is essentially a remedial process concerned with secondary rights and obligations, that is, with state responsibility in the sense of the present study.[115] By contrast a large number of international human rights instruments now provide for some form of individual complaint mechanism in case of violation of the primary rights they specify, and not only against foreign states within whose jurisdiction they may be but also against the individual's own state. The European Convention on Human Rights is a prime example of a human rights protection system that offers real remedies to people in forty-seven European states through the European Court of Human Rights.[116] Individuals in the Americas may resort to the Inter-American Commission and the Inter-American Court of Human Rights; those in Africa have the African Court of Human and Peoples' Rights. Various conventions have established procedures for complaints to treaty monitoring bodies, such

[112] The International Court has recognized this: see e.g. *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466, 493–4; *Avena*, ICJ Rep. 2004 p. 12, 35–6. See further Amerasinghe (2008), 16–20.

[113] See Dugard, First Report, ILC Ybk 2000/II(1), 212–3; Amerasinghe (2008), 18, 73–8.

[114] Dugard, First Report, ILC Ybk 2000/II(1), 213–5; ADP Commentary, Art. 1; Amerasinghe (2008), 73–8. ADP, Art. 17 provides that the ADP do not apply to the extent that they are inconsistent with 'special rules of international law, such as treaty provisions for the protection of investments'; see ADP Commentary, Art. 17. See also ARSIWA and Commentary, Art. 33(2).

[115] Amerasinghe (2008), 75.

[116] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Art. 46. See further Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd edn, 2009); Jacobs, White and Ovey, *The European Convention on Human Rights* (5th edn, 2010).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:12 Page Number: 586

as the process of individual complaint to the Human Rights Committee set up in the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[117]

But it does not follow, from the proliferation of human rights mechanisms providing individual rights to claim, that the institution of diplomatic protection is no longer useful.[118] There is no multilateral convention that specifically provides aliens with access to effective remedies for breaches of their human rights, and large sections of the global population are not covered by any operational regional instrument. Further, participation by states in most of the treaty monitoring procedures is optional, and enforcement possibilities are slim given that the 'views' expressed by treaty monitoring bodies are non-binding. While individuals have undoubtedly become participants in the international legal system,[119] it is still the case that most states would not take complaints from individuals as seriously as they would take a diplomatic protection claim against them by another state. In his defence of the continued relevance of diplomatic protection, Dugard observed:

> To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning.[120]

It is, perhaps, more to the point to consider how the two institutions interact in practice. The ADP shed some light on this issue, providing that the rules of customary international law dealing with diplomatic protection and the rules for the protection of human rights are complementary – any right to resort to measures other than diplomatic protection in seeking redress for internationally wrongful acts is 'not affected' by the ADP.[121] That is, neither system trumps or excludes the other, and the existence of one alternative does not extinguish the other.

This is borne out by relevant human rights instruments. For example, Article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families reinforces the

[117] 16 December 1966, 999 UNTS 171. The Committee was established by ICCPR, Pt IV. See further Ghandhi, *The Human Rights Committee and the Right of Individual Communication* (1998); Tyagi, *The UN Human Rights Committee* (2011), 386–630; Parlett (2011).

[118] See Dugard, First Report, ILC Ybk 2000/II(1), 213–5; Amerasinghe (2008), 73–8.

[119] The term 'participant' is preferable to the more contentious terms 'subject' and 'object'; see Higgins, *Problems and Process: International Law and How We Use It* (1994), 48–55; Dugard, (2005) 24 AYIL 75, 77.

[120] Dugard, First Report, ILC Ybk 2000/II(1), 214.

[121] ADP Commentary, Art. 16.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:12 Page Number: 587

right of affected individuals to seek diplomatic protection, even though the Convention provides for a monitoring body and an optional right of individual petition similar to the procedures under the ICCPR First Optional Protocol.[122] In the case of violations of obligations *erga omnes*, the parallel availability of diplomatic protection and the right of all states to invoke responsibility under ARSIWA Article 48 – without needing to satisfy the tests for nationality or exhaustion of local remedies – is potentially significant.[123] The parallel development of human rights law and diplomatic protection is also evident in the application of principles such as the local remedies rule by human rights bodies: the material content of the rule is basically the same in both institutions, although its manner of implementation may be influenced by the particular context in which it is applied.[124]

The International Court in *Diallo* affirmed that the scope *ratione materiae* of diplomatic protection has widened over time, and now encompasses internationally guaranteed human rights.[125] This confirms that diplomatic protection may be used to uphold recognized human rights beyond the traditional minimum standards of treatment for aliens.[126] In other words, far from rendering diplomatic protection obsolete, the development of international human rights law has expanded the rights that may be covered by the old institution of diplomatic protection.[127]

18.3.2 Investment protection

Another important field of international law in which diplomatic protection and individual rights to claim may arise in parallel is the field of investment protection.[128] There has been a proliferation of bilateral and multilateral treaties for the promotion and protection of foreign

[122] 18 December 1990, 2220 UNTS 3. See also the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, 13 December 1985, GA Res. 40/144, Art. 10.

[123] Vermeer-Künzli, (2007) 56 ICLQ 553.

[124] See Amerasinghe (2004), 64–83; Amerasinghe (2008), 329–33.

[125] *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §39.

[126] See Lillich (1978), 390–408 for an account of the 'much-noted, but little-explored synthesis between international human rights law and the law governing the treatment of aliens' (at 408). For an even earlier perspective: García Amador (1958), 435–42.

[127] Amerasinghe is critical of the work of the ILA on diplomatic protection, for favouring protection of the interests of the alien 'to the extent sometimes of obliterating the balance in the institution of diplomatic protection and consequently attacking its foundation as an inter-state concept': Amerasinghe (2008), 6 n. 7.

[128] See generally Broches, (1972) 136 Hague *Recueil* 331, 371–80; Kokott, (2002) 69 ILA Rep. Conf. 259; Spiermann, (2004) 20 Arb. Int. 179, 200–5; Amerasinghe (2008), 334–41; Juratowitch, (2008) 23 ICSID Rev. 10; Potestà (2012).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:12 Page Number: 588

investment, most of which provide private investors with direct rights to claim against host states in the event of injury. In *Barcelona Traction* the International Court acknowledged that foreign investment is largely protected by bilateral investment treaties (BITs);[129] at the same time the Court has resolutely refused to infer general international law from these.

Thus while the Court described the role of diplomatic protection in this context as 'somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative',[130] it went on to note that the trend of establishing

> special legal régimes governing investment protection, or [including] provisions in this regard ... in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.[131]

In other words, the expansion of private rights to claim against foreign states for breaches of obligations in respect of investment protection may have to a large extent sidelined the need for diplomatic protection in such cases, but it has not changed the rules of admissibility of diplomatic claims, according to the Court.[132] This position is reflected in ADP Article 17, which frames diplomatic protection as a residual remedy, the rules of which will not apply in cases where they are 'inconsistent with special rules of international law, such as treaty provisions for the protection of investments'.[133]

One of the most important *lex specialis* regimes in this context is that provided for in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[134] Its key jurisdictional provisions are as follows.

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the

[129] *Barcelona Traction,* Second Phase, ICJ Rep. 1970 p. 3, 47.
[130] *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §88. [131] Ibid., §90.
[132] For the view that the BIT phenomenon has affected substantive standards see *Mondev International Ltd* v. *US*, ICSID Case No. ARB(AF)/99/2, 11 October 2002, §116; for the contrary view, *Glamis Gold Ltd* v. *US*, 8 June 2009, §§612–16, available at www.italaw.com.
[133] See ADP Commentary, Art. 17.
[134] 18 March 1965, 575 UNTS 159. See Broches (1972), 371–80.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:13 Page Number: 589

dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

. . .

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, 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.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

It is clear from Article 25(1) that the Convention envisages direct participation by foreign investors as parties to the dispute, without requiring the consent of or espousal of their claim by the state of nationality – although the investor's state of nationality must be a party to the Convention as well as the relevant bilateral or multilateral investment treaty.[135] Article 26 waives the requirement to exhaust local remedies, if it would otherwise apply, in circumstances where ICSID arbitration is chosen as the dispute settlement method, unless express provision for application of the rule is made in the BIT or otherwise in the arrangements between the parties to the dispute. Article 27 amounts to an express agreement among parties to the Convention that they will suspend their own rights to claim in respect of disputes that have been submitted to ICSID arbitration by their nationals and other states parties to the ICSID Convention, including their right to initiate diplomatic protection.[136]

Provisions allowing for direct investor-state arbitration have become commonplace in BITs, and it is seen as the mechanism of choice for aggrieved foreign investors.[137] There is a wide variety of different

[135] Claims can also be brought directly under investment contracts, provided the state of the investor's actual or deemed nationality is a party to the ICSID Convention and the contract so provides: see e.g. the 2012 US Model BIT, available at www.state.gov/documents/organization/188371.pdf, Art. 24. See further Crawford (2008).

[136] See further Schreuer (2001), 82–414; Juratowitch (2008), 14–22.

[137] Juratowitch (2008), 11.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:13 Page Number: 590

methods available for dispute settlement – ICSID arbitration, ad hoc arbitration (whether under the United Nations Commission on International Trade Law (UNCITRAL) Rules or other set of institutional rules), or arbitration through the Court of Arbitration of the International Chamber of Commerce. Some treaties specify a default form of arbitration; in others the states will agree in advance to certain forms and leave the choice to the investor. Either way, as the ADP commentary observes, the dispute settlement procedures provided for in ICSID and in BITs offer significant advantages for foreign investors over the customary international law system of diplomatic protection:

> [T]hey give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.[138]

On rare occasions, however, a state may choose to resort to diplomatic protection following injury to one of its nationals, raising questions about the interface between the national's right to commence investor-state arbitration and the state's right to initiate a diplomatic protection claim or other interstate procedures.[139] The short answer would seem to be that respondent states should be protected from double recovery, and any conflict between the two rights should be resolved according to the terms of the treaty in question, which might provide for interstate dispute settlement alongside investor-state arbitration, or might follow ICSID in excluding diplomatic protection.[140] In effect, a modern bilateral investment treaty disaggregates the legal interests that were clumped together under the *Mavrommatis* formula.[141]

[138] ADP Commentary, Art. 17, §2. Note, however, that it is not necessarily the case that all BITs dispense with the conditions for the exercise of diplomatic protection; waiver cannot lightly be presumed. Nationality of a state party to the treaty is required, and in some cases the BIT will specify that local remedies must be exhausted before resort to international arbitration, or will provide this as an option for the investor. See further Amerasinghe (2008), 334–41.

[139] See Juratowitch (2008).

[140] For discussion of examples see ibid., 14–22. A rather different scenario presents itself in *Ecuador* v. *US*, PCA Case No. 2012–5: Ecuador has commenced arbitration proceedings against the United States alleging a dispute between the two states over the interpretation of Art. II(7) of the United States–Ecuador BIT. The allegedly disputed interpretation was set out in a partial award issued in a separate arbitration, brought *against* Ecuador by two US investors (see *Chevron Corp and Texaco Petroleum Co*. v. *Ecuador*, PCA Case No. 34877, Partial Award on the Merits, 30 March 2011).

[141] For expansion of this idea see Crawford, (2002) 96 AJIL 874, 887–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:13 Page Number: 591

In practice, some treaties will make provision for the interplay between diplomatic protection and investment arbitration, others will not. Generally this has not given rise to much difficulty, because despite the boom in investor-state arbitration triggered by the emergence of thousands of BITs, the interstate dispute resolution procedures in those treaties have largely been ignored.[142] One exception is the decision of the arbitral tribunal in the Italy–Cuba arbitration, the first known award in an interstate dispute arising under a BIT in circumstances when investor-state arbitration would have been an alternative option according to the treaty.[143] Italy relied on its 'double standing' (*double légitimation*) to commence ad hoc arbitration proceedings against Cuba, being its own direct right to claim under interstate dispute settlement provisions in the BIT, as well as its right to espouse the claims of the sixteen Italian complainant companies through diplomatic protection.[144]

At the interim stage the tribunal rejected Cuba's objection that the existence of individual rights on the part of the companies to pursue their own claims meant that Italy's right to initiate a diplomatic protection claim was excluded by the BIT; it found that by analogy with ICSID Article 27, diplomatic protection would only be barred if the investors had consented to submit their own disputes to arbitration.[145] The tribunal reached this conclusion notwithstanding the fact that Cuba is not a party to the ICSID Convention and the BIT provided for ad hoc, not ICSID, arbitration. This represents a helpful solution to the question of how to co-ordinate the different dispute settlement mechanisms available under BITs, though it could hardly be said that it reflects the *lex lata* on this point.[146] A further objection on the question of local remedies was also rejected, the tribunal making a distinction between the claim Italy brought it in its own right and its diplomatic protection claim on behalf of the injured companies; exhaustion of local remedies was not required as a prerequisite for the first claim, but it was for the second, as nothing in the BIT suggested that the parties had waived the requirement to exhaust local remedies for the purposes of diplomatic protection. The tribunal left the consideration of whether local remedies had in fact been exhausted

[142] Potestà (2012), 344.
[143] *Italy* v. *Cuba*, Interim Award, 15 March 2005 and Final Award, 15 January 2008. See Potestà (2012).
[144] *Italy* v. *Cuba*, Interim Award, 15 March 2005, §25. [145] Ibid., §65.
[146] Potestà (2012), 346.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:14 Page Number: 592

for the merits.[147] Ultimately, in its final award, the tribunal dismissed all the claims that Italy had pursued to the merits stage.

In summary, while developments in the field of investment protection have certainly reduced the need to resort to diplomatic protection, it cannot be said that such protection is now redundant.[148] There are still a number of situations that can be envisaged in which diplomatic protection might remain the most effective, or indeed only, remedy for an injury to private persons investing in foreign states:

> Although investment treaties are now plentiful, there are still (a) bilateral relationships that are not covered by such treaties, (b) bilateral relationships that, although covered by such treaties, do not provide an individual ability for investors to bring a claim against the host State, and (c) bilateral relationships that, although governed by an investment treaty providing for investor-State arbitration, do not cover the full range of disputes that may arise.[149]

18.3.3 Other fields

A further important area in which international law has recognized the rights of individual persons is in connection with diplomatic and consular relations.[150] There is no individual right of invocation in this context, however; the substantive rights of the victims may be asserted by the state on their behalf.

In the *LaGrand* case, the Court was faced with a dispute over whether rights of consular notification and access under the Vienna Convention on Consular Relations[151] amount to human rights, as Germany contended, or to rights of states, as the United States argued. Without making a decision on whether the rights had assumed the character of a human right, the Court held that Article 36(1) created individual rights which could be invoked by the national state of the detained person, finding that '[t]he clarity of these provisions, viewed in their context, admits of no doubt'.[152]

The relationship between individual rights and the rights of states arose in this context again in the *Avena* case.[153] Mexico argued that the alleged infringement of the rights of its nationals had

[147] *Italy* v. *Cuba*, Interim Award, 15 March 2005, §§89–91.
[148] Juratowitch (2008), 27–33 [149] Ibid., 27. [150] See ADP Commentary, Art. 16, §4.
[151] 22 April 1963, 596 UNTS 261.
[152] *LaGrand*, ICJ Rep. 2001 p. 466, 492–4. It followed from this conclusion that Art. 36(2) also applied to the rights of the individual as well as the rights of the sending state: ibid., 497.
[153] *Avena*, ICJ Rep. 2004 p 12.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:14 Page Number: 593

also violated its own rights as a state. Referring to its finding in *LaGrand*, the Court further observed

> that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State, and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1*(b)*. The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection.[154]

This implies that if Mexico was not asserting its own rights, the victims would have been required to comply with the rule, which in turn suggests that the Court saw the situation as one of diplomatic protection, despite its concluding observation, rather than consular assistance. In practice it can be difficult to distinguish between them, but in circumstances of consular assistance, the local remedies rule would not apply.[155] In the *Diallo* case, the Court did not have cause to examine the local remedies question in connection with Guinea's allegations that the DRC had violated Mr Diallo's rights under the Vienna Convention,[156] but it did ultimately find a violation of Article 36(1)(b) on the merits.[157]

18.4 Functional protection by international organizations and third states

The ILC noted that similarities exist between diplomatic protection and the doctrine of functional protection, but these are outweighed by important differences in the rationale and purpose behind each institution, with the result that functional protection is not covered by the ADP.[158] The introduction to the ADP commentary makes the distinction clear:

> Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an

[154] Ibid., 35–6.
[155] ADP Commentary, Art. 1, §§9–11.
[156] *Diallo*, Preliminary Objections, ICJ, 24 May 2007, §45.
[157] *Ahmadou Sadio Diallo (Guinea v. DRC)*, ICJ, 30 November 2010, §§90–7.
[158] ADP Commentary, 23–4, §3. Functional protection is not ruled out, however, by its exclusion from the ADP; see Art. 16.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:14 Page Number: 594

injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence.[159]

Diplomatic protection is founded on a link of allegiance, through nationality, whereas it would be a strain to say that functional protection is based on a similar bond.[160] Instead, as the name suggests, it is founded on concerns in respect of the organization's ability to fulfil its function, and the need to ensure both the security of the agent and the independence of the organization.[161] A further distinction between diplomatic protection and functional protection is that where the former is recognized as a right or entitlement of the state, the latter is closer to a duty on the part of the international organization to protect its agents, which may even extend to a possible obligation of prevention if the agent finds him- or herself in a difficult situation which has not yet resulted in actual injury.[162]

The key source of the capacity to exercise functional protection is the separate legal personality of the international organization, as recognized by the International Court in *Reparation for Injuries Suffered in the Service of the United Nations*.[163] On the question of whether the UN had capacity to bring a claim against a responsible government for injury suffered by an agent, the Court held that it did,[164] and observed:

> [I]n order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter.[165]

Since 1949, international law has developed to recognize that other international organizations besides the UN also enjoy independent legal personality, although the standing to claim against a responsible state in

[159] Ibid. See further Benlolo Carabot and Ubéda-Saillard (2010), 1076–7.
[160] *Reparation for Injuries*, ICJ Rep. 1949 p. 174, 182.
[161] Benlolo Carabot and Ubéda-Saillard (2010), 1074–5. [162] Ibid., 1076.
[163] ICJ Rep. 1949 p. 174. [164] Ibid., 187. [165] Ibid., 183.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:15 Page Number: 595

exercise of functional protection for injury to its agents will depend on the constitutive instrument of each organization.[166] The Court has taken a liberal view of the term 'agent' as 'any person through whom [the organization] acts'.[167] As for the conditions *ratione materiae* for the exercise of functional protection, the general rule is that activities carried out in the official service of the organization and performance of the mission will be covered, whereas private acts of agents will not (although they might still be covered by diplomatic protection of citizens abroad, depending on the circumstances).[168] The determination whether an agent has acted in the course of the performance of his or her mission depends on the facts of the particular case.[169] Functional protection will only be extended to an agent where that protection is necessary.[170]

Although the Court stated in *Reparations* that an agent should not have to rely on the protection of his or her state of nationality, the doctrine of functional protection does not prevent that state from exercising its right to offer diplomatic protection; nor is there any rule of international law that assigns priority to the claim of either the state or the organization. The Court commented that it saw 'no reason why the parties concerned should not find solutions inspired by goodwill and common sense'.[171] In practice, the concurrent implementation of diplomatic and functional protection in relation to the same incident can cause difficulties. These difficulties are sometimes pre-empted by treaty provisions regulating how claims should be managed.[172]

Problems may also arise if the agent is a national of the responsible state; while this is not pertinent to admissibility in the context of functional protection and does not constitute an obstacle to the claim,[173] examples such as the detention of a Polish agent and Poland's

[166] On the law of international organizations see generally Sands and Klein, *Bowett's Law of International Institutions* (6th edn, 2009); Amerasinghe (2005); *Brownlie's Principles*, ch. 7.

[167] ICJ Rep. 1949 p. 174, 177. See further Benlolo Carabot and Ubéda-Saillard (2010), 1078–9.

[168] Ibid., 1079–80.

[169] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Rep. 1999 p. 62, 85.

[170] The *Jurado* case, (1964) 40 ILR 296, is discussed as an example in which protection would have been 'totally unjustified', and was rightly rejected by the International Labour Organization, in Meron, (1980) 167 Hague *Recueil* 289, 335.

[171] Ibid., 185–6.

[172] E.g. Convention on the International Liability for Damage Caused by Space Objects, 29 March 1972, 961 UNTS 187, Art. IX. See further Benlolo Carabot and Ubéda-Saillard (2010), 1081–3.

[173] *Reparation for Injuries*, ICJ Rep. 1949 p. 174, 186.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:15 Page Number: 596

subsequent refusal to co-operate in the *Wesolowska* case illustrate the issues that can arise on a practical level.[174]

Finally, in cases where the respondent is not a member state of the organization, it would only be in limited cases that the non-member state would owe specific duties to the organization and thus be responsible for a breach. The Court did not discuss the basis on which such a claim might successfully be brought, and once again it will depend on the particular facts whether a valid functional protection claim could be brought against a non-member state by an international organization.[175]

Besides diplomatic protection by the national state, and functional protection by an international organization, questions may also arise over whether a state can exercise functional protection on behalf of a non-national – for example, an alien serving as a member of its armed forces or diplomatic corps.[176] Similar considerations apply to ships' crews: ADP Article 18 recognizes that both the state of nationality of crew members and the flag state of the ship have the right to exercise protection.[177]

Various mechanisms exist in international law whereby a state may protect a non-national against the internationally wrongful act of another state.[178] As noted in the ADP commentary, interstate proceedings are available under a variety of treaties without the requirement of nationality, for example the ICCPR,[179] the International Convention on the Elimination of All Forms of Racial Discrimination,[180] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[181] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[182] the American Convention on Human Rights,[183] and the African Charter on Human and Peoples' Rights.[184]

In terms of general international law, the International Court in the *South West Africa* cases stated that the equivalent of an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest, was not known to

[174] See the discussion in Meron, (1980) 167 Hague *Recueil* 289, 334–7.
[175] See Amerasinghe (2005), 392–3. [176] See ILC Ybk 2002/I, 226.
[177] ADP Commentary, Art. 18. [178] See further ibid., Art. 16, §2.
[179] 16 December 1966, 999 UNTS 171, Art. 41.
[180] 21 December 1965, 660 UNTS 195, Art. 11.
[181] 10 December 1984, 1465 UNTS 85, Art. 21. [182] Art. 24.
[183] 22 November 1969, 1144 UNTS 123, Art. 45.
[184] 27 June 1981, 1520 UNTS 217, Arts. 47–54.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 18 Title Name: CRAWFORD
Date:15/3/13 Time:20:02:16 Page Number: 597

international law.[185] This notion that a state cannot bring legal proceedings in protection of non-nationals has since been qualified by ARSIWA Article 48, which permit states to invoke state responsibility in the event of a breach of communitarian norms, without having to satisfy the requirements of nationality and exhaustion in the law of diplomatic protection.[186] Notably, ARSIWA Article 48(2)(b) provides that states entitled under Article 48(1) may claim reparation for the breach of an obligation *erga omnes* 'in the interest of the injured state *or of the beneficiaries of the obligation breached*' (emphasis added). This implies that a state may invoke state responsibility and call for reparation on behalf of non-state actors, although Article 48(2)(b) by its own terms can do no more than set out a general principle in this respect.[187]

On the whole, however, the dicta of the Court in the *South West Africa* cases remain relevant – in the absence of some special factor, such as an arrangement of agency, a *sui generis* treaty regime or the breach of a communitarian norm, a state does not have a general right to bring a claim for a violation of state responsibility with respect to a non-national.[188]

[185] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, ICJ Rep. 1966 p. 6, 47.
[186] See ARSIWA and Commentary, Art. 48(1). See also Chapter 11.
[187] See ARSIWA Commentary, Art. 48, §12. On the relationship between diplomatic protection and invocation of responsibility for violation of obligations *erga omnes*, see further Vermeer-Künzli (2007).
[188] Cf. ILC Ybk 2006/I, 283 (Pellet).

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:53 Page Number: 598

19 Implementation of responsibility by judicial process

19.1 Introduction

This chapter addresses certain issues concerning the jurisdiction of international courts and tribunals and their implementation of responsibility. The next section sets out the *Chorzów Factory* principle and examines some possible implications of it. For example, does it apply in reverse – can the principle be applied to cases where a tribunal has been asked to decide on compensation for expropriation without having been given explicit jurisdiction to determine whether an expropriation has taken place? The discretion of judicial bodies in awarding remedies is tackled in a third section. The *Chorzów Factory* principle of full reparation is normally stated in terms of obligation, yet the practice of international courts and tribunals comes close to supporting the idea of discretion to decide among appropriate remedies. A fourth section addresses certain issues related to the election of remedies. If the *Chorzów Factory* principle embodies an entitlement, it is nonetheless one which depends in practice on choices made by the claimant. Illustrations include the claimant's right to elect the form of remedy, election of remedies in the course of proceedings, fork-in-the-road clauses and the *non ultra petita* rule. Taken together all three elements reveal a much more flexible situation than orthodox statements of the principle might suggest. There are also situations in which the *Chorzów Factory* principle appears to be not merely qualified, but effectively abandoned. These situations involve mass claims, instances in which claims are brought by a large number of claimants and where there are limited funds available to pay them. The variety of techniques that have been developed to deal with these situations will be reviewed in a final section.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:54 Page Number: 599

19.2 Jurisdiction in matters of responsibility

19.2.1 The Chorzów *principle*

As every international law student is told, the principle that jurisdiction to determine a breach implies jurisdiction to award compensation was articulated in general terms by the Permanent Court in the *Chorzów Factory* case.[1] The Court found:

> The decision whether there has been a breach of an engagement involves no doubt a more important jurisdiction than a decision as to the nature or extent of reparation due for a breach of an international engagement the existence of which is already established. If Article 23, paragraph 1 [of the Convention concerning Upper Silesia], covers the disputes mentioned in the first and third categories [of Article 36 of the PCIJ Statute], it would be difficult to understand why – failing an express provision to that effect – it should not cover the less important disputes mentioned in the fourth category.[2]

The Court summed up its conclusion in the subsequent judgment on the merits: 'jurisdiction as to the reparation due for the violation of an international convention involves jurisdiction as to the forms and methods of the reparation'.[3]

This principle is now firmly established. For example, in *LaGrand* the International Court recalled that '[w]here jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required

[1] *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9.

[2] Ibid., 23. Art. 23(1) of the Convention concerning Upper Silesia between Germany and Poland, Geneva, 15 May 1922, 9 LNTS 465, stated:

> Si des divergences d'opinion, résultant de l'interprétation et de l'application des articles 6 à 22, s'élevaient entre le Gouvernement allemand et le Gouvernement polonais, elles seraient soumises à la décision de la Cour permanente de Justice internationale.

Translation by the PCIJ: 'Should differences of opinion, resulting from the interpretation and the application of Articles 6 to 22, arise between the German and the Polish Governments, they should be submitted to the decision of the Permanent Court of International Justice.' Art. 36 of the PCIJ Statute provided *inter alia* that:

> The Members of the League of Nations and the States mentioned in Annex C to the Covenant may ... declare that they recognize as compulsory ipso facto and without special agreement ... the jurisdiction of the Court in all or any of the classes of 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.

[3] *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 61.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:54 Page Number: 600

by the Court to consider the remedies a party has requested for the breach of the obligation.'[4]

It may be asked whether the principle works the other way around. The question has arisen in the context of investment protection: when a tribunal has jurisdiction to determine compensation for expropriation, does it also have jurisdiction to determine whether expropriation has taken place?

This question came up in the jurisdictional phase of *RosInvestCo UK* v. *Russia* in 2007.[5] The case concerned the expropriation in 2004 of a leading oil company Yukos, in which the British corporation RosInvestCo owned seven million shares. The relevant jurisdictional provision, Article 8, of the UK–Soviet BIT read as follows:

> This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement . . .[6]

The first paragraph of Article 8 was found by the tribunal to include three jurisdictional clauses:

1. the amount or payment of compensation under Articles 4 or 5 of this Agreement,
2. or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement
3. or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.[7]

The claimant argued that Article 8 conferred jurisdiction on the tribunal to determine whether an expropriation had taken place. Specifically, it argued that the phrase 'any other matter' 'must necessarily give the tribunal jurisdiction over disputes that are in addition to those covered by the First Jurisdictional Clause'.[8] Moreover, it argued that interpreting the subject-matter jurisdiction as excluding the power to decide on

[4] *LaGrand (Germany v. US)*, ICJ Rep. 2001 p. 466, 485.

[5] *RosInvestCo UK Ltd* v. *Russia*, Award on Jurisdiction, October 2007, available at ita.law.uvic.ca/documents/RosInvestjurisdiction_decision_2007_10_000.pdf.

[6] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, 6 April 1989, available at www.unctad.org/sections/dite/iia/docs/bits/uk_ussr.pdf.

[7] *RosInvestCo*, Award on Jurisdiction, October 2007, §108.

[8] Ibid., §92.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:55 Page Number: 601

expropriations would render 'any decision to pay compensation entirely within the discretion of the Russian authorities' and make the protection given to UK investors 'illusory'.[9]

Russia denied that subject-matter jurisdiction under Article 8 'encompassed 'the power to determine whether there was an expropriation and if so, its legality'.[10] In its view, 'the Tribunal only has jurisdiction when the alleged expropriation is acknowledged, in particular through an agreement to refer a dispute concerning the amount of compensation to arbitration, or determined otherwise, for example by a Russian court or an act of [the] legislature'.[11]

The tribunal held that under the ordinary meaning of the first jurisdictional clause of Article 8 of the UK–Soviet BIT, the qualification by the words 'concerning the amount or payment of compensation', 'can only be understood as a limitation of the jurisdiction conferred by that clause'.[12] Contrasting this limitation with arbitration clauses in other BITs entered into by the United Kingdom or Russia, the tribunal concluded that the exclusion of the question whether expropriation occurred and was lawful from the scope of the jurisdictional clause was intentional. Turning to the second jurisdictional clause, the tribunal again rejected the Claimant's position, holding that 'such an interpretation would deprive the wording "or concerning any other matter consequential upon" . . . of any substantial meaning.'[13] As the tribunal found the wording of Article 8 to be perfectly clear, it found no need to address additional or supplementary criteria for interpretation. It thus concluded that 'it ha[d] no jurisdiction as to the occurrence and validity of an expropriation on the basis of Article 8'. It went on, however, to uphold its jurisdiction on the basis of the most-favoured-nation-clause in Article 3(2) of the UK–Soviet BIT in conjunction with the Denmark–Russia BIT.[14]

This decision can be compared with the earlier *Berschader* arbitration, between Belgian investors and Russia.[15] Article 10(1) of the Belgium/Luxemburg–Soviet BIT provided as follows:

> Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 [dealing with expropriation] of the present Treaty shall be the subject of

[9] Ibid., §94. [10] Ibid., §76. [11] Ibid., §78.
[12] Ibid., §110. [13] Ibid., §115. [14] Ibid., §132.
[15] *Vladimir Berschader and Moïse Berschader* v. *Russia*, Award on Jurisdiction, 21 April 2006, available at ita.law.uvic.ca/documents/BerschaderFinalAward.pdf.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:55 Page Number: 602

a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute.[16]

Here, too, the Claimant argued that the jurisdictional clause in Article 10 conferred jurisdiction on the tribunal to determine whether an expropriation had taken place and whether it was legal.[17] The tribunal held summarily that the wording of Article 10.1 'expressly limits the type of dispute, which may be subjected to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act occurring under the terms of Article 5'.[18] The tribunal went on (by majority) to reject an argument for jurisdiction based on a most-favoured-nation-clause. Both tribunals, however, rejected the argument that jurisdiction to determine compensation for expropriation entails jurisdiction to determine whether expropriation has taken place.

The contrary argument was, however, accepted in two more recent decisions, *European Media Ventures*[19] and *Renta* v. *Russia*.[20] In the former case, Article 8(1) of the Belgium/Luxembourg–Czech Republic BIT granted the tribunal jurisdiction over disputes 'concerning compensation due by virtue of [the Articles of the BIT dealing with expropriation]'. The tribunal held that this wording did limit its jurisdiction, but its jurisdiction to award forms of relief other than compensation, not its jurisdiction to determine whether an expropriation had taken place. An application to set aside the award before the English High Court was dismissed by Simon J.[21] Although he concluded that Article 8(1) did confer jurisdiction to determine whether an expropriation had taken place, he was very doubtful that the parties had intended by the

[16] Treaty between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg, and the Government of the Union of Soviet Socialist Republics on the Promotion and Mutual Protection of Investments, Moscow, 9 February 1989, available at www.unctad.org/sections/dite/iia/docs/bits/belg_lux_usssr_fr.pdf. Unofficial translations are included in the Award.

[17] Agreement between the Government of the Kingdom of Norway and the Government of the Russian Federation on Promotion and Mutual Protection of Investments, 4 October 1995, available at www.unctad.org/sections/dite/iia/docs/bits/norway_russia.pdf.

[18] *Berschader*, Award on Jurisdiction, 21 April 2006, §152.

[19] *European Media Ventures SA* v. *Czech Republic*, Award on Jurisdiction, 15 May 2007, not public. See Douglas (2009), 253–5. The subsequent Award of 8 July 2009 is also not public.

[20] *Renta 4 SVSA et al*. v. *The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, available at www.italaw.com/cases/documents/916.

[21] *Czech Republic* v. *European Media Ventures SA*, [2007] EWHC 2851 (Comm.).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:56 Page Number: 603

wording chosen to exclude from jurisdiction claims for forms of relief other than compensation.[22]

Renta v. *Russia* also concerned a claim related to the expropriation of Yukos. The claim was brought pursuant to Article 10 of the Russian Federation–Spain BIT, which granted jurisdiction 'relating to the amount or method of compensation due under Article 6 of the [BIT]'. The tribunal based its conclusion on the textual analysis of Article 10; it reasoned:

> The plainest proposition to be derived from Article 10(1) is that it allows arbitration with respect to debates about the amount or method of such compensation as may be due under Article 6. The difficulty begins precisely once one asks: Who determines whether compensation is indeed 'due' under Article 6? . . . Article 10 gives an investor the right to seek arbitration with respect to '[a]ny dispute . . . relating to the amount or method of payment of the compensation due under Article 6'. The Claimants allege expropriation. Russia denies any obligation under this head. There is therefore a dispute as to whether compensation is 'due'. The force of this simple proposition is buttressed by the open texture of the introductory words: *any disputes . . . relating to*.[23]

It is hard to distinguish these two lines of decisions purely on the basis of the jurisdictional clause under consideration. The tribunal's reasoning in *Renta* v. *Russia* could equally be applied to the phrase 'compensation to be paid' in the jurisdiction clause considered in *Berschader*. The consequence of interpreting such clauses as not entailing jurisdiction to determine whether expropriation has taken place is that a state may avoid paying compensation for an expropriation by denying, however implausibly, that an expropriation has taken place, leaving the investor without a remedy. On the other hand, allowing for a widening of the scope of jurisdiction by means of liberal interpretation could go against the will of the drafters of the instrument in question. For example, there is evidence to suggest that the parties intended Article 8(1) of the Belgium/Luxembourg–Czech Republic BIT to restrict the jurisdiction of tribunals to matters relating to the amount of compensation.[24]

19.2.2 The distinction between cause of action and applicable law

In the implementation of responsibility by courts and tribunals, the distinction between cause of action and applicable law has sometimes been muddled. A salient question is whether, when a tribunal has

[22] [2007] EWHC 2851 (Comm.), §51.
[23] *Renta*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, §28.
[24] Douglas (2009), 254–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:56 Page Number: 604

jurisdiction over a dispute on the basis of a treaty, it can answer questions having no basis in the treaty but nonetheless related to the dispute. This question was addressed by the *MOX Plant* Annex VII tribunal, after the United Kingdom had argued that the tribunal lacked jurisdiction over its dispute with Ireland because Ireland had submitted the same dispute to a tribunal of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and was planning to start proceedings at the Court of Justice of the European Communities. The United Kingdom based itself on Article 282 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which provides:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.[25]

In its Order on Ireland's request for provisional measures, the tribunal rejected this argument, stating that 'even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention' and that 'since the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of the Convention and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute'.[26] It therefore found Article 282 to be inapplicable to the dispute under consideration.

The question of the scope of the arbitral tribunal's jurisdiction came up in the next phase of the dispute. The United Kingdom maintained that a large part of Ireland's claim was based on the OSPAR Convention and various EC directives, rather than on the Law of the Sea Convention, and that these parts of the claim were therefore inadmissible. The tribunal agreed that there was a 'cardinal distinction' between, on the one hand, the scope of its jurisdiction under Article 288(1) of the Convention and, on the other hand, the law the tribunal can apply according

[25] 10 December 1982, 1834 UNTS 3.

[26] *MOX Plant Case (Ireland v. UK)*, Order on Request for Provisional Measures, 3 December 2001, 126 ILR 259, 273–4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:57 Page Number: 605

to Article 293.[27] Moreover, 'to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible'.[28] The tribunal found, however, that Ireland's case did arise substantially under the Convention.

A similar conclusion was reached by the OSPAR tribunal to which one aspect of the same dispute was submitted, holding that 'the competence of a tribunal established under the OSPAR Convention was not intended to extend to obligations the Parties might have under other instruments (unless, of course, parts of the OSPAR Convention included a direct *renvoi* to such other instruments)'.[29] The tribunal went on to say:

> Interpreting Article 32(6)(a) otherwise would transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit ratione materiae to the jurisdiction of a tribunal established under the OSPAR Convention. Here, there is no indication that the Parties to the OSPAR Convention have, in their individual capacities, submitted themselves to such a comprehensive jurisdictional regime with respect to any other international tribunal. Nor is it reasonable to suppose that they would have accepted such a jurisdictional regime through the vehicle of the OSPAR Convention.[30]

These tribunals both rejected the proposition that tribunals established under a treaty can decide on claims based on obligations originating from other treaties.

A different view was taken by the Annex VII Tribunal in *Guyana/Suriname*.[31] This arbitration essentially concerned the delimitation of a single maritime boundary between the two states. In addition, Guyana claimed that Suriname was internationally responsible for an incident

[27] *MOX Plant Case (Ireland v. UK)*, Order No. 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures), 24 June 2003, 126 ILR 314, 318. Art. 288(1) states that '[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.' Art. 293(1) provides that '[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.'

[28] Ibid.

[29] *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. UK)*, Final Award, 2 July 2003, 126 ILR 334, 364.

[30] Convention for the Protection of the Marine Environment of the North-East Atlantic, 25 March 1998, (1993) 32 ILM 1069 (OSPAR Convention), Art. 32(6)(a) provides that '[t]he decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority voting of its members.' It is possible that the arbitral tribunal was in fact referring to Art. 32(5)(a), which states that '[t]he arbitral tribunal shall decide according to the rules of international law and, in particular, those of the Convention.'

[31] *Guyana/Suriname*, Award on the Merits, 17 September 2007, available at www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:57 Page Number: 606

which had occurred with an exploratory rig and drill ship licensed by Guyana, the *CE Thornton*. This ship was engaged in exploratory activities when, on 2 June 2000, it was approached by the Surinamese Navy, which ordered it to leave, alleging that the ship was within Surinamese waters. The navy ships warned that if the *CE Thornton* did not comply within twelve hours, 'the consequences would be theirs'.[32] The crew of the *CE Thornton* interpreted this as a warning that force would be used, and left the area. The Surinamese captains in command of the navy ships insisted that they were not under orders to use force, and had no intention to do so. Guyana claimed that Suriname's conduct had amounted to the unlawful threat or use of armed force, in violation of the UN Charter and customary international law. Suriname argued that these claims had no basis in the Law of the Sea Convention and were therefore inadmissible.

The tribunal, in agreement with Guyana, decided it had jurisdiction to consider the use of force claims.[33] To support this conclusion, the tribunal quoted from the Preamble of the Convention, which affirms 'that matters not regulated by this Convention continue to be governed by the rules and principles of general international law', and it cited the findings of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga (No. 2)* case:

> In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.[34]

Apart from approving of this passage, the tribunal did not advance any basis for its decision. The tribunal did find that Suriname's conduct constituted a breach of Articles 74(3) and 83(3) of the Convention, on the delimitation of the exclusive economic zone (EEZ) and the continental shelf respectively, but these provisions hardly concern the use of force.[35]

[32] Ibid., §436. [33] Ibid., §406.

[34] *The M/V Saiga (No. 2) Case (St Vincent and the Grenadines v. Guinea)*, Admissibility and Merits, 1 July 1999, 120 ILR 143, 196.

[35] Both provisions read: 'Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period,

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:58 Page Number: 607

It based its eventual finding that Suriname's actions constituted an unlawful threat of use of force solely on the UN Charter and customary international law, again without any discussion of the content of these obligations.

The tribunal's invocation of the *M/V Saiga (No. 2)* case is misleading. This was a prompt release case, and force was used in boarding the vessel. The question of its legality thus related directly to the subject matter of the dispute. Moreover, the tribunal based its condemnation of the use of force on specific case law and on Article 22(1)(f) of the Straddling Fish Stocks Agreement, which states:

> 1. The inspecting State shall ensure that its duly authorized inspectors:
> . . .
> (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.[36]

Although this Agreement is separate from the 1982 Convention, it is clearly related, and the question of the use of force was relevant for the tribunal's decision in that case. The same can hardly be said for the *Suriname/Guyana* boundary delimitation.

It is clear that the approach taken by the *MOX Plant* and *OSPAR* tribunals, as opposed to that taken by the *Guyana/Suriname* tribunal, must be correct. This approach diminishes the likelihood of jurisdictional conflict between tribunals, as the tribunals limit themselves to determining violations of the treaty under which they were established. There is a distinction between jurisdiction to determine a dispute using all sources of the applicable law and jurisdiction on the basis of a treaty. In the latter case, courts and tribunals lack jurisdiction to decide on particular claims not finding their basis in the treaty under consideration.

Where a court or tribunal has a limited jurisdictional grant, it nonetheless has inherent power to determine issues necessary for the determination of the question over which it has jurisdiction, such that its grant of jurisdiction is effective. In the *Namibia* Advisory Opinion the

not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.'

[36] 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, 2167 UNTS 3, 4 August 1995. The Tribunal referred to the following cases: *SS I'm Alone* (*Canada/US*), (1935) 3 RIAA 1609; *Red Crusader Report*, (1962) 35 ILR 485.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:58 Page Number: 608

Court considered that it had power to consider the conformity of General Assembly and Security Council resolutions with the UN Charter, notwithstanding that that question was outside the scope of the request for the advisory opinion. South Africa had argued that in adopting resolution 2145 (XXI) on the termination of the Mandate for South West Africa, the General Assembly had acted *utra vires*. The Court stated:

> It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry. On the other hand it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions ... The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for an advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.[37]

It is unclear how far this 'incidental power' of courts and tribunals extends. In reaching the conclusion that it had jurisdiction to determine whether an expropriation had taken place, the tribunal in *Renta* v. *Russia* reasoned that the 'existence of the basic predicate of a remedy under Article 10 cannot be deemed outside the purview of a tribunal constituted under that very Article'.[38] Given the consensual nature of dispute settlement, where it is clear that it was the intention of the parties to a BIT to exclude such a predicate from jurisdiction, that fact should weigh against a tribunal exercising its power. The extent of the power is particularly relevant for proceedings under UNCLOS. In *Guyana/Suriname* the issue of whether the Annex VII tribunal had jurisdiction to determine questions relating to the land boundary between the parties was raised, but the tribunal held that it was unnecessary to resolve the matter.[39] The pending proceedings in *Mauritius* v. *UK* will likely raise the issue of whether the dispute settlement provisions of UNCLOS empower a tribunal to resolve disputes over title to land.[40]

[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971 p. 16, 45.
[38] *Renta*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, §31.
[39] *Guyana/Suriname*, Award on the Merits, 17 September 2007, §308.
[40] Prows, (2011) 15(8) *ASIL Insights*.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:59 Page Number: 609

19.2.3 Jurisdiction over counterclaims

Another issue related to the jurisdiction of courts and tribunals to implement responsibility is the scope of jurisdiction over counterclaims. This is a question which has often arisen at the ICJ, less often before tribunals.

Counterclaims are not mentioned in the Statute, which means that the Court's law on the issue is judge-made.[41] A provision regulating the Court's practice on counterclaims was included in Article 80 of the Rules only in 1978. As amended in 2001, it reads:

> 1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.
>
> . . .
>
> 3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties.

The counterclaim must thus fall independently within the Court's jurisdiction and it must be admissible in the sense that it is sufficiently closely connected to the primary claim. The Court will consider these questions at the merits stage of the proceedings, after the respondent has advanced one or more counterclaim(s) in its counter-memorial. If the applicant objects to the counterclaim or if the Court feels that it is not adequately informed of the positions of the parties, it may hold a short hearing on the matter. It will then issue an order assessing whether the counterclaim meets the requirements of Article 80. If it does, the counterclaim is included in the proceedings and the Court will go on to assess any remaining issues of jurisdiction and admissibility in the merits phase.

The Court was first faced with a counterclaim in the *Asylum* case. Peru had asked the Court, by way of a counterclaim, to declare that Colombia's granting of asylum to Haya de la Torre violated the 1928 Convention on Asylum. The Court found that the counterclaim had a 'direct connexion' to the primary claim and that it was thus admissible.[42] After discussion of the merits of the counterclaim, the Court partially sustained it.

[41] For a thorough discussion of counterclaims and the ICJ, see Rosenne, 2–3 *The Law and Practice of the International Court 1920–2005* (2006), 896–8, 1232–41.

[42] *Asylum (Colombia/Peru)*, ICJ Rep. 1950, 266, 281. The Court also approved the inclusion of counterclaims in the proceedings in the *Land and Maritime Boundary Dispute* case,

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:59 Page Number: 610

The Court clarified its interpretation of Article 80 in its Judgment on the merits in *Oil Platforms*. It had previously found, in an order of 10 March 1998, that the United States' counterclaim was admissible. The United States had submitted '[t]hat in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987–88 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty [of Amity].'[43] The Court held that it was open to Iran at the merits stage to contest the Court's jurisdiction over the counterclaims and their admissibility. The Court's task in the Order 'was only to verify whether or not the requirements laid down by Article 80 of the Rules of Court were satisfied' and the Order therefore did not address 'any other question relating to jurisdiction and admissibility, not directly linked to Article 80 of the Rules.'[44] This was clear from the wording of the Order, which said that the counterclaim was admissible 'as such'.[45] The Court therefore went on to consider Iran's objections to the Court's jurisdiction over and the admissibility of the counterclaim, rejecting the objections and, subsequently, the merits of the claim.

The Court set out a more detailed explanation of the law and procedures regulating counterclaims in *Bosnian Genocide*. First, it clarified that

> Whereas it is established that a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, whereas at the same time, it is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it; whereas the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings – for example, that a finding be made against the Applicant; and, whereas in this respect, the counter-claim is distinguishable from a defence on the merits.[46]

although it found that it did not have to address the merits of the claims, as neither party had sufficiently proved the facts it was alleging: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order, 30 June 1999, ICJ Rep. 1999 p. 983; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, ICJ Rep. 2002 p. 303, 453.

[43] *Oil Platforms (Iran v. US)*, ICJ Rep. 2003 p. 161, 208. [44] Ibid., 210.

[45] *Oil Platforms (Iran v. US)*, Order on Counterclaims, ICJ Rep. 1998 p. 190, 206.

[46] *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order on Counterclaims, [1997] ICJ Rep. 243, 256.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:55:59 Page Number: 611

The Court acknowledged that its Rules do not define counterclaims: rather, 'it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case'.[47] This degree of connection 'must be assessed both in fact and in law', on the basis of the factual complex underlying the principal claim(s).[48]

For example, in *DRC* v. *Uganda*, the Court held that Uganda's counterclaims relating to the DRC's use of force in violation of Article 2(4) of the UN Charter and to the DRC's alleged attacks against diplomatic personnel and property were directly connected with the subject matter of the DRC's claims.[49] Uganda's third counterclaim, concerning the DRC's alleged violation of the Lusaka Agreement, was, however, found to relate to 'methods for solving the conflict' rather than the conflict itself, and not to be 'part of the same factual complex'.[50] This counterclaim was therefore held inadmissible.[51]

The question of counterclaims has also arisen in international investment arbitrations. Article 19(3) of the UNCITRAL Rules 2010 provides:

> In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

Three tribunals applying the terms of Article 19(3) have held that counterclaims are permissible in principle, but in practice the requirements for a counterclaim are unlikely to be met in investment arbitration. The first major case was *Saluka BV* v. *Czech Republic*.[52] Saluka, a

[47] Ibid., 258.

[48] Ibid. See also *Oil Platforms*, Order on Counterclaims, ICJ Rep. 1998 p. 190, 204–5.

[49] *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Order on Counterclaims, 29 November 2001, ICJ Rep. 2001 p. 660, 678–680.

[50] Ibid., 680.

[51] See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Order, 6 July 2010, ICJ. Germany brought proceedings against Italy alleging that Italy had failed to respect the jurisdictional immunity which Germany enjoys under international law, *inter alia* by allowing civil claims to be brought in the Italian courts in which reparation was sought for injuries caused by violations of international humanitarian law committed during the Second World War. Italy sought to bring a counterclaim with respect to the question of the reparation owed. The Court held that it did not have jurisdiction over the counterclaim and so did not need to determine whether the counterclaim was directly connected with the subject-matter of the German claim: ibid., 10–11.

[52] *Saluka Investments BV* v. *Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004. See also *Dr Horst Reineccius, First Eagle SoGen Funds, Inc., Mr Pierre Mathieu and la Société de Concours Hippique de la Châàtre* v. *Bank for International*

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:00 Page Number: 612

Dutch company, had acquired a substantial minority shareholding in IPB, a Czech state-owned bank, in a partial privatization. In controversial circumstances IPB became insolvent, went into administration and was sold for a pittance to another bank. Saluka claimed deprivation of its investment and violation of the fair and equitable treatment standard set out in the Netherlands–Czech Republic BIT. The Czech Republic brought a counterclaim which *inter alia* alleged breaches of the original share purchase agreement with the privatization agency, a state organ. The arbitration was conducted under the UNCITRAL Rules.

The tribunal found that its jurisdiction was 'in principle wide enough to encompass counterclaims' as long as the counterclaim satisfied the jurisdictional requirements articulated in the Netherlands–Czech Republic BIT, Article 8 of which held that disputes must concern an investment.[53] Additionally, 'a legitimate counterclaim must have a close connexion with the primary claim to which it is a response'.[54] The tribunal drew on ICSID and Iran–US Claims Tribunal rules:

> Article 19.3 of the UNCITRAL Rules, Articles 25(1) and 46 of the ICSID Convention and Article II(1) of the Iran-US Claims Settlement Declaration, all reflect essentially the same requirement: the counterclaim must arise out of the 'same contract' (UNCITRAL Rules, Article 19.3), or must arise 'directly out of an investment' and 'directly out of the subject-matter of the dispute' (ICSID, Articles 25(1) and 46), or must arise 'out of the same contract, transaction or occurrence that constitutes the subject matter of [the primary] claims' (Article II(1) of the Claims Settlement Declaration). The Tribunal is satisfied that those provisions, as interpreted and applied by the decisions which have been referred to, reflect a general legal principle as to the nature of the close connexion which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim.[55]

In the end, however, the tribunal found that it lacked jurisdiction over the counterclaim because the disputes 'which have given rise to the Respondent's counterclaim are not sufficiently closely connected with the subject-matter of the original claim put forward by Saluka to fall within the Tribunal's jurisdiction under Article 8 of the Treaty'.[56] The tribunal in *Paushok* v. *Mongolia* similarly held that while in principle its

Settlements, Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares, 22 November 2002; *Final Award on the Claims for Compensation for the Shares Formerly Held by the Claimants, Interest Due Thereon and Costs of the Arbitration and on the Counterclaim of the Bank against First Eagle Sogen Funds, Inc.*, (2003) 23 RIAA 252.

[53] *Saluka*, §§39, 60. [54] Ibid., §61. [55] Ibid., §76. [56] Ibid., §81.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:00 Page Number: 613

jurisdiction was wide enough to encompass counterclaims, the matters raised by the respondent did not have a close connection with the claimants' claims.[57]

Counterclaims are also provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[58] (ICSID Convention) Article 46, which gives tribunals jurisdiction over counterclaims 'arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre'. In *Roussalis* v. *Romania* a majority of the tribunal did not allow a counterclaim on the basis that it was not within the scope of the consent to arbitration.[59] Article 9 of the Greece–Romania BIT conferred jurisdiction over '[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under [the BIT]'. The tribunal reasoned that Article 9 limited its jurisdiction to claims brought by investors in relation to obligations of the host state and so did not provide for counterclaims to be introduced by the host state in relation to obligations of investors.[60] The tribunal also reasoned that as BITs impose no obligations on investors, a tribunal would only have competence to hear counterclaims where the applicable law of a BIT included domestic law.[61] The applicable law of the Greece–Romania BIT was limited to the provisions of the BIT itself and applicable rules and principles of international law. Professor Reisman dissented and stated that 'in my view, when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue'.[62] This would not appear to be correct. It is clear that Article 46 does not function to extend

[57] *Sergei Paushok et al.* v. *Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, §§689–99, available at www.italaw.com/cases/816.

[58] 18 March 1965, 575 UNTS 159.

[59] *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, 7 December 2011, available at www.italaw.com/cases/documents/935.

[60] Ibid., 142.

[61] Ibid. In *Amto* v. *Ukraine*, a dispute pursuant to the Energy Charter Treaty and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the Tribunal similarly held that it did not have jurisdiction over a counterclaim on the ground that the respondent had not identified any basis in the applicable law for the counterclaim: *Limited Liability Company Amto* v. *Ukraine*, SCC No. 080/2005, 26 March 2008, §118, available at www.italaw.com/cases/documents/82.

[62] *Roussalis*, ICSID Case No. ARB/06/1, Declaration of Reisman, 28 November 2011.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:01 Page Number: 614

a tribunal's competence and that counterclaims must be within the scope of the parties' consent.[63]

On the other hand the tribunal in *Goetz* v. *Burundi* upheld jurisdiction over a counterclaim, saying:

> It is not disputed that the dispute between the Goetz partners and Burundi has a direct relation with the investments made by the former, in particular in ABC [the investment vehicle] following the delivery by Burundi of a certificate of freedom to operate authorizing the bank to carry out its activities in the manner laid down in the certificate. The counterclaim relates to the conditions in which ABC carried out these same activities in disregard of the certificate of freedom to operate of which it was the beneficiary. It thus relates, itself, to an investment as defined in the BIT.[64]

In international investment arbitration a counterclaim may thus be admissible, depending on its connection with the primary claim, as long as it falls within the description of a dispute concerning an investment within the terms of the relevant BIT.[65] That tribunals may consider counterclaims brought under appropriately worded BITs is clearly a desirable conclusion. Despite the asymmetrical character of a BIT, tribunals should be able to hear closely related counterclaims arising under the investment contract, otherwise the maxim *pacta sunt servanda* would only operate in one direction. Moreover, rejecting counterclaims would increase the likelihood of the same dispute being addressed by two different courts or tribunals – an impractical and inefficient result which could also lead to conflicting outcomes. As Professor Reisman stated in *Roussalis* v. *Romania*,

> In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by the claimant – perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.[66]

[63] Schreuer, *The ICSID Convention: A Commentary* (2nd edn, 2009), 754–5.
[64] *Goetz* v. *Burundi*, (2012) ICSID Case No. ARB/01/2, §277 (author's translation). The counterclaim failed on the merits.
[65] See also *Klöckner* v. *Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, 2 ICSID Reports 162, 165.
[66] *Roussalis*, ICSID Case No. ARB/06/1, Declaration of Reisman, 28 November 2011.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:01 Page Number: 615

19.3 Is there a remedial discretion?

For the Permanent Court it was initially controversial whether it could award remedies at all, in the absence of express authorization by the parties. Article 36(2)(d) of the Statutes of both the PCIJ and the ICJ lists 'the nature or extent of the reparation to be made for the breach of an international obligation' as one of the questions over which a state may give the Court jurisdiction through an optional declaration, but apart from this the Statutes gave no guidance on the determination of remedies.

In *Chorzów Factory* the jurisdiction of the Court to award damages was challenged by the Poland, on the basis that the treaty on which the Court based its jurisdiction did not explicitly provide for jurisdiction over questions of reparation. This argument was rejected. The Court said:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in 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.[67]

The Court drew the conclusion that jurisdiction to determine a breach must imply jurisdiction to determine reparation:

> An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes.[68]

The Court's interpretation was thus one based on the principle of effectiveness.

The ILC's Draft Articles on State Responsibility adopted on first reading were formulated in terms of the right of the injured state to reparation. Thus '[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act' restitution in kind, compensation or satisfaction and/or, where appropriate, assurances or guarantees of non-repetition.[69] This version of the Articles left no doubt that an injured state has a right to one or more remedies which would naturally be awarded by an international court or tribunal.

[67] *Factory at Chorzów*, Jurisdiction, (1927) PCIJ Ser. A No. 9, 21. [68] Ibid., 25.
[69] See Draft Articles, Arts. 42–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:02 Page Number: 616

By contrast, ARSIWA framed the injured state's entitlement to reparation in terms of the respondent state's obligation to provide it: 'The State responsible for an internationally wrongful act is under an obligation' to provide restitution, compensation or satisfaction.[70] Also under this formulation courts and tribunals apparently have no discretion as to whether to award reparation, though they retain discretion as to which remedy is most appropriate. In practice, however, it seems that courts and tribunals have usually bent over backwards to avoid awarding as a remedy anything other than monetary compensation or, in the case of the ICJ, declarations of wrongfulness.[71]

The Court's competence to determine remedies even in the absence of explicit consent of the parties is well established. The Court has not spent much time discussing why it awards a certain remedy. It has generally avoided awarding monetary compensation in cases of state responsibility, preferring instead to rely on declarations of wrongfulness as a form of satisfaction or, exceptionally, on what amount to injunctions. This is despite the Court's repeated reaffirmation that:

> 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.[72]

Thus in *LaGrand* the Court ordered the United States to 'allow the review and reconsideration of the conviction and sentence' of persons convicted without being notified of their right to contact their consulates.[73] It left the choice of means of how to do this in practice to the United States. The Court found that the United States had by its actions violated Article 36 of the Vienna Convention on Consular Relations, but it did not award any reparation; none was sought by Germany.

In *Land and Maritime Boundary between Cameroon and Nigeria*, Cameroon asked the Court to order Nigeria to give a guarantee of non-repetition in addition to ending the administrative and military presence of Nigeria on what Cameroon argued was its territory.[74] The Court found that such a remedy would be admissible, but held that a guarantee of

[70] ARSIWA, Arts. 35–7. See also Art. 31(1): 'The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.'

[71] Already in 1985 Gray observed that declaratory judgments were 'the norm in the practice of the ICJ, rather than reparation, let alone restitution': Gray, (1985) 56 BYIL 25, 39.

[72] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 81.

[73] *LaGrand*, ICJ Rep. 2001 p. 446, 513.

[74] *Cameroon* v. *Nigeria*, ICJ Rep. 2002 p. 303, 452.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:02 Page Number: 617

non-repetition would be unnecessary as it trusted the parties to abide by the boundaries determined by it. The Court also found that as it was awarding the area in question to Cameroon, the determination of Nigeria's responsibility for its occupation had become a moot point. The injury suffered by Cameroon was 'sufficiently addressed' by the Judgment itself.[75]

A similar approach was taken by the Court in *Bosnian Genocide*. The Court found that Serbia had violated its obligation to prevent genocide, but as a causal nexus between this breach and the damage resulting from the genocide could not be established, the Court held that monetary compensation would not be an appropriate form of reparation.[76] It therefore considered a declaration of wrongfulness in the operative paragraphs of the Judgment to be sufficient satisfaction. It also held that such a declaration would be the appropriate remedy for Serbia's failure to punish perpetrators of the genocide. Specifically, the Court ordered Serbia to co-operate with the International Criminal Tribunal for the former Yugoslavia (ICTY) and to transfer to The Hague persons wanted for genocide or other crimes under the Genocide Convention.[77] Bosnia's request for guarantees of non-repetition was, however, rejected by the Court, as it found that there were insufficient grounds for believing that a second genocide might occur. The reparations awarded to Bosnia were therefore limited to the order to co-operate with the ICTY, together with declarations that 'Serbia ha[d] violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995' and that 'Serbia ha[d] violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal.'[78]

Similarly, in *Certain Questions of Mutual Assistance in Criminal Matters* case the Court held that its finding that France had violated its international obligation to Djibouti by not giving reasons for its refusal to execute a letter rogatory presented to it by the latter constituted 'appropriate

[75] Ibid.

[76] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 233–4.

[77] Ibid., 235. See also 237 (op. clause 8).

[78] Ibid., 237 (op. clauses 5 and 6, respectively).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:03 Page Number: 618

satisfaction'.[79] The Court thus refused to award the injunctions, guarantees of non-repetition and reparation requested by Djibouti.

Exceptions to this approach can, however, be found in judgments in the *Nicaragua* and *DRC* v. *Uganda* cases. In *Nicaragua*, the Court found that the United States had breached several rules of customary international law, including the obligation not to use force against another state, and the Treaty of Friendship, Commerce and Navigation between the two states. The Court therefore held that the United States was under an obligation to make reparation to Nicaragua for these breaches, although it found it appropriate to reserve the question of the amount of reparation for subsequent procedures.[80] It explained that this would give Nicaragua the opportunity to amend its claim in the light of the breaches established by the Court, which were less far-reaching than the alleged breaches claimed by Nicaragua, and to afford the United States, which had not participated in the proceedings on the merits, a chance to present its views on the appropriate amount of compensation. The Court also addressed Nicaragua's request for the award of US$370,200,000 as the 'minimum (and in that sense provisional) valuation of direct damages':

> There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement.[81]

Nicaragua eventually commenced proceedings for determining the amount of compensation, but it dropped its request after a new government came into power, so that the Court never decided on the matter.[82]

The Court came to a similar decision in *DRC* v. *Uganda*. In that case the Court found that the internationally wrongful acts for which Uganda

[79] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Rep. 2008 p. 177, 245.
[80] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1986 p. 14, 142–3.
[81] Ibid.
[82] Schulte, *Compliance with Decisions of the International Court of Justice* (2004), 205–6.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:03 Page Number: 619

was responsible, which included the unlawful use of force, violation of sovereignty and territorial integrity and of international humanitarian and human rights law, caused injury to the DRC and persons on its territory.[83] It therefore concluded that Uganda was under an obligation to make reparation, which was to be determined by negotiations between the two states or, failing an agreement, in a subsequent phase of the proceedings.

The first, and for sixty-three years the only, instance in which the Court determined the amount of reparation due for a breach of international law was *Corfu Channel*. In a separate decision issued eight months after its Judgment on the merits, the Court, with the help of experts, set the amount of compensation due from Albania to the United Kingdom at £843,947.[84]

In *Diallo* the Court found that the DRC was under an obligation to make appropriate reparation in the form of compensation to Guinea, in relation to breaches of international law arising out of its treatment of a Guinean national.[85] The Court did not set the amount of compensation due, but provided that the parties had six months in which to settle the question. After the parties failed to reach an agreement in the time specified, the Court fixed the amount of compensation due at US$95,000.[86]

The ICJ has thus proved itself more reluctant than the PCIJ in determining compensation. In its very first case, the Permanent Court ordered that Germany pay France 140,749.35 francs for refusing the SS *Wimbledon* access to the Kiel Canal.[87] In *Chorzów Factory* the stage of determining compensation was not reached because the parties reached a settlement.[88]

To summarize, the Court seems open to awarding monetary compensation in some cases of state responsibility, but it is extremely reluctant to award restitution or guarantees of non-repetition. Despite not have remedial discretion, at least according to the ILC Draft Articles adopted on first reading, the Court has done its utmost to reserve a certain degree of discretion, particularly as to the type of remedy to award.

[83] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p. 168, 257.
[84] *Corfu Channel (UK v. Albania)*, Judgment on Compensation, ICJ Rep. 1949 p. 244, 250.
[85] *Ahmadou Sadio Diallo (Guinea v. DRC)*, 30 November 2010, ICJ, 50.
[86] *Ahmadou Sadio Diallo (Guinea v. DRC)*, Compensation owed by the RDC to Guinea, 19 June 2012, ICJ, 21.
[87] *SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 15.
[88] *Factory at Chorzów*, Order, 25 May 1929, (1928) PCIJ Ser. A No. 19, 11.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:03 Page Number: 620

For investment tribunals, virtually all remedies awarded to date have been in the form of monetary compensation. This is the only type of remedy mandated by the ICSID Convention.[89] There is, however, no general rule against the award of non-pecuniary remedies, and some commentators have advocated more use of these remedies.[90] The only tribunal to consider the matter in depth was that in *Enron* v. *Argentina*. Enron's Argentinian subsidiary asked for an injunction against the collection of various taxes. Argentina challenged the tribunal's jurisdiction to award such a remedy, arguing that

> [T]he Tribunal lacks such a power under the Convention and the Treaty, and it could only either issue a declaratory statement that might satisfy the investor or else determine the payment of compensation based on a finding that a certain measure is wrongful . . . [A]n ICSID tribunal cannot impede an expropriation that falls exclusively within the ambit of State sovereignty; that tribunal could only establish whether there has been an expropriation, its legality or illegality and the corresponding compensation.[91]

Argentina considered any other remedy to be too much of an infringement of its sovereignty. The tribunal rejected this argument, finding that it did have 'the power to order measures involving performance or injunction of certain acts'.[92] It came to this conclusion largely on the basis of the *Rainbow Warrior* case, in which the tribunal held:

> The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, 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.[93]

[89] ICSID Convention, Art. 54(1) provides: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.' Art. 43(1) of the US model BIT 2004 provides:

> Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:
> (a) monetary damages and any applicable interest; and
> (b) restitution of property . . .

[90] See, e.g., McLachlan, Shore and Weiniger, *International Investment Arbitration: Substantive Principles* (2007), 341.

[91] *Enron Corp and Ponderosa LP* v. *Argentine Republic*, ICSID Case No. ARB/01/3, Award on Jurisdiction, 14 January 2004, §76, available at www.asil.org/ilib/enron.pdf.

[92] Ibid., §81.

[93] *Rainbow Warrior (New Zealand/France)*, (1990) 20 RIAA 215, 217, 270.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:04 Page Number: 621

The tribunal ultimately chose not to award a non-pecuniary remedy.

The tribunal in *Goetz* v. *Burundi* came up with a solution to the problem that non-pecuniary remedies will often be considered too much of an infringement of state sovereignty. The case concerned the withdrawal of a certificate granting tax and customs exemptions. The tribunal gave Burundi a choice of either reinstating the exemptions or paying damages:

> [I]t falls to the Republic of Burundi, in order to establish the conformity with international law of the disputed decision to withdraw the certificate, to give an adequate and effective indemnity to the claimants as envisaged in Article 4 of the Belgium-Burundi investment treaty, unless it prefers to return the benefit of the free zone regime to them. The choice lies with the sovereign discretion of the Burundian government. If one of these two measures is not taken within a reasonable period, the Republic of Burundi will have committed an act contrary to international law the consequences of which it would be left to the Tribunal to ascertain.[94]

To conclude, if a state has breached its international obligations to the investor, resulting in injury to the latter, financial compensation will usually be awarded. There may, however, be movement towards acknowledging some degree of discretion as to the type of remedy international investment tribunals may award. At least under ICSID Rules, however, it seems that a tribunal may not award a non-pecuniary remedy in the absence of a monetary alternative.

19.4 Election of remedies

19.4.1 The claimant's right to elect and election in the course of proceedings

It is up to the injured state to determine initially the consequences of a breach of international law.[95] Thus an injured state is normally entitled to elect as between the available forms of reparation. Article 43(2) provides that the injured state may specify to the state whose responsibility it is invoking 'what form reparation should take'. The right to elect as between different forms of remedies applies equally in cases where there is more than one injured state, including where one or more states are particularly injured by the breach of a collective or community obligation. A 'specially affected state' may thus claim cessation and the

[94] *Goetz and ors* v. *Republic of Burundi*, ICSID Case No. ARB/95/3, Award on Jurisdiction, 6 ICSID Reports 3, 44.

[95] Gray (1987), 6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:04 Page Number: 622

reparation of its choice. The situation is different for the class of states interested in the violation of the collective obligation, but not directly injured by it. These states may seek the cessation of the internationally wrongful act, along with guarantees of non-repetition, and may call for reparation for the directly injured state(s). They are not themselves entitled to any form of reparation. The same applies, *mutatis mutandis*, to cases where no state is injured as a result of a breach of collective or community obligations, for example because the injured parties are individuals or organizations.

It is thus possible that an injured state and a state other than the injured state both invoke the responsibility of another state but ask for different remedies. This happened for example in the *The SS Wimbledon*: Japan, which had not suffered any injury or loss, sought only a declaration of wrongfulness from the Court while France, whose national had suffered a loss as a result of the German refusal to permit the *Wimbledon* to pass through the Kiel Canal, sought and obtained damages.[96]

The ICJ generally respects the choice of reparation made by the applicant and will not venture beyond it. In *Nuclear Tests*, for example, the Court refrained from discussing the legality of the tests carried out by France, as it found that the remedy requested by Australia and New Zealand, an order that France would not carry out further tests, had been made redundant by a unilateral French declaration to the same effect.[97] The Court simply noted that 'a declaration is a form of "satisfaction" which the Applicant might have legitimately demanded when it presented its final submissions in the present proceedings, independently of any claim to compensation' and left the matter at that.[98] Similarly, in the *LaGrand* case, the Court refrained from discussing compensation because Germany had not asked for it.[99]

The reparation sought by the injured state must be notified to the responsible state in accordance with ARSIWA Article 43(2) and the injured state may not seek reparation if it has validly waived its claim in accordance with Article 45.

An injured state's right of election is not unlimited, as can be seen from the language of Article 43(2)(b), which does not set out the right in an absolute form. The commentary recognizes three situations in which

[96] *SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 30.
[97] *Nuclear Tests (Australia v. France)*, Jurisdiction, ICJ Rep. 1974 p. 253, 270–2; *Nuclear Tests (New Zealand v. France)*, Jurisdiction, ICJ Rep. 1974 p. 457, 475–7.
[98] *Nuclear Tests (Australia v. France)*, Jurisdiction, ICJ Rep. 1974 p. 253, 258.
[99] *LaGrand*, ICJ Rep. 2001 p. 446, 513.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:05 Page Number: 623

the right is qualified. First, where there is a plurality of injured states and they do not make consistent elections.[100] The commentary to Article 46 states:

> 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. 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.[101]

It is simplistic to say that the commentary here recognizes a hard and fast rule that 'where one injured State seeks restitution and the other seeks compensation, then compensation is to prevail'.[102] The commentary is merely giving an example. As the Drafting Committee stated, Article 46

> did not deal with the case where injured States took different attitudes to the forms of reparation, as that seemed to be a problem of limited practical importance. Such cases, if they arose, were likely to present special features and to be significantly affected by the content of the obligation breached.[103]

Second, the commentary stated that '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'.[104]

Third, the commentary states that

> in so far as there are continuing obligations the performance of which are not simply matters for the two States 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.[105]

According to Gray there is 'controversy as to whether certain categories of breaches such as those involving *jus cogens* or *erga omnes* obligations leave an injured State with no choice of remedy other than to seek restitution'.[106] Both of the last two types of situation are explicable on

[100] On the apportionment of reparation in situations involving a plurality of injured states, see Chapter 17.
[101] ARSIWA Commentary, Art. 46, §4. [102] Gray (2010), 593.
[103] ILC Ybk 2000/I, 395 (Chairman of the Drafting Committee). See also Crawford, Third Report, 76.
[104] ARSIWA Commentary, Art. 43, §6. [105] Ibid. [106] Gray (2010), 594.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:05 Page Number: 624

the basis of the obligation of cessation and continued duty of performance.[107] Where a primary obligation continues, a responsible state has an obligation to cease its wrongful conduct (if continuing) and a duty to continue performance of the primary obligation.[108] In such situations, to permit the injured state to receive compensation in lieu of restitution could amount to double recovery.[109]

It is open to a state to ask for a variety of remedies at the start of proceedings and to narrow this range as the case progresses or to change their preferred remedy in the course of proceedings. In *Chorzów Factory*, for example, Germany decided to accept compensation after initially insisting on restitution of the factory.[110] In *Passage through the Great Belt*, Finland eventually accepted compensation in a negotiated settlement, after insisting on the deconstruction of the disputed bridge during the proceedings.[111] At common law parties are entitled to change the remedies they seek up to the day of judgment. No limit on the period during which parties may seek such a change has been established in international law, but presumably it extends at least to the making of formal submissions at the end of the oral phase.

19.4.2 Fork-in-the-road clauses

A fork-in-the-road clause dictates that where an investment tribunal would otherwise have jurisdiction pursuant to a treaty, a party may lose the ability to avail itself of such jurisdiction by choosing another forum for the resolution of its dispute. The choice of one such form of dispute may expressly preclude resort to another under the principle of *electa una via*. Under provisions of this kind, the loss of access to international arbitration apparently applies only if the dispute was submitted to the domestic courts.[112]

In order to determine whether the choice under a fork-in-the-road clause has been taken, it is necessary to establish whether the parties and the causes of action in the two suits are identical. The loss of access to international arbitration applies only if the *same* dispute has

[107] See also Crawford, Third Report, 64; ILC Ybk 2000/II(2), 37. On the obligation of cessation and the continued duty of performance, see Chapter 14.
[108] ARSIWA, Arts. 29, 30. [109] On the rule against double recovery, see Chapter 20.
[110] *Factory at Chorzów*, Order, 25 May 1929, (1928) PCIJ Ser. A No. 19, 17.
[111] *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, ICJ Rep. 1991 p. 12; *Passage through the Great Belt (Finland v. Denmark)*, Order, 10 September 1992, ICJ Rep. 1992 p. 348.
[112] McLachlan, Shore and Weiniger (2007), 103–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:05 Page Number: 625

previously been submitted by the same party to the domestic courts. This principle is now well established.[113] It was held by the tribunal in *Vivendi*, for example, that the same type of claim must be in existence in both the domestic and international proceedings.[114] The relevant article in the BIT under consideration in that arbitration provided that '[o]nce an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of those procedures is final.'[115] The tribunal interpreted this provision to apply only to claims explicitly alleging a cause of action under the BIT or charging Argentina with a violation of the BIT. This excluded claims brought under domestic proceedings on the basis of the concession contract between Argentina and the claimant.

The applicable law applied in the local courts and the investment tribunal must thus be the same for the fork-in-the-road clause to exclude jurisdiction. The clause does not spring into action when an investor brought a local claim for breach of contract and its international claim is based on a breach of the BIT. As the tribunal held in *CMS* v. *Argentina*,

> Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there has been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.[116]

Schreuer has argued that the national and international disputes would have to be identical in order for a fork-in-the-road clause to apply so that, if the international claim is based on a breach of treaty, 'the dispute before the domestic courts or administrative tribunals would also have to concern an alleged breach of a right conferred or created by the BIT'.[117] This interpretation has been refuted by McLachlan et al., who argue that this approach is excessively restrictive and that 'the fork in the road clause ought to operate should the investor choose to pursue *a*

[113] See e.g. *Vivendi Universal* v. *Argentina*, First Award, (2000) 5 ICSID Reports 296, 310–11, 315–16; *Vivendi Universal* v. *Argentina*, First Annulment, (2002) 6 ICSID Reports 340, 352, 356; *LG&E Energy Corporation, LG&E Capital Corporation and LG&E International Inc*. v. *Argentine Republic*, Decision on Objections to Jurisdiction, (2004) 11 ICSID Reports 411, 428.

[114] (2000) 5 ICSID Reports 296, 315–16.

[115] Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments, 3 July 1991, 1728 UNTS 282, Art. 8(2).

[116] *CMS Gas Transmission Co*. v. *Argentine Republic*, Decision on Jurisdiction, (2003) 7 ICSID Reports 492, 511.

[117] Schreuer, (2004) 5 JWIT 231, 248.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:06 Page Number: 626

claim equivalent in substance to that created by the BIT against the host State'.[118] A fork-in-the-road clause can thus operate to deprive a tribunal of jurisdiction.

In *Pantechniki* the sole arbitrator Paulsson held that jurisdiction over a claim was excluded by the operation of a fork-in-the-road clause.[119] He stated that 'there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract.'[120] The Albanian court case in question concerned a minister's refusal to pay the amount of contractual compensation set by a commission. Paulsson stated that this conduct 'might be challenged as an arbitrary act by a senior official which falls to be examined for compliance with the substantive standards of the Treaty'.[121] He reasoned that if the Albanian courts accepted that the claimant was entitled to payment, 'it would grant the Claimant exactly what it is seeking before ICSID – and on the same "fundamental basis". The Claimant's grievance thus arises out of the same purported entitlement.'[122]

19.4.3 The non ultra petita *rule*

The discretion to award reparation is limited by the *non ultra petita* rule. This rule prescribes that the Court cannot award the applicant state more than what it requested in its submissions. For example, in the *Corfu Channel* case the United Kingdom had asked for £700,087 compensation for the loss of one of its ships, HMS *Saumarez*. The Court decided to get an expert opinion on the technical question of the valuation of the ship, and the experts valued the loss at £716,780. Nevertheless, the Court held that it could not 'award more than the amount claimed in the submissions of the United Kingdom Government'.[123] This approach was criticized by Judge ad hoc Ečer, who argued that the Court based itself on a procedural rule which should not affect its method of calculation. In his view, 'the Court, without any reference to this rule, must decide, in the first place and on grounds of law, and not of mathematics, what basis [for calculation of compensation] is juridically to be adopted'.[124] If the result arrived at was more than asked for by the

[118] McLachlan, Shore and Weiniger (2007), 106–7 (emphasis in original).
[119] *Pantechniki SA Contractors and Engineers (Greece)* v. *Republic of Albania*, Award, ICSID Case No. ARB/07/21, 30 July 2009, available from www.italaw.com/cases/810.
[120] Ibid., §64. [121] Ibid., §65. [122] Ibid., §67.
[123] *Corfu Channel*, Judgment on Compensation, ICJ Rep. 1949 p. 244, 249.
[124] Ibid., 252, 253 (Judge ad hoc Ečer, diss.).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:06 Page Number: 627

applicant government, the Court should limit the award in accordance with the *non ultra petita* rule.

The rule is also supported by arbitral jurisprudence. For example, in the *Spanish Zone of Morocco Claims* arbitration, Rapporteur Max Huber was faced with a British demand for compound interest at 7 per cent while Spain argued for simple interest at 5 per cent. Huber decided:

> The rate of 5 per cent would certainly be too low. By contrast one could well envisage in certain cases a rate higher than 7 per cent. That being so, one must nevertheless respect the judicial principle according to which it is impermissible to go beyond the claims of the parties. Despite the special character of the inquiry with which he has been entrusted, the Rapporteur considers ... that as far as possible he should take account of the principles governing judicial procedure. That is why he adopts a rate of 7 per cent as the maximum as well as the minimum.[125]

This can, however, be seen as a rather mechanical application of the *non ultra petita* principle. It is hard to justify this separation of the interest rate from its method of calculation. A higher rate of interest calculated as simple interest would not have exceeded the amount of interest actually sought by the United Kingdom.

The tribunal in the *Rainbow Warrior* arbitration found itself confined by New Zealand in the remedy it could award. New Zealand sought the return of the French agents to the island where they were previously detained and specifically rejected any other remedy. This appears to have been accepted by the tribunal as a limit on its powers of decision:

> New Zealand has not however requested the award of monetary compensation – even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two parties ... on ... relevant matters, such as the amount of damages.[126]

The tribunal thus decided not to award monetary compensation, although it made a recommendation to similar effect (which France accepted).[127]

The *non ultra petita* rule has its limits. The rule does not normally apply to the jurisdictional phase of proceedings, as the Court must satisfy itself

[125] (1924) 2 RIAA 615, 650. [126] (1990) 20 RIAA 217, 272. [127] Ibid., 272, 274.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:07 Page Number: 628

that it has jurisdiction.[128] Although it might be reluctant to do so, the Court can thus entertain objections to jurisdiction not raised by the parties, and arguably must do so if these objections are so fundamental as to call jurisdiction into question. With regard to the merits of a case, the Court could be faced with a situation in which it finds a flaw in one party's case which was not pointed out by the other party. In such a situation, the Court may base itself on considerations other than those advanced by the parties as long as it stays within the dispute properly referred to it and the points raised by the parties. This follows from the fundamental principle that the Court must decide in accordance with international law and that, pursuant to the principle of *jura novit curia*, it knows and must apply the law 'whatever the parties say, or omit to say'.[129]

This issue arose in the *Arrest Warrant* case. The DRC had advanced Belgium's 'exercise of excessive universal jurisdiction' as a subsidiary ground for the unlawfulness of the warrant.[130] Belgium contended that this claim was excluded from the Court's jurisdiction by the *non ultra petita* rule, as the DRC had dropped it in its final submissions. The Court agreed with Belgium that it could not rule on the claim of excessive universal jurisdiction, but it nevertheless held:

> While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.[131]

The majority's decision was criticized by Judge ad hoc van den Wyngaert and by Judges Higgins, Kooijmans and Buergenthal. All disagreed with the sequencing of the reasoning of the majority, arguing that the question of jurisdiction should logically have been addressed prior to the question of immunity, as otherwise the latter is a purely hypothetical

[128] See Statute of the International Court of Justice, 26 June 1945, 15 UNCI 355, Art. 53(2), which provides that '[t]he Court must . . . satisfy itself . . . that it has jurisdiction in accordance with Articles 36 and 37.'

[129] Fitzmaurice, (1958) 34 BYIL 100, 105.

[130] *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, ICJ Rep. 2002 p. 3, 18.

[131] Ibid., 19.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:07 Page Number: 629

exercise.[132] In addition, Judges Higgins, Kooijmans and Buergenthal advanced the following interpretation of the *non ultra petita* rule:

> Belgium is wrong it if wishes to convey to the Court that the *non ultra petita* rule would bar it from *addressing* matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions.
>
> . . .
>
> Thus the *ultra petita* rule can operate to preclude a finding of the Court, in the *dispositif*, on a question not asked in the final submissions by a Party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it *does* make in the *dispositif*.[133]

The rule thus represents an outer limit to the final award or decision open to a court or tribunal, without limiting the grounds of its decision within that boundary. The ICJ remains free to choose the grounds for its judgments, but its ability to award certain remedies – or to award a certain amount of compensation – may be limited by the claims advanced by the parties.

19.5 Systematic remedies arising from individual cases

Various techniques have been developed to deal with mass claims, such as *pro rata* payments, model claims, approximations and executive decision-making, as with the UN Compensation Commission created in relation to Iraq's invasion and occupation of Kuwait.[134] One notable example is the Eritrea–Ethiopia Claims Commission (EECC). The EECC was established in the aftermath of the Eritrea–Ethiopia war, pursuant to the Algiers Agreement.[135] Although the EECC was conceived as a mass claims procedure,[136] the two states elected not to pursue the option of filing mass claims on behalf of individuals and instead filed their claims

[132] Ibid., 164 (Judge ad hoc van den Wyngaert, diss.), 68 (Judges Higgins, Kooijmans and Buergenthal).
[133] Ibid., 66–7 (Judges Higgins, Kooijmans and Buergenthal, emphasis in original).
[134] *Brownlie's Principles*, 734.
[135] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 2138 UNTS 94, Art. 5.
[136] Ibid., Art. 5(8). See also EECC, Rules of Procedure, Ch. 3; EECC, Decision 2; EECC, Decision 5; all available at www.pca-cpa.org/showpage.asp?pag_id=1151.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:07 Page Number: 630

as interstate claims.[137] The EECC awarded Eritrea compensation totalling approximately US$163 million and Ethiopia compensation totalling US$174 million – in effect a net payment of US$11million to Ethiopia.[138]

This example is not reflective of the general experience with mass claims. The United Nations Compensation Commission (UNCC), for example, has so far made available US$37.7 billion for payments to 1.5 million specific recipients.[139] This section will discuss three situations in which international courts and tribunals are faced with mass claims, and the techniques that have been developed to deal with them: (i) mass claims before the ECHR and its use of pilot cases, (ii) class actions in investment arbitrations, and (iii) compensation for victims in international criminal proceedings.

19.5.1 The ECHR: Broniowski *and its progeny*

A new approach to providing remedies to victims of wrongful state conduct has been pioneered by the European Court of Human Rights. Faced with hundreds of cases stemming from the same wrongful conduct, completely overwhelming the Court, the Committee of Ministers of the Council of Europe adopted Resolution 2004(3) on 12 May 2004, in which it invited the Court

> to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[140]

On the same day, the Committee also adopted a recommendation aimed at improving the domestic remedies of members.[141] It recommended that member states

> ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found.[142]

[137] EECC, Final Award, Eritrea's Damages Claims, 17 August 2009, 26 RIAA 505, §§25, 53, 65.
[138] Ibid., §IX; EECC, Final Award, Ethiopia's Damages Claims, 17 August 2009, 26 RIAA 631, §XII.
[139] UNCC, press release, 26 July 2012, available at www.uncc.ch/pressrel.htm.
[140] Council of Europe Doc. CM/Res. (2004)/3E, §1.
[141] Council of Europe Doc. CM/Rec (2004)/6E. [142] Ibid., §1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:08 Page Number: 631

Further, member states should

review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court.[143]

The appendix containing good practice attached to the Recommendation provided for 'pilot' judgments with wide-ranging effects for the respondent state:

When a judgment which points to structural or general deficiencies in national law or practice ('pilot case') has been delivered and a large number of applications to the Court concerning the same problem ('repetitive cases') are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.

Both the Resolution and the Recommendation were based on proposals made by the Court itself.[144]

The impetus behind both the Resolution and the Recommendation was the Court's ever-growing case load, and the hope that victims of human rights abuses would forego making an application to the Court, or retract an application already pending, if effective remedies were provided by the responsible state.

The Court gave its first pilot judgment in *Broniowski* v. *Poland*.[145] The background to this case was the repatriation of approximately 1,240,000 Polish nationals from Polish 'borderlands', also known as land 'beyond the Bug river', which was no longer part of its territory after the Second World War.[146] In agreements with Ukraine, Belarus and Lithuania, Poland undertook to compensate the persons who were expatriated for

[143] Ibid., §2.

[144] See the Report adopted by the Steering Committee for Human Rights (CDDH) on guaranteeing the long-term effectiveness of the European Court of Human Rights (Council of Europe Doc. CDDH(2003)006, 21 March 2003) and the Response of the European Court of Human Rights to the CDDH Interim Activity Report prepared following the forty-sixth Plenary Administrative Session (Council of Europe Doc. CDDH-GDR(2004)1, 2 February 2004).

[145] *Broniowski* v. *Poland*, ECtHR, App. No. 31443/96, 22 June 2004. See Šikuta and Hulbálková, *European Court of Human Rights: Case-Law of the Grand Chamber 1998–2006* (2007), 292–7.

[146] *Broniowski*, ECtHR, App. No. 31443/96, 22 June 2004, §10.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:08 Page Number: 632

the loss of their property. The applicant's grandmother had owned property in territory beyond the Bug river, but she and her descendents had only received around 2 per cent of the compensation from the Polish government to which they claimed to be entitled. The applicant's attempts to obtain the rest of the compensation through the Polish courts had been unsuccessful.

The Court found that Poland had violated Article 1 of Protocol 1 to the Convention, on the right to the peaceful enjoyment of one's possessions.[147] Recognizing that this violation 'originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons', the Court turned its intention to the wider category of Bug River claimants. Basing itself on Article 46 of the Convention, which provides that 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties', as well as on the Resolution and Recommendation adopted by the Committee of Ministers, the Court held that it could order Poland to adopt measures to remedy the systemic defects in the compensation mechanism, under the supervision of the Committee of Ministers. Although the Court noted that it did not have the authority to determine which remedial measures were appropriate, it indicated to Poland that the current act providing for compensation would not do, as it did not cover the applicant and persons in the same situation. The Court therefore ordered Poland

> through appropriate legal measures and administrative practices, [to] secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No 1.[148]

The Court suspended its consideration of other Bug River applications pending Poland's implementation of the relevant measures.[149]

The Court stressed repeatedly that this decision should be viewed in the light of the rapid growth of its case load, particularly as a result of applications 'deriving from the same structural or systemic cause'.[150] The flaws in Poland's compensation mechanism had affected nearly 80,000 people, 167 of whom had already filed applications with the

[147] Ibid., §187. [148] Ibid., op. §4. [149] Ibid., §198. [150] Ibid., §190.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:08 Page Number: 633

Court at the time of its judgment. As a result, the future effectiveness of its machinery was threatened.

The claimant and Poland subsequently reached a friendly settlement.[151] In addition, Poland issued a declaration stating that it would undertake

> to implement as rapidly as possible all the necessary measures in respect of domestic law and practice as indicated by the Court ... and that, to this end, [it would] intensify [its] endeavours to make the new Bug River legislation effective and to improve the practical operation of the mechanism designed to provide the Bug River claimants with compensation ...[152]

In its decision to strike the case off its list, the Court clarified that in pilot cases redress for the individual and general redress 'should go hand in hand' so that the respondent state simultaneously takes the individual and general measures required by the Court.[153] The Court thus evaluated whether, in addition to providing adequate redress to the applicant, the measures taken by Poland would remedy the underlying defect in its legal order. Although the Court noted that it is for the Committee of Ministers to monitor and evaluate the implementation of general measures taken by a member state, it was satisfied that Poland was committed to remedying the existing defects and that it could rely on its actual and promised measures 'as a positive factor'.[154] The case was accordingly struck from its list.

Prior to the decision to strike the case off the list, Poland enacted a law entitling Bug River claimants to compensation set at 20 per cent of the value of their property.[155] Having regard to the introduction of this compensation scheme, to its effective functioning in practice and to the availability of other domestic remedies, in December 2007 the Court began to strike out the applications of Bug River claimants on the basis that the issue giving rise to the Bug River cases had been resolved and further examination of similar cases was no longer justified.[156] In the 2008 decision *EG* v. *Poland* the Court stated that while it remained for the Committee of Ministers to supervise the execution of the *Broniowski* judgments, the application of the pilot judgment procedure in respect

[151] *Broniowski* v. *Poland*, ECtHR, App. No. 31443/96, Grand Chamber Judgment on Friendly Settlement, 28 September 2005. For a summary see Šikuta and Hulbálková (2007), 358–62.

[152] *Broniowski*, ECtHR, App. No. 31443/96, Grand Chamber Judgment on Friendly Settlement, 28 September 2005, §31.

[153] Ibid., §36. [154] Ibid., §42. [155] Ibid., §13.

[156] *Wolkenberg* v. *Poland*, ECtHR, App. No. 50003/99, 4 December 2007, §§74–5, 77.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:09 Page Number: 634

of the Bug River cases was no longer justified, and it closed the procedure.[157] In the light of the measures taken by Poland, the Committee of Ministers decided to conclude its examination of the execution of the *Broniowski* judgments in September 2009.[158] It noted that up to the end of July 2009, compensation payments had been made corresponding to approximately €206.5 million.

The Court gave a second pilot judgment in *Xenides-Arestis*, which concerned a Greek Cypriot who claimed that he had been deprived by Turkey of the enjoyment of his property in northern Cyprus.[159] The Court agreed. As 1,400 similar cases were at the time pending before the Court, it is perhaps not surprising that it ordered Turkey to implement an effective remedial system to deal with all these claims. A number of changes were subsequently made to the Northern Cypriot Compensation Commission. The Court has yet to assess whether these changes have made the compensation mechanism effective enough to declare similar claims inadmissible.

The application of the pilot judgment procedure was challenged by Poland in *Hutten-Czapska* v. *Poland*.[160] The Polish government claimed that the applicant's circumstances were not typical ones. This case was also different from the two discussed above, in that only eighteen similar cases were pending before the Court. The Court rejected Poland's objection, and clarified that it takes account of potential future cases as well as existing applications when assessing whether or not to make a pilot judgment:

> While the number of similar applications pending before the Court currently stands at eighteen – a figure which, in comparison with the *Broniowski* case, may seem insignificant – one of those cases has been lodged by an association of some 200 landlords asserting a breach of their individual rights. At any rate, the identification of a 'systemic situation' justifying the application of the pilot-judgment procedure does not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket, which hinders

[157] *EG* v. *Poland*, (2009) 48 EHRR SE3, §29.
[158] Execution of the judgments of the European Court of Human Rights: Broniowski against Poland, 30 September 2009, Council of Europe Doc. CM/ResDH(2009)89 44, available at https://wcd.coe.int/.
[159] *Xenides-Arestis* v. *Turkey*, ECtHR, App. No. 46347/99, 22 December 2005.
[160] *Hutten-Czapska* v. *Poland*, ECtHR, App. No. 35014/97, 19 June 2006.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:09 Page Number: 635

the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding.[161]

As in *Broniowski*, the parties reached a friendly settlement and Poland enacted measures to remedy the systems defects in its legal system identified by the Court. After the Court had scrutinized these measures, it struck the case off its list.[162]

Although any measure which alleviates the Court's colossal caseload is to be welcomed, there are significant problems with the pilot judgment procedure. These were forcefully identified by Judge Zagrebelsky in his partly dissenting opinion to the *Hutten-Czapska* case. He named 'the indication in the operative provisions of the need for the State to amend its own legislation in order to solve a general problem affecting persons other than the applicant' as the main problem associated with the pilot judgment approach.[163] In his opinion, there is no basis for such an indication in Article 46 of the Convention: the supervision of the implementation of judgments is a task solely for the Committee of Ministers. He noted the importance of Resolution 2004(3) and Recommendation 2004(6), but argued that the Court had exceeded the new competences granted to it in those documents, venturing into the realm of politics. Judge Zagrebelsky criticized the pilot judgment procedure even more strongly in his separate opinion to the decision to strike *Hutten-Czapska* off its list:

> The Court is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants.[164]

This is a task for the Committee of Ministers and the Court 'should be wary of making comments on that issue, both on account of the need to exercise caution in relation to future applications it might have to examine impartially in adversarial proceedings and so as not to disturb unduly the balance provided in the Convention system between its own role and that of the Committee of Ministers'.[165]

[161] Ibid., §236.
[162] *Hutten-Czapska* v. *Poland*, App. No. 35014/97, Grand Chamber Judgment on Friendly Settlement, 28 April 2008.
[163] *Hutten-Czapska* v. *Poland*, ECtHR, App. No. 35014/97, 19 June 2006, Judge Zagrebelsky, partly diss., §2.
[164] Ibid., Judge Zagrebelsky, sep. op. joined by Judge Jaeger, §7. [165] Ibid., §8.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:10 Page Number: 636

Judge Zagrebelsky also questioned whether the Polish bill would be adequate to remedy the defects, particularly as it could still change during its passage through the Sejm. He held that it was unlikely to impact on similar cases before the Court, which could therefore remain pending for years. He noted that when the Court resumed its examination of these similar cases, it would do so on a case-by-case basis, as usual. The pilot judgment procedure therefore did not achieve its goal of facilitating 'the most speedy and effective resolution of a dysfunction established in national human rights protection' or of alleviating the Court.[166] Instead, it weakened the protection of individuals seeking access to the Court, not least by increasing the length of proceedings, and worked to the advantage of the respondent government. He came to the following conclusion:

> A procedure such as the one which resulted in the Court's judgment in the present case, and which took on the aspect of a Committee of Ministers procedure, calls into question the Court's role and authority without entailing any benefits for applicants, the functioning of the Court and human-rights protection in general. Execution of the operative provisions of the pilot judgment will still have to wait, notwithstanding the positive attitude of the respondent Government and the Court's direct involvement through the negotiation of a friendly settlement, which in turn purports to be of a 'pilot' and hence 'systemic' nature. The Court has included in the operative provisions of the pilot judgment an obligation for the State to take general measures to remedy the systemic problem and links its acceptance of the friendly settlement to the implementation of such measures, yet at the same time, and not without some contradiction, it confines itself to taking note of (and appreciating) what is merely the start of a course to be pursued.[167]

Other commentators have also questioned whether the Court will be inclined to afford more discretion to states in implementing an often massive change to its legal order, which would undermine the protection it affords to the applicant in a pilot case.[168] The pilot judgment procedure may also leave applicants with cases based on the same systemic defect in limbo for a prolonged period of time, while the state in question changes it legislation and the Court assesses whether the changes implemented suffice.[169] Both these problems require careful monitoring by the Committee of Ministers. A more serious problem, however, is the fact that the pilot procedure may undermine a claimant's right to have

[166] Ibid., §13. [167] Ibid., §§15–16.
[168] Welch and Fairclough (eds.), [2008] EHRLR 279, 282.
[169] Leach, [2005] EHRLR 148, 162.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:10 Page Number: 637

his or her case dealt with. Although one can see the need to reduce the Court's caseload, both the legal basis for the pilot judgment procedure and its effectiveness are open to doubt.

The implications for other international courts and tribunals of this new course taken by the ECtHR will likely be limited. The problem of many complaints arising out of the same state conduct is so far one which is specific to the human rights law. The pilot judgment procedure was also borne out of necessity: it was estimated in 2005 that without taking alleviating measures the Court's backlog would grow to 250,000 cases by 2010.[170] Other international courts and tribunals, although often struggling with a heavy caseload, do not face even remotely that number of cases and will not need to take the drastic measures taken by the European Court, which is essentially a victim of its own success.

19.5.2 Class actions in investment arbitration: Abaclat *v.* Argentina

In August 2011, a BIT tribunal held for the first time that a mass claim was within its jurisdiction and admissible. The proceedings in *Abaclat* v. *Argentina*[171] arose out of Argentina's default on sovereign bonds during the Argentine financial crisis. The claimants were some 60,000 Italian nationals who were represented in the proceedings by Task Force Argentina (TFA). Argentina contended that mass claims did not fall within the scope of its consent to arbitration and, even if they did, the tribunal did not have the power to adopt the necessary procedural rules to deal with mass claims. The majority of the tribunal rejected Argentina's arguments.

In relation to the issue of jurisdiction, the majority of the tribunal stated that 'both Parties have consented to ICSID arbitration as a dispute resolution method for disputes arising out of the BIT. The only remaining question is whether a specific consent regarding the specific conditions in which the present arbitration would be conducted is required – that is, regarding the form of collective proceedings'.[172] It held that such specific intent was not required, explaining:

> Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could loose [*sic*]

[170] Lord Woolf et al., *Review of the Working Methods of the European Court of Human Rights* (December 2005), 8, available at www.echr.coe.int/echr/en/header/the+court/reform+of+the+court/reports/.

[171] *Abaclat and ors* v. *Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, available at www.italaw.com/cases/35.

[172] Ibid., §489.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:10 Page Number: 638

such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold? And second, can the Tribunal really 'loose' [*sic*] a jurisdiction it has when looking at Claimants individually?[173]

Arbitrator Abi-Saab dissented, arguing that consent to mass claims cannot be deduced from mere consent to arbitration due to the fundamental differences between the two modes of arbitration.[174]

The better view is that consent to arbitration does encompass consent to a large number of claims being presented in a single proceeding. It is well established that consent to arbitration extends to multiparty arbitration.[175] Given the acceptance of multiparty arbitration, it is difficult to argue that on reaching some number of claimants an application falls outside the scope of a respondent state's consent to arbitration. As Schreuer states, 'Once the principle of multipartite arbitration is accepted, no question should arise by virtue only of the number of co-claimants.'[176]

Whether a multiparty arbitration can be conducted in the form of a mass claim is a different question, one of admissibility. The real concern with mass claims is the manner in which they are heard. After holding that the claims were within the scope of Argentina's consent to arbitration, the majority of the tribunal asked whether the proceedings were admissible, specifically: 'can an ICSID arbitration be conducted in the form of "mass proceedings" considering that this would require an adaptation and/or modification by the Tribunal of certain procedural rules provided for under the current ICSID framework?'.[177] Article 44 of the ISCID Convention provides:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not

[173] Ibid., §490.

[174] *Abaclat and ors* v. *Argentine Republic*, ICSID Case No. ARB/07/5, Abi-Saab, diss., 28 October 2011, §§153, 170, available at www.italaw.com/cases/35.

[175] For example, *Funnekotter* v. *Zimbabwe* involved fourteen claimants: *Bernardus Henricus Funnekotter and ors* v. *Republic of Zimbabwe*, ICSID Case No. ARB/05/6, 22 April 2009. In *Klöckner* v. *Cameroon*, ICSID Case No. ARB/81/2, the argument that the use of singular form for 'national' in Art. 25(1) of the ICSID Convention barred multiparty arbitration was raised but was not taken up by the tribunal and was apparently dropped by Cameroon: Schreuer (2009), 163.

[176] Schreuer (2009), 163.

[177] *Abaclat*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, §491.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:11 Page Number: 639

covered by this Section or the Arbitration Rules or any rule agreed by the parties, the Tribunal shall decide the question.

As acknowledged by the majority of the tribunal,

> [T]he power of a tribunal is limited to the filling of gaps left by the ICSID Convention and Arbitration Rules. In contrast, a modification of existing rules can only be effected subject to the parties' agreement . . . A tribunal's power is further limited to the filling of gaps left by the ICSID framework in the specific proceedings at hand, and a tribunal's role is not to complete or improve the ICSID framework in general.[178]

The majority of the tribunal noted that the proceedings would require a departure from normal procedure: the TFA had been provided with powers which may go beyond the powers granted to a normal agent under Rule 18 of the ICSID Arbitration Rules and, given the large number of claimants, a simplification of the examination method and procedure would be necessary.[179] The majority of the tribunal held that the adaptations necessary to deal with the claimants' claims were 'acceptable under Article 44 of the ICSID Convention'.[180]

The correctness of the majority's conclusion can be doubted. It seems quite clear that the development of procedural rules for dealing with mass claims does not constitute merely filling a gap in the ICSID framework, but rather involves developing an entire framework for a new form of proceeding. In the words of the dissent, the majority's proposed 'adaptation'

> does not consist of providing for an inadvertently overlooked minor contingency or a small missing detail in an existing rule needed for its implementation that would correspond to the meaning of 'filling a gap'; but of *changing* or *substituting* the existing rules by other 'specific rules', which clearly constitute an amendment, modification or revision of the existing rules; an operation which lies beyond the limited power granted to the Tribunal under Article 44 of the Convention.[181]

The inevitable fact is that the 'adapted' procedure substantially changes Argentina's procedural rights, in that it will not be able to bring arguments in full length and detail concerning the individual situation of

[178] Ibid., §§522–3. See also Schreuer (2009), 688.
[179] *Abaclat*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, §§530–2.
[180] Ibid., §547.
[181] *Abaclat*, ICSID Case No. ARB/07/5, Abi-Saab, diss., 28 October 2011, §217 (emphasis in original).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:11 Page Number: 640

each claimant, including as to issues potentially affecting jurisdiction.[182] Arbitrator Abi-Saab also noted that none of the international bodies that have been established to deal with mass claims have taken on themselves or been authorized to invent their own procedures.[183] This is not to say that mass claims will never be admissible under the ICSID framework. Claims such as those in *Abaclat* could be heard if the parties agreed on necessary rules of procedure, as permitted by Article 44.

The majority of the tribunal also referred to the fact that the rejection of the claims would constitute a 'denial of justice'. It stated:

> The Tribunal finds it appropriate to compare the consequences of these implications to the consequences of rejecting the claims for lack of admissibility and requesting each Claimant to file an individual ICSID claim. In this regard, the Tribunal finds that not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations. Thus, the rejection of the admissibility of the present claims may equal a denial of justice.[184]

Even if requiring each claimant to file an individual claim could be considered 'unjust' in the ordinary sense of the term, it is not correct to say that the rejection of the mass claim would amount to a denial of justice. It was not the case that the claimants would have been deprived of an efficient dispute settlement mechanism as there were other forums in which it was open to the claimants to pursue their claims.[185] Also, denial of justice is an issue of merits and does not arise for consideration before a tribunal has established that claims are within its jurisdiction and are admissible.[186] Arbitrator Abi-Saab further elaborated:

> [I]t is also out of place and even odd in international law to speak in general of an absence of a competent forum (which is not the case here), in terms of 'denial of justice'. This is because international law, given its a-centralized character, has no system of courts or tribunals of plenary or general jurisdiction (*juridictions de droit commun*) covering all cases and litigants ... [A]ll international courts and tribunals are tribunals of attributed jurisdiction (*juridictions d'attribution*); a jurisdiction based on the consent of the parties or litigants and confined within the limits of this consent.[187]

[182] *Abaclat*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, §536.
[183] *Abaclat*, ICSID Case No. ARB/07/5, Abi-Saab, diss., 28 October 2011, §188.
[184] *Abaclat*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, §537. See also §484.
[185] *Abaclat*, ICSID Case No. ARB/07/5, Abi-Saab, diss., 28 October 2011, §§253–5.
[186] Ibid., §256. [187] Ibid., §257 (internal reference omitted).

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:12 Page Number: 641

19.5.3 Compensation as an incident of criminal proceedings

There have recently been developments in international criminal law towards providing compensation for victims of international crimes. The Rules of Evidence and Procedure of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) all include the following provision:

> (A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
> (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.
> (C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.[188]

The rule has its basis in Security Council Resolution 827 (1993), which adopted the ICTY's Statute and declared that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.

This mechanism has not, however, been very successful in practice. It appears that no application was made by victims pursuant to it, and in 2000 judges of the ICTY admitted that the rule was 'unlikely to produce substantial results in the near future'.[189] In the same report, the judges argued for the establishment of a UN claims commission for the compensation of victims of international crimes in the former Yugoslavia. No action has, however, been taken on this.[190]

Compensation for victims has been dealt with more comprehensively by the International Criminal Court (ICC). Paragraphs 1 and 2 of Article 75 of the Rome Statute provide:

> 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and

[188] ICTY, Rules of Evidence and Procedure, rule 106, adopted 11 February 1994; ICTR, Rules of Procedure and Evidence, rule 106, adopted 29 June 1995; SCSL, Rules of Procedure and Evidence, rule 105, amended 7 March 2003.

[189] See Schabas (2006), 150; and the Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, UN Doc. S/2000/1063, appendix, §45.

[190] Schabas (2006), 150.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:12 Page Number: 642

rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

The Court's Rules of Procedure and Evidence further specify that '[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.'[191] The Court may also make use of experts in determining the amount and type of reparation.[192] The Court further provides a mechanism for enforcing its order for reparation through its states parties, although this may not be very effective if (as is likely) the convicted person claims indigence.[193]

Perhaps partly to cater for the eventuality that it is not possible to obtain the necessary funds for reparation from the convicted person, the Court has also set up a Trust Fund for Victims (TFV), 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'.[194] This Fund may receive money and other property collected through fines or forfeiture, transferred to it by order of the Court.[195] It is also funded by donations from private individuals and corporations. Apart from awarding compensation to individual or collective groups of victims, the Trust Fund may also award reparations through an intergovernmental, international or national organization.[196] The Fund has started operating and is currently functioning as a type of NGO in states under investigation by the Court.[197]

The ICC has for the first time had to address the issue of reparations, in connection with the conviction of Thomas Lubanga. In August 2012 a trial chamber handed down a decision 'establishing the principles and procedures to be applied to reparations'.[198] It is clear from the decision that the principles and procedures so set out are limited to the case in

[191] ICC, Rules of Procedure and Evidence, rule 97(1). [192] Ibid., rule 97(2).
[193] See Arts. 75(4), 93(1)(k), 109. See also Schabas, *An Introduction to the International Criminal Court* (3rd edn, 2007), 338.
[194] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, Art. 79(1).
[195] ICC Statute, Art. 79(2). [196] ICC, Rules of Procedure and Evidence, rule 98.
[197] See the website of the Trust Fund at www.trustfundforvictims.org.
[198] *Prosecutor* v. *Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC, Trial Chamber I, 7 August 2012.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 19 Title Name: CRAWFORD
Date:18/3/13 Time:11:56:14 Page Number: 643

question.[199] The trial chamber decided that the matter of reparations would principally be dealt with by the TFV,[200] although the TFV's ultimate proposals would need to be presented to a chamber of the ICC for its approval.[201] In its decision, the trial chamber adopted a broad conception of compensable harm.[202] This was somewhat tempered by other statements made by the chamber – namely, its recognition that there are limited funds available and that non-monetary forms of reparation may be appropriate (such as the conviction and sentence rendered by the ICC);[203] its endorsement of the TFV's suggestion that a collective, 'community-based' approach to reparations is appropriate;[204] and its recognition that Lubanga himself would only be able to contribute non-monetary reparations.[205]

Compensation is thus increasingly seen as a corollary of international criminal proceedings. While concluding that the ICC reparation regime has a potentially significant role to play in victim redress alongside cognate regimes at the national and international levels, McCarthy identifies several challenges for the successful operation of the system. He notes, *inter alia*, the limited resources available, the selectivity of prosecutions before the ICC and the risk of a fragmented response to harms, with the crimes of persons accused being merely a few of the many crimes committed during an armed conflict.[206] Evans identifies other challenges which raise the more fundamental question whether international criminal proceedings are an appropriate framework through which to address the large-scale harms caused in war. She notes the tension between the interests of victims and the desire for expediency in the criminal justice process, the inadequacy of international criminal proceedings as a forum for victims to relate their experiences and the inability in international criminal proceedings to address comprehensively the questions relating to institutional and state responsibility that victims wish to explore.[207] It remains to be seen how effective the awarding of compensation at the ICC will be in practice, after the failure of this mechanism at the international tribunals. The concerns identified by McCarthy and Evans raise the question whether this is a context in which the *Chorzów Factory* principle cannot and should not be applied.

[199] Ibid., §181. [200] Ibid., §261. [201] Ibid., §289(c). [202] Ibid., §230.
[203] Ibid., §§222, 237, 288. [204] Ibid., §274. [205] Ibid., §269.
[206] McCarthy (2012), 349–59.
[207] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012), 123.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:31 Page Number: 644

20 Invocation in cases involving multiple parties

20.1 Introduction

Interstate litigation before the International Court of Justice is typically bilateral.[1] A basic assumption underpinning the Court's Statute is that there are two parties to a given legal dispute, and that for third parties an adversarial contentious proceeding is *res inter alios acta*.[2] Complexities arise when the system is confronted with cases involving multiple parties, even where, strictly speaking, many of those cases are still essentially bilateral, in the sense that there are only two 'sides' to the dispute.[3] As disputes involving multiple parties are brought with increasing frequency – already in 1987 Damrosch speculated that 'the two-party, zero-sum dispute may well already be the exception rather than the rule'[4] – those complexities merit some discussion.

Of course, the 'strict bilateralism of the Court's judicial process'[5] does not mean that other states may not be involved in the wider circumstances surrounding a claim. In many situations a third state may have an interest in the case or its outcome, although it is not a claimant or respondent. Such an interest may be simply incidental or tangential, or the state may be more directly connected with the underlying dispute.

[1] E.g. Noyes and Smith (1988), 231–8; Gill, *Litigation Strategy at the International Court* (1989), 91; Chinkin, 2 (1993); Rosenne, 2 *The Law and Practice of the International Court of Justice 1920–2005* (2006), 539; Besson (2007), 18–9; Aust (2011), 297.

[2] Rosenne, 3 *Law and Practice of the International Court of Justice 1920–2005* (2006), 1439, 1596. The Court's bilateralism mirrors the traditional bilateralism of the law of state responsibility, on which see e.g. Aust (2011), 13–23, and further Chapter 10.

[3] This is not to suggest that two claimants or two respondents will have an identical case against the other side, however: Gill (1989), 91.

[4] Damrosch, in Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987) 376, 376.

[5] Rosenne, 2 *Law and Practice of the International Court of Justice 1920–2005* (2006), 543.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:31 Page Number: 645

In some cases the third state may seek to intervene in the proceedings; in others it will prefer to remain absent. Both situations can impact on the claim, as can various other procedural incidents.

This chapter focuses on some of the key issues of judicial admissibility and procedure that have arisen in cases involving multiple states before the International Court of Justice.[6] These issues are related to, but distinct from, the principles and conditions for establishing and invoking state responsibility in situations involving a plurality of states.[7] State responsibility arises independently of whether or not it is actually invoked by an injured state or states.[8] ARSIWA are not directly concerned with the separate questions of jurisdiction and admissibility in the context of international dispute resolution.[9]

20.2 Multiple claimants

There are several examples of cases involving multiple claimant states in the jurisprudence of the Court. One early example was the *Wimbledon*, proceedings brought by the United Kingdom, France, Italy and Japan (with Poland intervening) against Germany.[10] Others have included the *South West Africa* cases, initiated by Ethiopia and Liberia against South Africa,[11] the *North Sea Continental Shelf* cases involving Denmark, the Netherlands and the Federal Republic of Germany,[12] the *Nuclear Tests*

[6] For multi-party dispute resolution in an arbitration context see e.g. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (2005); Permanent Court of Arbitration, *Multiple Party Actions in International Arbitration* (2009).

[7] For discussion of situations involving a plurality of responsible states as a matter of substance, see Chapter 10. For situations involving a plurality of injured/claimant states as a matter of substance, see Chapter 17. For mass claims procedures, see Chapter 19.

[8] ARSIWA, Art. 1; Crawford, in Crawford, Pellet and Olleson (2010) 931.

[9] Crawford, Third Report, 65–6. An exception is found in Art. 44, which covers certain fundamental questions of admissibility. Thus a state's responsibility may not be invoked if the claimant has not complied with applicable rules regarding the nationality of claims and the exhaustion of local remedies: see further ARSIWA Commentary, Art. 44, and Chapter 17. These rules will normally not apply to responsibility for breaches of communitarian norms: see Chapter 11.

[10] *SS Wimbledon*, (1923) PCIJ Ser. A No. 1. For discussion see ARSIWA Commentary, Art. 46, §3.

[11] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, ICJ Rep. 1966 p. 6. These claims were joined by the Court and treated as a single case; see Order, 20 May 1961, ICJ Rep. 1961 p. 13.

[12] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Rep. 1969 p. 3. These claims were joined by the Court and treated as a single case; see Order, 26 April 1968, ICJ Rep. 1968 p. 9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:32 Page Number: 646

cases between Australia and New Zealand on the one part and France on the other[13] and the *Fisheries Jurisdiction* cases involving the Federal Republic of Germany and the United Kingdom against Iceland.[14]

The foundation for multiple states to bring a claim against a respondent state is laid in Part III, Chapter I of ARSIWA, which deals with invocation of responsibility. An 'injured state', as defined in Article 42, is entitled to invoke the responsibility of the state that breached the obligation;[15] Article 46 expressly contemplates that multiple states may be injured by the same internationally wrongful act, with each having an independent right to invoke responsibility.[16] Thus where the obligation is an integral one, all states parties to the relevant treaty would be injured by its breach and entitled to invoke responsibility; an analogy can be drawn with the right to invoke material breach as grounds for terminating a treaty under Article 60(2) of the Vienna Convention on the Law of Treaties (VCLT).[17]

Further, Article 48(1) provides a state other than an injured state with a right to invoke responsibility 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.[18]

The right to invoke responsibility is limited under Article 48(2) to claiming cessation and assurances and guarantees of non-repetition of the internationally wrongful act, and performance of the obligation of reparation in the interest of the injured state or the beneficiaries of the obligation breached.

Article 48 and its commentary do not make express reference to a plurality of states invoking responsibility, nor does the provision refer back to Article 46 in the way it refers back to Articles 43, 44 and 45 (see Article 48(3)). Nonetheless, it is clear that multiple states could invoke

[13] *Nuclear Tests (Australia v. France)*, ICJ Rep. 1974 p. 253; *Nuclear Tests (New Zealand v. France)*, ICJ Rep. 1974 p. 457. These claims (though heard together) were not joined, in part because the remedies sought were slightly different.

[14] *Fisheries Jurisdiction (UK v. Iceland)*, ICJ Rep. 1975 p. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, ICJ Rep. 1975 p. 175. Again, these claims were not joined.

[15] See ARSIWA Commentary, Art. 42.

[16] Ibid., Art. 46.

[17] 22 May 1969, 1155 UNTS 331. See Crawford, Third Report, 76; Huesa Vinaixa (2010), 952–3.

[18] ARSIWA Commentary, Art. 48. See further Gaja (2010) 957; Vaurs-Chaumette (2010).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:32 Page Number: 647

responsibility under Article 48 simultaneously, or along with states claiming on the basis of their status as injured states under Article 42. First, there is nothing in the language of Article 48 that limits action under that provision to a single state – it simply provides that 'any State other than an injured State' has a right to invoke responsibility if the conditions in Article 48(1)(a) or (b) are met. Second, the whole premise of Article 48 is to enable action in the collective interest to uphold multilateral arrangements that 'transcend the sphere of bilateral relations of the states parties'.[19] Finally, the commentary to Article 46 recognizes that a plurality of claimant states may be a mix of injured states and states invoking responsibility under Article 48, not just a plurality of injured states, noting that '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'.[20]

As formulated, Articles 42, 46 and 48 resolve some of the serious problems with the first reading Draft Article 40, which designated large numbers of states as 'injured' by breaches of multilateral obligations without making distinctions between their legal status or degree of involvement with the facts. Although a breach of a multilateral obligation may still cause injury to numerous states, under the ARSIWA it is clear that the grounds for invoking responsibility will depend on whether the state is a primary victim of the breach, or is seeking to uphold a wider collective interest, and the remedies available will differ accordingly.[21] Beyond the cases specified in ARSIWA, special rules may also exist to determine which states may invoke responsibility in particular circumstances. In *Wimbledon*, for example, Article 386 of the Treaty of Versailles provided the basis for invocation of responsibility by the four claimants (of which probably only France was an injured state in terms of Article 42).[22] ARSIWA Article 55 (*lex specialis*) makes it clear that such special rules will precedence.

Of course, the fact that multiple states may invoke responsibility over the same act or transaction does not imply uniform outcomes for each claimant. The factual and legal basis for each state's invocation of responsibility may well be different. The *Wimbledon* case again provides an example: France claimed and was awarded compensation, but the other

[19] ARSIWA Commentary, Art. 48, §7. On the background to Art. 48 see further Chapter 11.
[20] ARSIWA Commentary, Art. 46, §4. See further ibid., Pt III, Ch. I, §3, which confirms that Arts. 42 and 48 are not mutually exclusive.
[21] Crawford, Third Report, 76.
[22] (1923) PCIJ Ser. A No. 1, 20; ARSIWA Commentary, Pt III, Ch. I, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:32 Page Number: 648

claimant states sought only declaratory relief as to the legal situation.[23] Injured states seeking compensation cannot recover more than the extent of their own injury; states other than injured states cannot claim reparation in their own right but only the remedies set out in Article 48(2).

Difficulties may nonetheless arise if the remedies sought by one claimant conflict with those sought by another, for example where one state seeks restitution while another prefers compensation.[24] The commentary to Draft Article 44 adopted on first reading acknowledged the need for consideration of the implications in such situations.[25] In practice, however, such problems have arisen infrequently, and ultimately the ILC did not feel the matter required regulation in the ARSIWA.

Multiple claims must not result in unduly burdensome obligations on the respondent, and although this is not formally required it is generally acknowledged that claimants should work together to find a practical solution to prevent this.[26] In the hypothetical context of claims against a responsible state being brought both by the United Nations and by the state of nationality of an individual victim, the International Court has said:

> Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. 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.
>
> . . . [I]t is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and co-operative disposition to find a practical solution.[27]

20.3 Multiple respondents

As the other side of the coin, claims may also involve multiple respondents. This is the procedural corollary of the principle of independent responsibility set out in ARSIWA Article 47 and discussed in Chapter 10: each

[23] (1923) PCIJ Ser. A No. 1. See further Crawford, Third Report, 76 n. 540.

[24] This problem arose in *Forests of Central Rhodope*, (1933) 3 RIAA 1405; see Crawford, Third Report, 76; ARSIWA Commentary, Art. 46, §4.

[25] See ILC Ybk 1993/II(2), 71 (the earlier Draft Art. 8 became Draft Art. 44 as adopted on First Reading).

[26] E.g. the co-operation between Israel, the United States and the United Kingdom when formulating their claims against Bulgaria after the 1955 aerial incident: see *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Memorial of the Government of Israel, 2 June 1958, 106; ARSIWA Commentary, Art. 46, §3 n. 744.

[27] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949 p. 174, 186.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:33 Page Number: 649

state is specifically responsible for its own conduct, and this responsibility is not diminished or reduced by the fact that other states participated in the commission of the act, or were otherwise implicated in the wrongful conduct, for example by their provision of aid or assistance. The jurisprudence contains examples of cases brought against multiple respondents. Uganda, Rwanda, and Burundi were each respondents in the *Armed Activities on the Territory of the Congo* cases;[28] Libya filed its claims in the *Lockerbie* dispute against both the United Kingdom and the United States;[29] and following the Kosovo crisis Yugoslavia/Serbia and Montenegro commenced ten separate proceedings questioning the legality of the use of force by ten different NATO member states.[30]

Given that the factual circumstances underlying most interstate disputes are not bilateral but more complex,[31] it is perhaps surprising that cases against multiple respondents are not more common. In *Certain Phosphate Lands in Nauru*, for example, Nauru brought its claim against Australia alone, despite having asserted grievances against New Zealand and the United Kingdom together with Australia in correspondence; it stated that its claim against Australia was without prejudice to its position that the other states were also responsible.[32] The principal reason for reticence in that case was jurisdictional: although New Zealand's acceptance of jurisdiction in its Optional Clause declaration was in essence framed in the same terms as Australia's, that of the United

[28] Judgment was given in the case against Uganda in 2005: *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005 p 168. The DRC discontinued its proceedings against Rwanda and Burundi in 2001 (see *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, Order, 30 January 2001; *Armed Activities on the Territory of the Congo (DRC v. Burundi)*, Order, 30 January 2001, ICJ Rep. 2001 p. 3), but subsequently filed a new application against Rwanda, which was dismissed for lack of jurisdiction: *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, Jurisdiction and Admissibility, ICJ Rep. 2006 p. 6.

[29] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK)*, Preliminary Objections, ICJ Rep. 1998 p. 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US)*, Preliminary Objections, ICJ Rep. 1998 p. 115.

[30] The respondent states in the *Legality of Use of Force* cases were Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States. All claims were dismissed for lack of jurisdiction but at various stages and on various grounds: see e.g. *Legality of Use of Force (Yugoslavia v. US)*, Provisional Measures, ICJ Rep. 1999 p 916; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, ICJ Rep. 2004 p. 279.

[31] Damrosch (1987); Chinkin (1993), 16.

[32] See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Rep. 1992 p. 240, 341–2 (Judge Schwebel, diss.).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:33 Page Number: 650

Kingdom diverged; a claim against all three states might have failed against the United Kingdom while being seen as conceding the principle of joint responsibility.[33] But there may be many different political, strategic, evidential, and factual elements contributing to a claimant state's decision to name state A as sole respondent instead of or as well as claiming against state B. For a claimant it might be more straightforward to bring its claim against a single respondent even when there are multiple responsible parties. Even in a case against multiple respondents it cannot be assumed that all responsible parties have been named.

Conversely, from a respondent's perspective it may well be preferable for other allegedly responsible states to be involved in the proceedings. In *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua only claimed against the United States, although it subsequently also commenced separate proceedings against Honduras and Costa Rica.[34] This reduced a complex multilateral regional dispute down to a bilateral claim against the most powerful opponent, and the United States as sole respondent argued (unsuccessfully) that the case could not proceed in the absence of the states in whose collective self-defence it was allegedly acting.[35]

As Noyes and Smith put it, 'Any mature legal system governing the conduct of actors in a society must contemplate multiple party responsibility for wrongs.'[36] While the litigation framework of the International Court does have scope for dealing with cases involving multiple respondents and/or multiple responsible parties, such cases continue to present various difficulties of procedure and admissibility.

20.4 Intervention by third states

Despite the predominantly bilateral character of international claims, there is provision in the Statute of the International Court for interested third parties to intervene in proceedings before the Court on two grounds: either because they are able to satisfy the Court that they have an interest of a legal nature which may be affected by the decision in

[33] As noted by Judge Ago, diss.: ibid., 327. Fortunately, Australia's position in the administration of Nauru was different and primary, as the Court noted in dismissing Australia's preliminary objections: ibid., 258.

[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392. Both the later proceedings were discontinued by Nicaragua: *Border and Transborder Armed Actions (Nicaragua v. Costa Rica)*, Order, 19 August 1987, ICJ Rep. 1987 p. 182; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Order, 27 May 1992, ICJ Rep. 1992 p. 222.

[35] See discussion in Chinkin (1993), 16–17.

[36] Noyes and Smith (1988), 266.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:33 Page Number: 651

the case (Article 62), or because the case involves a question over the construction of a convention to which that third state is a party (Article 63).[37] The procedural requirements for intervention are specified in the Rules of Court.[38]

In Article 62 situations it is for the state seeking to intervene to identify its interest and show how that interest 'may' (not 'will' or 'must') be affected, so that the Court can come to a decision on the limits and scope of any permitted intervention.[39] Under Article 63, if a state is party to the convention in question then it may intervene in the proceedings as of right, at least in theory;[40] the intervening state will then be bound by the Court's interpretation of the treaty as if it were a party to the proceedings.[41] The similarities and differences between the two types of intervention in terms of the Statute may be somewhat artificial in practice, however, and the attitude of the primary parties to the case will influence the Court's decision.[42]

In *Wimbledon*, Poland applied to intervene under the equivalent provisions of the Statute of the Permanent Court. Initially it based its application on a legal interest in the case, but subsequently relied solely on its right to intervene as a party to the Treaty of Versailles; the intervention was permitted.[43] The Cuban application to intervene under Article 63 in

[37] On intervention see further e.g. Jessup, (1981) 75 AJIL 903; Chinkin (1993), 147–85; Rosenne, *Intervention in the International Court of Justice* (1993); Chinkin, 'Article 62' and Chinkin, 'Article 63', in Zimmermann, Tomuschat and Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), 1331–92; Rosenne (2006), 3 *Law and Practice*, 1439–506.

[38] See ICJ, Rules of Court, 1 July 1987, Arts. 81–6.

[39] See *Jurisdictional Immunities of the State (Germany v. Italy)*, Application to Intervene by Greece, Order, 4 July 2011, ICJ, §22; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras),* Application to Intervene by Nicaragua, ICJ Rep. 1990 p. 92, 117–18; *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Application to Intervene by Costa Rica, 4 May 2011, ICJ, §25; *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Application to Intervene by Honduras, 4 May 2011, ICJ, §§35–7.

[40] Cf. El Salvador's declaration of intervention under Art. 63, which was declared inadmissible by the Court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Declaration of Intervention, Order, 4 October 1984, ICJ Rep. 1984 p. 215.

[41] Art. 63(2). This is an exception to the general rule whereby decisions of the Court are only binding as between the parties to the dispute (Art. 59). On the non-discretionary character of Art. 63 see e.g. *Haya de la Torre (Colombia v. Peru)*, ICJ Rep. 1951 p. 71, 76; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application to Intervene by Honduras, 4 May 2011, ICJ, §§31–5. See further Fitzmaurice (1958), 125–7; Sztucki, (1985) 79 AJIL 1005, 1029–31; Damrosch (1987), 381; Chinkin (2006) 1369, 1372–4.

[42] See Sztucki (1985), 1030–1; Gill (1989), 92–4; Chinkin (1993), 193; Chinkin (2006) 1369, 1372–4.

[43] (1923) PCIJ Ser. A No. 1.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:34 Page Number: 652

the *Haya de la Torre* case was also granted, but the Court limited Cuba's participation to presentations on aspects of the relevant treaty that had not already been interpreted in the *Asylum* judgment, indicating that the right in Article 63 is not absolute.[44] The black sheep of the Article 63 jurisprudence is the Court's decision to reject El Salvador's declaration of intervention, without a hearing, at the preliminary objections phase of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*.[45] The Court's response to El Salvador's declaration contained virtually no reasons, coming across as 'on some points ambiguous, and on others evasive'.[46] The declaration of intervention was based squarely on Article 63, which in terms of the Statute should have left no room for discretion; even if the matter was considered under Article 62, it was clear that El Salvador had a legal interest in the subject matter of the dispute – and in any case there was no basis for denying El Salvador a hearing in accordance with Article 84(2) of the Rules of Court. The judgment cast doubt on the prevailing understanding that Article 63 provided a non-discretionary (albeit qualified) right of intervention, and has been the subject of considerable criticism.[47]

As for discretionary intervention under Article 62, two such applications in the 1980s also failed,[48] as did the Philippines' ill-considered application in *Sipadan and Ligitan*;[49] more recently the Court has rejected two more.[50] In fact, applications to intervene on the basis of an interest in the case have only been granted on three occasions. The decision of the chamber allowing Nicaragua to intervene in the *El Salvador/Honduras* frontier dispute clarified that a state intervening under Article 62 does not automatically become a party to the case, with all the rights and

[44] *Haya de la Torre (Colombia v. Peru)*, ICJ Rep. 1951 p. 71, 76–7.
[45] *Nicaragua*, Declaration of Intervention, Order, 4 October 1984, ICJ Rep. 1984 p. 215.
[46] Sztucki (1985), 1006.
[47] E.g. *Nicaragua*, Declaration of Intervention, Order of 4 October 1984, ICJ Rep. 1984 p. 215, 223–44 (Judge Schwebel, diss.); Sztucki (1985); Damrosch (1987), 384–8; Chinkin (1993), 179–80, 191–3; Chinkin (2006) 1369. For Judge Lachs' subsequent recantation see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 170–1.
[48] *Continental Shelf (Tunisia/Libya)*, Application to Intervene by Malta, ICJ Rep. 1981 p. 3; *Continental Shelf (Libya/Malta)*, Application to Intervene by Italy, ICJ Rep. 1984 p. 3.
[49] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application to Intervene by the Philippines, ICJ Rep. 2001 p. 575. Both parties opposed the intervention. The application was ill-advised in that it exposed the incoherence of the Philippines' claim to Sabah: ibid., 626–9 (Judge Kooijmans).
[50] See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application to Intervene by Honduras, 4 May 2011, ICJ, and Application to Intervene by Costa Rica, 4 May 2011, ICJ.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:34 Page Number: 653

obligations that that status entails – although nor does the Statute *prevent* an intervening state from joining as a party with the consent of the original parties.[51] No jurisdictional link is required between a state applying to intervene as a non-party and the original parties to the case;[52] but if the intervener does wish to become a party, a jurisdictional link must be established with both parties.[53] Equatorial Guinea was permitted to intervene as a non-party in the maritime boundary aspects of the dispute between Cameroon and Nigeria, in order to protect its own rights in the Gulf of Guinea and to inform the Court as to the nature of its rights and interests that could be affected by the determination of the Cameroon/Nigeria boundary.[54] Most recent was the Greek intervention in *Germany* v. *Italy*.[55] The Court gave permission for Greece to intervene as a non-party, but limited the scope of its intervention to those questions associated with decisions of Greek courts relating to the Distomo massacre in 1944 which the Court might need to consider in deciding the case between Germany and Italy.[56]

In summary, the Court's attitude to third-party intervention has been mixed, and although the jurisprudence has elucidated some of the principles to be applied, the outcome of any given application is not wholly predictable, even under Article 63. As a matter of policy, there are good reasons for maintaining a liberal approach to applications for intervention and permitting voluntary third party involvement unless there are strong arguments against it.[57] Not least of these is the desirability of efficient resolution of multilateral disputes within a single proceeding, rather than leaving the position uncertain as regards third parties. And, from a practical perspective, the more information the Court has before

[51] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Order, 28 February 1990, ICJ Rep. 1990 p. 92, 134–5.

[52] Ibid., 135. This amounted to a relaxation of the requirement of consent: see Lauterpacht, *Aspects of the Administration of International Justice* (1991), 26–30.

[53] See ICJ, Rules of Court, Art. 81(2)(c), as further discussed in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application to Intervene by Honduras, 4 May 2011, ICJ, §§27–9.

[54] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order, 21 October 1999, ICJ Rep. 1999 p. 1029. Neither party opposed the intervention. See further Thirlway, (2010) 81 BYIL 13, 145–7.

[55] See *Jurisdictional Immunities*, Application to Intervene by Greece, Order, 4 July 2011, ICJ.

[56] Ibid., §§25–6, 32.

[57] For discussion of policy considerations on both sides see Damrosch (1987), 387–8; Chinkin (1993), 181–5. For suggestions of how the Court's dealings with third parties (including non-states) could be improved, see Chinkin, in Peck and Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997) 43, 47–56; for arguments in favour of a procedure of intervention in the public interest see e.g. Chinkin (1993), 214–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:34 Page Number: 654

it, the better equipped it will be for acquiring a true understanding of the factual background of the dispute on which to base its legal analysis; this suggests that leaving questions of intervention to the merits phase is advisable.[58]

Of course, third parties should not through their intervention be allowed to change the nature of the main proceedings between the original parties by introducing a new case or attempting to re-litigate *res iudicata*.[59] There may be other legitimate reasons why the original parties prefer to keep the dispute within the confines of the bilateral framework. Nor is third-party intervention intended as a mechanism for lodging protests that are better aired in diplomatic fora.[60] But the intervention procedures provide a 'preventive'[61] mechanism for addressing in advance the potential consequences for third states of the Court's decisions, and protecting the legitimate interests of those states. It is true that a measure of protection is afforded by Article 59 of the Statute, which provides that the Court's decisions are binding only on the parties to the particular dispute.[62] Further, the Court has taken the view that 'the protection of third States' interests by the Court is to be accorded whether they apply to intervene or not'.[63] In *Continental Shelf (Libya/Malta)*, all Italy's goals were achieved through its very application for intervention, even though the application was rejected.[64]

But the reality is that these considerations are not always enough: for El Salvador the ultimate judgment on the merits of *Nicaragua* v. *US*, after its attempted intervention was declared inadmissible at the preliminary objections stage, was arguably 'as prejudicial to El Salvador as if [it] had

[58] Damrosch (1987), 400. There are arguments for the development of an *amicus curiae* procedure for states to submit information to the Court in contentious cases, similar to that allowed to public international organizations under the Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355, Art. 34; see e.g. Chinkin (1993), 226–9.

[59] *Haya de la Torre (Colombia v. Peru)*, ICJ Rep. 1951 p. 71, 77; *Libya/Malta,* Application to Intervene by Italy, ICJ Rep. 1984 p. 3, 20; *El Salvador/Honduras*, Application to Intervene by Nicaragua, ICJ Rep. 1990 p. 92, 134; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application to Intervene by Honduras, 4 May 2011, ICJ, §47.

[60] Chinkin (1993), 195.

[61] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application to Intervene by Honduras, 4 May 2011, ICJ, §38.

[62] See generally Bernhardt, in Zimmermann, Tomuschat and Oellers-Frahm (2006) 1231, esp. 1247–51; Chinkin (2006) 1369, 1390–1; Rosenne (2006), 3 *Law and Practice*, 1570–8.

[63] *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Application to Intervene by Costa Rica, 4 May 2011, §86.

[64] *Libya/Malta,* Application to Intervene by Italy, ICJ Rep. 1984 p. 3, 31–3 (Judge Nagendra Singh).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:34 Page Number: 655

participated fully and lost'.[65] The interests of justice are unlikely to be served by contriving to deal with disputes that are genuinely multilateral in character by characterizing them artificially as bilateral. It remains the case, however, that various factors make states themselves typically reluctant to attempt to intervene in proceedings unless they perceive that there are substantial interests of their own at stake; the small number of applications to intervene in the jurisprudence by no means reflects how frequently bilateral proceedings affect the legal interests of third states.[66]

20.5 The Monetary Gold principle: 'indispensable' third states

It follows that cases will arise in which a third state which is neither a claimant nor a respondent has an interest in the case but chooses to remain absent from the proceedings, rather than applying to intervene. States are entitled to abstain from participating in proceedings for their own reasons, whatever they may be.[67] In such cases, the Court has generally proved reluctant to make decisions that would involve directly pronouncing on the legal position of absent third parties, on the basis that they have not consented to the jurisdiction of the Court.[68] An early example in which the consent principle was used as a bar to proceedings in order to protect absent third parties was *Status of Eastern Carelia*, but that was an advisory opinion.[69] In the context of contentious proceedings, the principle is commonly associated with the *Monetary Gold* case.[70]

[65] Damrosch (1987), 387. See also Chinkin (1993), 182, for discussion of the evidence that the dispute 'could not be accurately presented as a bilateral affair': the US arguments on 'indispensable parties', El Salvador's declaration of intervention, the difficulties the Court faced in establishing the facts without the participation of El Salvador or the United States, and the fact that Nicaragua later filed proceedings against Honduras and Costa Rica in connection with the same events.

[66] Gill (1989), 91–2.

[67] Chinkin (1993), 198–212. For example, Indonesia would have seen no benefit in applying to intervene in *East Timor (Portugal v. Australia)*, ICJ Rep. 1995 p. 90; Iraq remained a 'hidden third party' in *Oil Platforms (Iran v. US)*, ICJ Rep. 2003 p. 161, 320 (Judge Owada).

[68] On the principle of consent to jurisdiction see e.g. *Rights of Minorities in Upper Silesia (Minority Schools)*, (1928) PC1J Ser. A No. 15, 22; *Corfu Channel (UK v. Albania)*, Preliminary Objections, ICJ Rep. 1948 p. 15, 27–8; *Anglo-Iranian Oil Co.*, Jurisdiction, ICJ Rep. 1952 p. 93, 102–3; *Ambatielos (Greece v. UK)*, ICJ Rep. 1953 p 10, 19. For discussion see further Rosenne (2006), 2 *Law and Practice*, 549–57.

[69] (1923) PCIJ Ser. B No. 5. The Court declined to render an advisory opinion, as requested by the League of Nations, after the Soviet Union had refused to consent to the adjudication of a treaty-based dispute with Finland over the status of Eastern Carelia.

[70] *Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and US)*, ICJ Rep. 1954 p. 19.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:35 Page Number: 656

The case has justly been described as one of 'exceptional singularity'.[71] After the end of the Second World War, Italy brought a claim against France, the United Kingdom and the United States asserting a right to certain Albanian gold in the respondents' hands.[72] The Italian claim was based on an unliquidated claim for damages against Albania; it was opposed by the United Kingdom whose liquidated claim against Albania was based on the *Corfu Channel* judgment. In order to avoid return of the gold to Albania, or its transfer to the United Kingdom in satisfaction of the judgment debt, Italy commenced proceedings against the three respondents, but then argued that the Court could not determine the matter without Albania's consent to jurisdiction, which had been withheld.[73] Faced with 'such a novelty to the judicial process as an attack on jurisdiction by a plaintiff',[74] the Court agreed: Albania's legal interests 'would not only be affected by a decision, but would form the very subject-matter of the decision'.[75] The Court could not decide on the rights to the gold as between the claimant and respondents without deciding the legal position as between Albania and Italy, so in the absence of Albania's consent, the claim was held inadmissible.

Although the principle of indispensable third parties is valid, it is suggested that the case was wrongly decided. Italy had no property right in the gold, which was monetary gold seized by Italian troops during the unlawful Italian invasion of Albania in the 1930s. Nor did it have any lien over the gold arising from its unliquidated (and unproved) *in personam* claims against Albania. The tactically brilliant Italian move – which held up the return of the gold to Albania for fifty years – should have been dismissed on the simple ground that a state cannot at the same time affirm and deny jurisdiction over its own claim.[76]

[71] *Aerial Incident of 3 July 1988 (Iran v. US)*, Order, 13 December 1989, ICJ Rep. 1989 p. 132, 140 (Judge Schwebel).

[72] For more detailed discussion of the complex background to the claim and the connection between the *Monetary Gold* proceedings and the unpaid damages awarded to the United Kingdom in *Corfu Channel*, ICJ Rep. 1949 p. 4, see Oliver, (1955) 49 AJIL 216; Lauterpacht (1958), 342–3; Aust (2011), 298–300. For the eventual settlement see Waibel, 'Corfu Channel case' (2009) MPEPIL, §§18–20; Corfu Channel Incident: Correspondence and Papers Relating to the Claim against Albanian Government Memorandum of Understanding between the Governments of Albania and of the United Kingdom, 8 May 1992, (1992) 63 BYIL 781.

[73] *Monetary Gold*, ICJ Rep. 1954 p. 19, 22–4.

[74] Oliver (1955), 216.

[75] *Monetary Gold*, ICJ Rep. 1954 p. 19, 32.

[76] *Brownlie's Principles*, 698–9. It would then have been for the three custodians to decide whether to maintain the principle of *in specie* return or to give priority to the United Kingdom's judgment debt. Cf. Oliver (1955), 221.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:35 Page Number: 657

The *Monetary Gold* principle has been both applied and distinguished in subsequent decisions, and it is surrounded by an aura of uncertainty. One thing that is clear, however, is that the principle is one of judicial competence, not a substantive determinant of responsibility.[77]

20.5.1 The scope of the principle

Rosenne states the principle as follows:

> The Court will not have jurisdiction over a duly constituted bilateral contentious case introduced by unilateral application if it appears that the principal issue to be decided, whatever the title of jurisdiction, requires the Court to pass on the legal position of a third State which is a not a party to the proceedings … The bilateralism of proceedings in the International Court coupled with the consensual basis of the Court's jurisdiction may deprive it of jurisdiction if it concludes that the real subject matter of the dispute is the legal position of a third State which is not a party to the proceedings. It is immaterial whether that third State's absence from the proceedings is a voluntary decision on its part or whether it has not been directly impleaded by either of the original parties.[78]

The fundamental rationale behind the *Monetary Gold* principle is 'elemental due process' in preventing the Court from passing judgement on the legal position of non-parties in their absence and without their consent.[79] The importance of consent as the foundation for the exercise of the Court's jurisdiction is beyond question. But, equally, the consent of the parties to a legitimately constituted case before the Court must not lightly be overridden by the interests of absent parties. The difficulty is to strike the appropriate balance between these two consent-based considerations – the need to avoid imposing jurisdiction on an absent state without its consent, and the need to avoid giving an absent state an effective power of veto over the parties' consent to have the position between themselves determined by the Court.[80] Views differ as to whether the practical application of the rule in the Court's subsequent jurisprudence has been 'unpredictable'[81] and offers only limited guidance,[82] or whether the Court 'has been very careful to keep this discretion [to refuse to exercise jurisdiction] within clearly identifiable limits'.[83]

[77] Crawford, Third Report, 76. [78] Rosenne (2006), 2 *Law and Practice*, 539.
[79] Oliver (1955), 221; Chinkin (1993), 200; Aust (2011), 310.
[80] See e.g. *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 335 (Judge Schwebel, diss.). See further Chinkin (1993), 202; Torres Bernárdez, in Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 737, 744–5; Aust (2011), 310–11.
[81] Tams and Zimmermann, (2008) 51 GYIL 391, 414. [82] Aust (2011), 307.
[83] Rosenne (2006), 2 *Law and Practice*, 544.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:35 Page Number: 658

20.5.1.1 The *Monetary Gold* jurisprudence

Thirty years after *Monetary Gold*, the United States relied on the precedent to advance an argument that Nicaragua's claims in *Military and Paramilitary Activities in and against Nicaragua* could not proceed in the absence of the various Central American states (Honduras, Costa Rica, El Salvador) allegedly engaged in collective self-defence against Nicaragua, as these were 'indispensable parties' to the case.[84] The Court rejected the US submissions, finding 'no trace' of any indispensable third parties rule in the Statute or the practice of international tribunals, and commenting that the circumstances of *Monetary Gold* 'probably represent the limit of the power of the Court to refuse to exercise its jurisdiction'.[85] None of the states referred to by the United States in *Nicaragua* could be regarded as in the same position as Albania so as to be 'truly indispensable to the proceedings'.[86]

The Court rejected similar arguments on the part of Australia in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, by a majority of nine to four.[87] The claim alleged maladministration during the period in which Australia, New Zealand and the United Kingdom were jointly responsible for administering the trust territory of Nauru. Australia, as sole respondent, argued that Nauru's claim against it was inadmissible because any judgment on the question of breach of the Trusteeship Agreement would involve the responsibility of the other two members of the Administering Authority, being third states that had not consented to the Court's jurisdiction; in effect, New Zealand and the United Kingdom were 'parties to the dispute' without being parties to the proceedings.[88] The Court, referring to its interpretation of *Monetary Gold* in *Nicaragua* and the application of that interpretation in the context of Nicaragua's application to intervene in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*,[89] concluded that the interests of the absent states did not constitute the very subject matter of the case before it. The Court distinguished *Monetary Gold* on the grounds that a finding on the responsibility of the absent members of the Administering Authority was not a prerequisite to the assessment of Australia's responsibility for breach of its own trusteeship obligations, which was the only object

[84] *Nicaragua*, Counter-memorial of the United States, 8–9, 134–5; *Nicaragua*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 430–1.
[85] Ibid., 431. [86] Ibid.
[87] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240. The dissenting judges on this preliminary objection were President Jennings, Vice-president Oda, Judges Ago and Schwebel.
[88] Ibid., 255. [89] ICJ Rep. 1990 p. 92, 116.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:36 Page Number: 659

of Nauru's claim. In response to Australia's argument that the claim was nonetheless inadmissible because the finding affecting the absent members would be made at least simultaneously, the Court held that

> a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.[90]

By contrast, in the *East Timor* case three years later, the majority of the Court came down on the side of refusing to exercise jurisdiction.[91] By fourteen votes to two, the Court held that making a determination on the legality of Australia's action would require as a prerequisite a determination of the legality of Indonesia's conduct, and Indonesia was not before the Court. On the facts of the case Indonesia's legal position would necessarily constitute 'the very subject-matter of the Court's decision'.[92] Portugal's assertion that the right of the East Timorese to self-determination was a right *erga omnes* was held to be irreproachable, but 'the character of the norm and the rule of consent to jurisdiction' were two different things, and the latter prevented the Court from acting even when the norms involved had *erga omnes* status.[93]

Since *East Timor* the Court has had various occasions to consider arguments based on the *Monetary Gold* principle. It has repeatedly upheld its jurisdiction where the alleged interests of the absent state are not 'the very subject-matter' of the judgment to be rendered on the merits of the application, and has consistently reiterated that it is not prevented from adjudicating when the judgment it is required to give might 'affect' the legal interests of a non-party state.[94] Thus, for example, in boundary delimitation cases it is appropriate that the Court should not refuse jurisdiction to resolve the dispute between the two states before it just because a tripoint exists on a frontier with a third state not party to the proceedings,[95] although it will remain 'mindful' of the resulting limitations on its jurisdiction.[96] It is also clear that 'it must be open to the

[90] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 259–62.
[91] *East Timor*, ICJ Rep. 1995 p. 90, 100–5. [92] Ibid., 102. [93] Ibid.
[94] See e.g. *Frontier Dispute (Burkina Faso/Mali)*, ICJ Rep. 1986 p. 554, 579; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, ICJ Rep. 1998 p. 275, 311–12; *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p 168, 237–8.
[95] This notion is applicable in territorial boundary delimitations as well as maritime ones; the discussion of the case law in Rosenne (2006), 2 *Law and Practice*, 544–6.
[96] ICJ Rep. 2002 p. 303, 421; see further Rosenne (2006), 2 *Law and Practice*, 545.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:36 Page Number: 660

Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case', even if some elements of the claim are found to be inadmissible in application of the *Monetary Gold* principle.[97] In *Germany* v. *Italy* one of the issues before the Court was whether Italian courts upholding and enforcing Greek judgments against Germany violated Germany's jurisdictional immunity; both parties based their arguments on whether Greece had itself violated Germany's immunity. The Court found that this was a separate question over which it did not have jurisdiction, because Greece was not a party to the proceedings between Germany and Italy, and which it did not need to answer in order to determine whether or not Italy had violated Germany's immunity through the actions of its own courts.[98]

20.5.1.2 Uncertainty of application

From the overview just given it would seem that the scope of the principle is relatively clearly defined. The key, repeatedly emphasized in the Court's jurisprudence, is whether the legal position of the third state is the real subject matter of the dispute. But confusion remains, and the minority judgments would suggest that there is still some dissatisfaction with the manner in which the principle has been applied.

The first issue is the practical one of differentiating between when a decision will merely 'affect' a third state or have implications for it, and when that state's interests are the real subject matter of the dispute so as to trigger the operation of the *Monetary Gold* principle. Judge Shahabuddeen in his separate opinion in *Nauru* distinguished between a 'judicial determination purporting to produce legal effects for the absent Party, as was visualized in the *Monetary Gold* case', and 'merely an implication in the sense of an extended consequence of the reasoning of the Court'.[99] In practice, however, it is questionable whether each of the *Nauru* and *East Timor* decisions could not feasibly have gone in another direction using the same test – indeed, even *Monetary Gold* itself could have been susceptible of a different outcome if decided by a tribunal 'less wedded to the principle of consent'.[100] Judge Schwebel, dissenting in *Nauru*, was unconvinced by the majority's

[97] *Libya/Malta,* Application to Intervene by Italy, ICJ Rep. 1984 p. 3, 25.
[98] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, 3 February 2012, ICJ, §§121–33.
[99] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 296 (Judge Shahabuddeen).
[100] Lauterpacht (1958), 343.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:37 Page Number: 661

conclusion that the judgment might affect the legal situation of the absent parties but without effectively determining their responsibility;[101] in the same case, President Jennings was of the opinion that it was 'surely manifest' that the legal interests of the absent states would form the very subject matter of the decision on the merits.[102] Judge Weeramantry made convincing arguments in dissent in *East Timor* to support his view that no finding on Indonesia's responsibility was necessary as a basis for determining Portugal's claim against Australia: '[i]f a decision on the claim can be separated from adjudicating with regard to a State which is not party to the litigation, the Court has jurisdiction on that claim.'[103]

A second area of uncertainty is the relationship between the *Monetary Gold* principle and the concept of 'indispensable parties'. Although the notion of 'indispensable parties' is commonly associated with the *Monetary Gold* principle, it actually originated in the US submissions in *Nicaragua* – a case which Judge Schwebel has accused of 'obfuscating' the *Monetary Gold* jurisprudence rather than reinforcing it.[104] When the United States framed its argument in *Nicaragua* in terms of 'indispensable parties' the Court was emphatic in its rejection of the concept, finding 'no trace' of such a theory in the Statute or the jurisprudence of the Court.[105] It saw such a theory as 'only conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings'.[106]

At first glance the rejection of arguments based on essential parties might seem to be inconsistent with the finding that the Court could not proceed in Albania's absence in *Monetary Gold*, but, on closer examination, the two concepts are distinct. *Monetary Gold* considers whether the real subject matter of the dispute turns on the interests of an absent party. The indispensable parties theory instead argues that the case cannot proceed without the participation of the absent state, and short of the Court having the power to compel that state's participation in the proceedings, the case must be declared inadmissible. The indispensable parties argument is presented as a plea to protect the absent party's position and uphold the principle of consent, but it can also be seen as a procedural tactic for an unwilling respondent to avoid the Court's

[101] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 331 (Judge Schwebel, diss.).
[102] Ibid., 301 (President Jennings, diss.).
[103] *East Timor*, ICJ Rep. 1995 p. 90, 242 (Judge Weeramantry, diss.).
[104] Ibid., 332 (Judge Schwebel, diss.).
[105] *Nicaragua*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 431. [106] Ibid.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:37 Page Number: 662

jurisdiction.[107] There is nothing in the Court's Statute to say that all essential parties must be involved before it can exercise jurisdiction on the matters put before it by the claimant and respondent states.[108] To quote Judge Shahabuddeen, who advised caution in adopting an 'indispensable parties' rule in litigation before the Court,[109]

> [T]he test to be applied in deciding whether the Court may not properly act is not simply whether it would have been more convenient to decide an issue with the presence before the Court of all the States that might be affected by the decision, but whether the absence of such a State is, in the particular circumstances, such as to make it impossible for the Court judicially to determine the issues presented before it even when account is taken of the protective provisions of Article 59 of the Statute.[110]

So for the purposes of deciding whether or not the *Monetary Gold* principle operates to restrict jurisdiction, the Court has repeatedly refused to accept arguments framed in a manner that would require it to find that certain absent parties are indispensable to the proceedings. Despite the Court's express rejection of the indispensable parties theory, the language has been taken up by commentators and it is frequently used interchangeably with the *Monetary Gold* principle.[111] It is noteworthy, then, to detect a certain relaxation of the Court's attitude towards the indispensable parties theory in *DRC* v. *Uganda*.[112] The DRC argued that '[i]t is Uganda's responsibility which is the subject-matter of the Congolese claim, and there is no other "indispensable party" whose legal interests would form "the very subject-matter of the decision", as in the *Monetary Gold* or *East Timor* precedents.'[113] The language of the Court's response suggests a slight shift towards acknowledgment of 'indispensable parties' rather than the traditionally firm rejection of that terminology. The Court began with the typical *Monetary Gold* formulation seen in other cases:

[107] Torres Bernárdez (1998), 745. In *El Salvador/Honduras,* Application to Intervene by Nicaragua, ICJ Rep. 1990 p. 92, it was the state requesting intervention that argued about indispensable parties, rather than the respondent.

[108] *Nicaragua*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 431; *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 258–62. See further Torres Bernárdez (1998), 745–9.

[109] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 292 (Judge Shahabuddeen).

[110] Ibid., 293.

[111] Some of judges have even adopted the term: e.g. Judge Simma's conclusion that 'the present case would not have fallen within the restrictive ambit of the doctrine of the "indispensable third party"', in respect of Iraq's involvement in *Oil Platforms*, ICJ Rep. 2003 p. 161, 359–60 (Judge Simma).

[112] *Armed Activities (DRC v. Uganda)*, ICJ Rep. 2005 p 168, 236–8.

[113] Ibid., 237.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:37 Page Number: 663

In the present case, the interests of Rwanda clearly do not constitute 'the very subject-matter' of the decision to be rendered by the Court on the DRC's claims against Uganda, nor is the determination of Rwanda's responsibility a prerequisite for such a decision.[114]

But it also went on to say:

Thus it is not necessary for Rwanda to be a party to this case for the Court to be able to determine whether Uganda's conduct was a violation of these rules of international law.[115]

The words chosen – 'thus it is not necessary for Rwanda to be a party' – are reminiscent of indispensable parties rather than *Monetary Gold*. In practice the two concepts are perhaps more closely related than the Court's reaction in *Nicaragua* might suggest. The link is reflected in Rosenne's description of the *Monetary Gold* principle as a 'limitation on the Court's jurisdiction following from the absence from the litigation of essential parties'.[116]

Another feature to note from the litigation arising out of armed conflict in the DRC is the suggestion in the separate opinion of Judge ad hoc Dugard in *DRC* v. *Rwanda* that the Court's decision in *DRC* v. *Uganda* to 'retreat' from the *East Timor* and *Monetary Gold* precedents and apply instead the *Nauru* reasoning was influenced by the status of the norms at issue:

Although the Court did not indicate that its choice was influenced by the fact that norms of *jus cogens* were involved in this case, it may safely be assumed that the gravity of the issues raised influenced the Court's choice.[117]

Judge ad hoc Dugard did not elaborate further on this comment, but, if it is correct, it amounts to a marked distinction from the position taken in *East Timor*, where the Court acknowledged the *erga omnes* character of the principle of self-determination but held that this character did not overturn its conclusion that it could not exercise jurisdiction without the consent of Indonesia; the character of the norm and the rule of consent to jurisdiction were separate things.[118]

[114] Ibid., 238. [115] Ibid.

[116] This description is followed by the explanation that it only applies 'when the decision as between the parties cannot be reached without the Court examining the legality of the conduct of another State not party to the proceedings or the legal position of that State': Rosenne (2006), 2 *Law and Practice*, 546–7.

[117] *Armed Activities (2002 Application) (DRC v. Rwanda)*, Jurisdiction and Admissibility, ICJ Rep. 2006 p. 6, 90 (Judge ad hoc Dugard).

[118] *East Timor*, ICJ Rep. 1995 p. 90, 102.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:38 Page Number: 664

But in another context, in *Germany* v. *Italy*, the Court reaffirmed that distinction in no uncertain terms.[119]

20.5.1.3 Further questions of scope

The question remains whether the *Monetary Gold* principle is actually necessary for the protection of absent states from adverse findings of responsibility. In its judgment on jurisdiction and admissibility in *Nicaragua* v. *US*, one of the reasons behind the Court's rejection of the US indispensable third parties argument was that 'other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention'.[120] The Court acknowledged that El Salvador's attempt to do just that had failed, but said that it could try again at the merits phase, concluding that there was therefore 'no question of these States being defenceless against any consequences that may arise out of adjudication by the Court'.[121] Even if a third state chooses not to intervene, there is the argument that it is protected by the provisions of Article 59 of the Statute.[122]

It is generally agreed, however, that the terms of Article 59 of the Statute alone may be insufficient to ensure protection in all cases.[123] The Court has observed:

> [T]he absence of [a request to intervene under Art 62] in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court . . .[124]

This passage suggests that Article 59's protective function is residual in character, applicable in cases where the Court has decided that the absent party's interests fall short of forming the 'very subject-matter' of the decision, and the absent state does not intervene. But in cases where

[119] See *Jurisdictional Immunities*, 3 February 2012, ICJ, §§81–97, on the relationship between serious violations of peremptory norms and the rules on immunity from jurisdiction.
[120] *Nicaragua*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 431, 425–6.
[121] Ibid., 425.
[122] Ibid., 431: 'Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute.'
[123] See e.g. Damrosch (1987), 390; Rosenne (2006), 2 *Law and Practice*, 1585–98, 1605; Bernhardt (2006), 1247–51.
[124] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 261.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:38 Page Number: 665

the Court's binding decision would require one of the parties to the case to renege on its obligations under a bilateral treaty with the absent state, for example, or to stop providing support for collective self-defence in circumstances where the absent state was reliant on it,[125] it must be acknowledged that the protection of Article 59 for absent states is sometimes 'notional rather than real'.[126]

Ultimately, cases raising *Monetary Gold* issues turn on the question of consent to jurisdiction, rather than on questions about the binding character of the Court's decisions.[127] Further, it is not just third states themselves that might be affected by a decision made in their absence. There will almost inevitably be an impact on those proceedings for the parties to the case; in *Continental Shelf (Libya/Malta)* Italy's interest as a third state significantly limited the scope of the Court's decision on the merits of the dispute between the two parties, even though Italy's request for permission to intervene had been denied.[128] For a claimant, there may be difficulties where the successful invocation of the respondent's responsibility requires proof of the wrongful conduct of another responsible state which is absent from proceedings;[129] or, conversely, for a respondent there may be disproportionate adverse consequences when other participants in the wrongful act are not present.[130]

20.5.1.4 Conclusion

The *Monetary Gold* principle emphasizes that jurisdiction should only be declined where the third state's position is really central to the dispute, such that a judgment on the key issues in the case would amount to subjecting the absent state to the Court's jurisdiction without its consent. In the majority of cases this will not be so. The Court is not prevented from exercising jurisdiction where a claim might affect or have consequences for absent third states. According to Rosenne, the test is whether the third state is 'directly impugned in the final submission of

[125] See Judge Schwebel's description of the result for El Salvador of the Court's judgment on the merits in *Nicaragua*: (*Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 333 (Judge Schwebel, diss.).

[126] Ibid., 342 (Judge Schwebel, diss.), referring to the lack of protection for the absent parties in that case (United Kingdom and New Zealand).

[127] Bernhardt (2006), 1250.

[128] *Continental Shelf (Libya/Malta)*, ICJ Rep. 1985 p. 13.

[129] See Aust (2011), 296–311.

[130] Wellens (2010), 24: 'The successful invocation of the *Monetary Gold* rule undoubtedly has a negative impact on the effective implementation of the alleged solidarity between plural responsible states.'

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:38 Page Number: 666

one or other of the parties, not whether the actions of that third State are discussed in the pleadings'.[131]

20.5.2 Possible exceptions

Despite the paramountcy of the consent principle, there may be exceptions to the operation of the *Monetary Gold* rule; three possible exceptions should be mentioned.

20.5.2.1 Defunct states

Under the *Monetary Gold* principle the Court will not exercise jurisdiction conferred by states A and B if the dispute between them requires it to determine the legal position of absent state C without its consent. But what if state C is defunct? In such circumstances the right of the parties before the Court to have their dispute determined should prevail over any consideration of the defunct state's interests. If state C no longer exists as an entity possessing the sovereignty which underpins the *Monetary Gold* principle, precedence must instead be given to the interests of the parties to have their dispute resolved by the Court.

The point can be illustrated more clearly by reference to the *Gabčíkovo-Nagymaros* case.[132] An original *forum prorogatum* claim was filed by Hungary against Czechoslovakia in 1992, alleging violations of a bilateral treaty for the construction and operation of a series of locks on the Danube.[133] On 1 January 1993 Czechoslovakia separated into the two independent states of Slovakia and the Czech Republic. Slovakia and Hungary subsequently presented the Court with a special agreement under which they had agreed that Slovakia was to be the sole successor state of Czechoslovakia in respect of rights and obligations relating to the project, and Hungary's original application lapsed. So this was succession to exclusive responsibility by agreement, and there was no *Monetary Gold* issue. But even if there had been no agreement that Slovakia would succeed to Czechoslovakia's rights and obligations under the treaty, and even if Hungary's allegations of internationally wrongful acts against Czechoslovakia was considered the very subject matter of the dispute, there seems no question that the Court would have applied the *Monetary Gold* principle to protect the legal interests of a state no longer in

[131] Rosenne (2006), 3 *Law and Practice*, 1581.

[132] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7. See Mikulka (2010), 295–6.

[133] Treaty concerning the Construction and Operation of the Gabčíkovo-Nagymaros Series of Locks, 16 September 1977, 1109 UNTS 211.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:39 Page Number: 667

existence. On the other hand, if a bilateral dispute between Hungary and the Czech Republic had required the Court to determine whether or not Slovakia was the sole successor state to Czechoslovakia in respect of some particular matter, the Court might well have decided that it was prevented from acting by the *Monetary Gold* principle.

20.5.2.2 Criminal prosecution

Although there is no scope for states themselves to be subject to criminal prosecution under international law, the development of individual criminal responsibility under international law means that state agents and officials may be prosecuted in international and foreign tribunals for criminal acts committed in the course of their official functions.[134] In fact some crimes specifically require as an element of the crime itself that the perpetrator was acting in his or her official capacity – for example torture, as defined in the 1984 Convention against Torture,[135] and the crime of aggression, which is squarely based on the definition of an act of aggression by a state.[136] As a result, individual criminal responsibility on the part of state officials may be closely linked to the state's concurrent responsibility for an internationally wrongful act.

Article 25(4) of the Statute of the International Criminal Court (ICC) provides that '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.[137] This provision, derived from the ILC's 1996 Draft Code of Crimes,[138] is the counterpart of ARSIWA Article 58, which provides: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.'[139]

[134] See e.g. Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, Art. 27 ('Irrelevance of official capacity').

[135] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Art. 1(1).

[136] ICC Statute, Art. 8*bis*(1), inserted pursuant to RC/Res.6 adopted at the Kampala Review Conference on 11 June 2010, defines the crime of aggression as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. Art. 8*bis*(2) relies on GA Res. 3314 (XXIX), 14 December 1974 for the definition of an act of aggression.

[137] ICC Statute, Art. 25(4). See Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 440–1.

[138] Draft Code of Crimes against the Peace and Security of Mankind, ILC Ybk 1996/II(2), 23 (Art. 4 and commentary).

[139] See ARSIWA Commentary, Art. 58, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:39 Page Number: 668

The intention was to make it clear that neither can hide behind the responsibility of the other: official capacity does not allow an individual to escape responsibility, and the prosecution or punishment of an individual does not exonerate the state from any responsibility of its own.[140] As the International Court has observed, this 'duality of responsibility continues to be a constant feature of international law'.[141]

As a matter of law, then, individual criminal responsibility and state responsibility are separate, and in principle neither affects the other. But as a matter of fact, it is likely that the conviction of a high-ranking state official for an international crime would create a strong presumption of concurrent state responsibility for the wrongful act.[142] If the ICC prosecuted a state official for international crimes, the position of his or her state of nationality might be central to the proceedings.

An exception to the *Monetary Gold* principle must be warranted in such circumstances. In proceedings before the ICC, *Monetary Gold* simply does not arise. The ICC has jurisdiction over natural persons, not states,[143] and on the terms of the Statute its findings (however influential) would not *determine* any issue of state responsibility.[144] There would be no scope for an argument that the prosecution must not proceed in order to protect the interests of the absent state.

20.5.2.3 Waiver

Another possible exception to the *Monetary Gold* principle might arise in circumstances of waiver: the voluntary renunciation of a right or claim.[145] Article 45(a) of ARSIWA provides that the responsibility of a state may not be invoked if the injured state has validly waived the claim, which is taken as meaning the breach itself, or its consequences in terms of responsibility.[146] This provision is analogous to VCLT Article 45, which deals with loss of the right to invoke a defect in a treaty.[147] The question whether the waiver is 'valid' is left to the primary rules in question, similar to the situation in respect of consent as a circumstance precluding the wrongfulness of an act.[148]

[140] Ibid.
[141] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007 p. 43, 116.
[142] Aust (2011), 315–16. [143] ICC Statute, Art. 25(1). [144] Ibid., Art. 25(4).
[145] Tams (2010), 1036.
[146] ARSIWA Commentary, Art. 45. The same goes for states other than injured states invoking responsibility under Art. 48: see Art. 48(3).
[147] See Crawford, Third Report, 68.
[148] See ARSIWA Commentary, Art. 45, §4; Art. 20, §§4–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:39 Page Number: 669

Although ARSIWA Article 45 does not specifically address waiver in situations involving a plurality of states, the commentary to the equivalent provision in the Draft Articles on the Responsibility of International Organizations expressly states:

> When there is a plurality of injured States or injured international organizations, the waiver by one or more State or international organization does not affect the entitlement of the other injured States or organizations to invoke responsibility.[149]

This was intended to clarify that a state or an international organization may only waive a claim on its own behalf, without prejudice to the rights of another injured state or international organization, in the light of the provision on a plurality of injured states or international organizations.[150] The same principle must apply to a plurality of states.

20.6 Other procedural incidents

20.6.1 Joinder of claims

Where two or more claims are filed in respect of the same issue, whether between the same parties or different parties, the Court has the power under Article 48 of the Statute and Article 47 of the Rules of Court to join them.[151] In this manner the Court may convert multiple proceedings dealing with the same or related facts into a single case leading to a single judgment, if it would be more convenient and efficient than dealing with them separately. Joinder is not automatic, however, just because the subject matter is similar or even identical in multiple proceedings.[152] Although the Court has the authority to join claims without hearing the parties, so far it has only made orders for joinder when the parties have consented.[153] In some cases the parties may prefer for each of the related claims to be kept separate, leading to separate judgments, although the Court might still choose to group the cases and hear them

[149] See DARIO Commentary, Art. 46, §4.
[150] Sixtieth Session of the ILC, Responsibility of International Organizations, Statement of the Chairman of the Drafting Committee Mr Pedro Comissário Alfonso, 4 June 2008, 9, available at untreaty.un.org/ilc/sessions/60/2008_dc_chairman_rio.4june2008.pdf.
[151] Chinkin (1993), 213; Torres Bernárdez, 'Article 48', in Zimmermann, Tomuschat and Oellers-Frahm (2006) 1081, esp. 1089; Rosenne (2006), 3 *Law and Practice*, 1209–19.
[152] Rosenne (2006), 1214.
[153] Ibid., 1209; Kooijmans, 'Article 31', in Zimmermann, Tomuschat and Oellers-Frahm (2006) 495, 503.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:40 Page Number: 670

together.[154] This was the case in the *Fisheries Jurisdiction* cases,[155] for example, and the *Legality of Use of Force* cases against ten NATO member states.[156]

Where different claimants are seen as being 'in the same interest' before the Court the joinder of their cases will have certain procedural consequences.[157] Thus the Court made an order for joinder in the *South West Africa* cases brought by Ethiopia and Liberia against South Africa, holding that the two claimants were 'to be reckoned as one party only' for the purposes of electing an ad hoc judge in accordance with the Statute.[158] Cases grouped together to be heard in common but with separate judgments will not be susceptible to those same implications. The scope of Article 48 is broad enough to encompass any procedural eventuality ranging from formal joinder to the grouping of certain aspects of the hearing for convenience.[159]

Something the Court cannot do, however, is compel an absent state with an interest in the proceedings before it to join the case, whether as a party or by way of non-party intervention.[160] This lack of any *proprio motu* power of joinder, frequently available to national courts, is a consequence of the consensual basis of jurisdiction before the International Court.[161] It is common for international judicial tribunals to lack such procedures,[162] but it can lead to problems for the Court and for the parties, particularly in situations where there are

[154] Rosenne argues that this type of consolidation should be distinguished from joinder proper, which refers to those instances in which an initial multiplicity of proceedings culminates in a single judgment; see Rosenne (2006), 3 *Law and Practice*, 1218 n. 27.

[155] *Fisheries Jurisdiction (UK v. Iceland)*, ICJ Rep. 1975 p. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, ICJ Rep. 1975 p. 175. See Rosenne (2006), 3 *Law and Practice*, 1211–12.

[156] For a discussion of the case law see Rosenne, 3 (2006), 1209–19.

[157] Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355, Art. 31(5) provides: 'Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.' See Kooijmans (2006), 501–3.

[158] *South West Africa*, Order, 20 May 1961, ICJ Rep. 1961 p. 13.

[159] Rosenne (2006), 3 *Law and Practice*, 1218.

[160] See e.g. *Libya/Malta,* Application to Intervene by Italy, ICJ Rep. 1984 p. 3, 25; *Nicaragua*, Jurisdiction and Admissibility, ICJ Rep. 1984 p. 392, 431; *El Salvador/Honduras)*, Application to Intervene by Nicaragua, ICJ Rep. 1990 p. 92, 134–5; *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 260. See further Chinkin (2006) 1331, 1337; Rosenne (2006), 2 *Law and Practice*, 551.

[161] *Phosphate Lands in Nauru*, ICJ Rep. 1992 p. 240, 260.

[162] One exception was the Central American Court of Justice in operation between 1907 and 1917, which had compulsory jurisdiction over all disputes submitted to it by Guatemala, Honduras, Nicaragua, El Salvador or Costa Rica: Noyes and Smith (1988), 235–6.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:40 Page Number: 671

multiple responsible states, and not all of them are before the Court,[163] or where the participation of an absent state would have assisted the Court in ascertaining the facts.[164] The Court has made reference to its inability to join absent parties on numerous occasions; short of a radical change to the fundamental requirement of consent for jurisdiction, there is no chance that this lack of competence will be remedied.

20.6.2 The composition of the bench

Cases involving multiple parties can pose difficulties when it comes to the composition of the bench. Article 31 provides a procedure enabling parties to ensure that there is a judge of their own nationality on the bench, through the appointment of ad hoc judges.[165] Under Article 31(5), however, where there are 'several parties in the same interest', they are to be 'reckoned as one party only' for the purposes of choosing an ad hoc judge.[166] The statute provides no guidance as to how the Court is to determine that the parties are 'in the same interest', and the Court's practice shows a mixed approach. On some occasions, the decision has rested on the near identity of the submissions of the parties in question and has been closely connected with a decision on joinder,[167] but on others the parties have been found not to be in the same interest despite the similarity of their conclusions, and the decision seems instead to have been the result of a more procedural consideration, in that the cases were commenced as separate cases in the list.[168]

Where closely related cases are grouped and heard in common but not joined, with the parties not held to be in the same interest, the Court may end up sitting in a varying composition in a number of very similar or even nearly identical cases. Such a situation arose in the

[163] Aust (2011), 296–7.

[164] For example Judge Fitzmaurice argued that the intervention of the Canadian government under Art. 62 should have been sought 'in order that its views might be made known' in *Barcelona Traction, Light & Power Company, Limited*, ICJ Rep. 1970 p. 3, 80 (Judge Fitzmaurice).

[165] See generally Lauterpacht (1991), 77–82; Gill (1989), 9ff; Rosenne, 'International Court of Justice (ICJ)', (2006) MPEPIL, §§35–40; Kooijmans (2006), 496; Rosenne (2006), 3 *Law and Practice*, 1079–1109.

[166] Ibid., 1093–6; Kooijmans (2006), 501–3.

[167] E.g. *South West Africa*, Order, 20 May 1961, ICJ Rep. 1961 p. 13; *North Sea Continental Shelf*, Order, 26 April 1968, ICJ Rep. 1968 p. 9.

[168] Kooijmans (2006), 502–3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:40 Page Number: 672

Lockerbie cases, where an inequality against the applicant, Libya, was introduced by the fact that a UK judge ad hoc was permitted to sit on the case against the United Kingdom, but not on the very similar one against the United States, while the regular American member of the Court sat on both benches.[169] The problem was even more pronounced in the ten separate *Legality of the Use of Force* cases arising out of the Kosovo crisis. The proceedings against the NATO respondents were identical, and the conclusions of the respondents virtually identical, but the Court upheld the appointment of different ad hoc judges by four of the respondents at the provisional measures stage, with five other respondents already having a judge of their nationality on the bench. This led to the 'curious spectacle of repeated adjournments of the court's public session to enable the court to reconvene in a different composition, according to which respondent was pleading at any given moment'.[170] When it came to the next phase of proceedings, the Court decided that ad hoc judges would not sit for the preliminary objections phase, and it maintained the same composition throughout, without prejudice to whether or not judges ad hoc might sit in subsequent phases.[171] Reference was made to Article 31(5), although the Court did not expressly hold the respondents to be parties in the same interest, it had not joined the cases and the proceedings remained separate.[172]

There is no provision in the Statute or the Rules for an intervening third state to choose an ad hoc judge.[173] Malta expressed an intention to do so when it applied to intervene in the *Continental Shelf (Tunisia/Libya)* case, but the Court found that Malta had to wait until its status in respect of intervention was decided, and as that application was unsuccessful, the question became moot.[174] It is safe to speculate that the Court would make a distinction between intervention as a party and as a non-party when considering a request for the appointment of an ad hoc judge by an intervening state, and that a non-party would have no right to appoint a judge ad hoc, but as yet there are no authorities on this point.

[169] Ibid., 502. [170] Rosenne (2006), 'International Court of Justice', §40.
[171] See e.g. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, ICJ Rep. 2004 p. 279, 287. As it happened, the respondents' preliminary objections were upheld and the cases were dismissed for lack of jurisdiction.
[172] Kooijmans (2006), 503.
[173] Ibid., 504–5; Chinkin (2006) 1390; Rosenne (2006), 3 *Law and Practice*, 1099–1106.
[174] *Tunisia/Libya*, Application to Intervene by Malta, ICJ Rep. 1981, p. 3, 6–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:41 Page Number: 673

20.6.3 The rule against double recovery

It is well established that an injured party cannot recover more than its assessed damage or injury through an award of compensatory damages.[175] This logically corresponds to the fact that the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act.[176] The risk of double recovery is increased in cases involving multiple parties – whether because a claimant brings a claim against multiple responsible states simultaneously, possibly in different fora, or because multiple claimants bring claims against one responsible state in connection with the same wrongful act. The issue of establishing causation may also be difficult when it comes to allocating a particular injury to a particular act, especially when there are concurrent causes.[177] Nonetheless, the same principle applies that an injured party may collect from any one or more of the responsible states 'only the full amount of his damage'.[178]

For most purposes the principle against double recovery is subsumed in the general principle of full (equitable) reparation, which generally implies that reparation should be no more than necessary to compensate the injured state for the loss, and be not inequitable in the circumstances.[179] The obligation of reparation only extends as far as the injury caused by the wrongful act; it does not cover all the consequences flowing from that act, and a respondent state should not be required to provide reparation in excess of its responsibility.[180] It is clear that the principle against double recovery applies in a situation involving a plurality of injured states: no single state could recover compensation for more than its own injury just because that injury took part within the context of a greater harm. In a situation where the same claimant may be entitled to reparation as against several responsible states, however, the rule might need to be made explicit, and it may operate as a

[175] This principle is enshrined in ARSIWA, Art. 47(2)(a). See further, e.g., *Factory at Chorzów*, (1928) PCIJ Ser. A No. 17, 49, 59, *Case concerning Gold Looted from the Netherlands*, (1963) 44 ILR 448, 471–2; Crawford, Third Report, 67–8; ARSIWA Commentary, Art. 47, §9.

[176] ARSIWA Commentary, Art. 36, §4.

[177] See e.g. ARSIWA Commentary, Art. 31, §10; Aust (2011), 278–84.

[178] To borrow a phrase from the US pleadings in *Aerial Incident of 27 July 1955 (US v. Bulgaria)*, Memorial of the United States, 2 December 1958, 229.

[179] Crawford, Third Report, 68. The principle that the responsible state is under an obligation to make full reparation for the injury caused by its internationally wrongful act is one of the core legal consequences of such an act, expressed in ARSIWA, Art. 31; see further ARSIWA Commentary, Art. 31; Barker (2010). See further Chapter 15.

[180] See ARSIWA, Art. 31(2); ARSIWA Commentary, Art. 31, §9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 20 Title Name: CRAWFORD
Date:15/3/13 Time:21:28:42 Page Number: 674

limitation on the invocation of responsibility.[181] Claimant states might refrain from invoking the responsibility of more than one responsible state if they perceive that they will receive adequate reparation through pursuit of a claim against one state only. This is without prejudice to any question of contribution or division of reparation as between multiple responsible states.[182]

It appears that claimant states themselves are generally conscious of the importance of avoiding double recovery, and will take preventive steps accordingly. For example, in the *Case Concerning Gold Looted from the Netherlands* before the Italy–Netherlands Conciliation Commission, the Netherlands sought restitution or full compensation from Italy for gold that was wrongfully removed from the Netherlands by Germany during the occupation and subsequently transferred to Italy. The Netherlands acknowledged that it could not simultaneously press its claim to compensation from Germany through its participation *pro rata* in the pool of gold administered by the Tripartite Commission:

> Indeed, such a double claim would involve an unjust enrichment prohibited by the general principles of law recognised by civilised nations and forming an integral part of international law ... In these circumstances, the Netherlands Government has declared itself 'ready to withdraw its claim before the Tripartite Commission to the extent that it will be compensated by the Italian Government' ... The Netherlands Government thus gives preference to compensation by the Italian Government.[183]

The rule against double recovery may be equally relevant in situations involving multiple claimants and a single respondent. Thus in the claims by the United Kingdom, the United States and Israel against Bulgaria following the destruction of an Israeli aircraft, the separate claimants took steps to co-operate so as to ensure that Bulgaria was not exposed to excessive claims for reparation.[184]

On the whole, the principle preventing double recovery is firmly entrenched in the fabric of international claims involving multiple parties, and it regulates conduct on both sides.

[181] See Crawford, Third Report, 67–8.
[182] ARSIWA, Art. 47(2)(b). See further ARSIWA Commentary, Art. 47, §10; Orakhelashvili (2010).
[183] (1963) 44 ILR 448, 471–2.
[184] See *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Memorial of Israel, 2 June 1958, 106; ARSIWA Commentary, Art. 46, §3 n. 744.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:25 Page Number: 675

21 Implementation of responsibility by extrajudicial process

21.1 Overview

Besides implementing state responsibility through formal claims – or through the processes of negotiation and settlement that may avoid the need for such claims – states may also have recourse to certain extrajudicial self-help measures under international law, whether to induce compliance with an obligation or, sometimes, to express disapproval of another state's conduct. Such unilateral acts of self-help may be based on the distinct concepts of retorsion, the exception of non-performance (the *exceptio inadempleti contractus*) or countermeasures. The most controversial of these is countermeasures, whether by an injured state acting alone or by a group of states acting collectively.

There are important conceptual differences between the different categories of self-help measures. Retorsion is an 'unfriendly' but not unlawful act – severing diplomatic relations, for example. Countermeasures, by contrast, may be defined as an act of non-compliance by a state with an international obligation owed towards another state in response to a prior breach of international law by that other state.[1] But it may be difficult to draw a clear-cut distinction between these various self-help measures in practice. In *Application of the Interim Accord of 13 September 1995 (former Yugoslav Republic of Macedonia v. Greece)*, for example, Greece (unsuccessfully) pleaded all three categories of the *exceptio*, suspension of benefits and countermeasures as alternative defences to the claim that it had breached its obligation to Macedonia under the Interim Accord of 1995.[2]

[1] For more detailed analysis of the definition see Alland, in Crawford, Pellet and Olleson (2010) 1127.

[2] *Application of the Interim Accord of 13 September 1995 (former Yugoslav Republic of Macedonia v. Greece)*, judgment of 5 December 2011.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:25 Page Number: 676

The difficulty of characterizing countermeasures as such is compounded by the fact that clear statements explaining which unilateral self-help measure a state actually relies on in a particular instance are rarely advanced at the time.

In particular, the distinction between acts of retorsion and countermeasures, especially in the context of collective action, may sometimes be difficult to draw in practice.[3] Countermeasures do not include policies of collective non-recognition, whether such non-recognition is obligatory[4] or optional, nor do they, for example, include unilateral trade restrictions based on the national security exception under Article XX of the GATT.[5] Similarly, where a state responds to a material breach of a treaty it will not always be immediately apparent whether it does so as an essentially protective measure in order to restore a certain contractual balance (by relying on the *exceptio inadimpleti contractus* or termination/suspension of treaty obligations under Article 60 VCLT or other treaty-law doctrines) or in order to enforce international law by relying on the notion of countermeasures.[6]

While these practical difficulties should not be exaggerated, they cannot be ignored.[7] With that in mind, this chapter examines each of the different categories in turn, before addressing the separate question of disputes concerning responsibility before the Security Council and other international fora ('institutional measures').

21.2 Unilateral self-help measures

21.2.1 Retorsion

The most common unilateral self-help measure in international practice is retorsion, that is, retaliation against another state in a manner that does not interfere with the target state's rights under international law.[8] The ILC categorizes retorsion as '"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'.[9]

[3] Crawford, Third Report, 102.

[4] As e.g. in the situation considered by the International Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971 p. 16.

[5] Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: General Agreement on Tariffs and Trade, 15 April 1994, 1867 UNTS 187.

[6] Cf. Tams (2005), 19–22.

[7] For a detailed study see Dawidowicz, (2006) 77 BYIL 333.

[8] See Giegerich, 'Retorsion' (2011) MPEPIL.

[9] ARSIWA Commentary, Pt III, Ch. II, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:26 Page Number: 677

That said, there is no *requirement* that the target state should have committed an internationally wrongful act first; it may itself have simply acted in an unwelcome or unfriendly way.[10] As the ILC explained, acts of retorsion may include the prohibition of or limitations on normal diplomatic relations or other contacts, embargoes of various kinds, withdrawal of voluntary aid programmes and so on.[11] Regardless of what the motive behind acts of retorsion may be, if they do not actually breach the international obligations of the state or states taking them vis-à-vis the target state, they are intrinsically lawful and fall outside the scope of ARSIWA.[12] They can be described as 'socio-political acts with legal relevance'.[13]

While there is no universal agreement, retorsion is widely regarded as a freedom (as opposed to a right to which certain limitations may apply[14]) and is accordingly largely unregulated by international law.[15] The Permanent Court's well-known dictum in the *Lotus* case – referring to the freedom of action of states in the absence of any international legal obligations to the contrary – is often said to support this position.[16] Measures of retorsion may sometimes have a punitive or retributive element, whereas reprisals must be directed at inducing the target state to comply with its international obligations; further, measures of retorsion are not required to be temporary or reversible. In the usual case, however, this would be politically sensible.[17] In some cases a state will prefer to apply retorsionary measures even if it has a right to take countermeasures, whether for political reasons or perhaps

[10] Giegerich, 'Retorsion', (2011) MPEPIL, §1.

[11] ARSIWA Commentary, Pt III, Ch. II, §3; for further examples see Giegerich (2011), §10.

[12] ARSIWA Commentary, Pt III, Ch. II, §3. See further, e.g., Crawford, Third Report, 102; ILC Ybk 1992/II(2), 23. The modern definition of retorsion coincides with its historical counterpart, see e.g. Vattel, *Le Droit des gens* (1758), Bk II, Ch. XVIII, §341 (ed. Kapossy and Whatmore 2008, 459–60); Rivier, 2 *Principes du droit des gens* (2nd edn, 1899), 189; IDI Res. 1934/III (Paris), Art. 2(1).

[13] Giegerich (2011), §§12, 29, citing Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes* (2005), 43.

[14] For the view that acts of retorsion may be limited by the principle of proportionality and the doctrine of abuse of rights, see e.g. Cassese (2005), 310.

[15] The discretion to apply measures of retorsion is not absolute, however; it may be subject to specific prohibitions or procedural and substantive limits. See discussion in Giegerich (2011), §§14–27.

[16] *SS Lotus*, (1927) PCIJ Ser. A No. 10, 18–19.

[17] See UN Charter, Arts. 2(3), 33–8; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625(XXV), 24 October 1970, Principle 2. See further Giegerich (2011), §§8, 22.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:26 Page Number: 678

because countermeasures would be disproportionate to the wrong committed by the target state.[18]

21.2.2 *The exception of non-performance* (exceptio inadimpleti contractus)[19]

The doctrine commonly referred to as the *exceptio inadimpleti contractus* or the exception of non-performance is based on the principle that performance of an obligation may be withheld if the other party has itself failed to perform. It has often been conflated with the concept of countermeasures,[20] but unlike countermeasures, the *exceptio* is limited to the suspension of performance of the same or a closely related obligation;[21] it flows from the principle of reciprocity.[22]

The status of the *exceptio* has been and remains unclear. While it has been recognized to some extent as an operative principle in international jurisprudence,[23] there is an argument that it has slipped through the gap between the primary rules on the law of treaties, and the secondary rules on state responsibility.[24] Uncertainty has prevailed over whether the *exceptio* is a general principle applicable to treaty and non-treaty

[18] Ibid., §7. See also Alland (2010), 1131–2.

[19] For a discussion of the principle with further references to the case law, see Crawford, Second Report, 78–9; Crawford, Third Report, 95–6. See also Greig, (1994) 34 Va JIL 295; Crawford and Olleson, (2001) 21 AYIL 55.

[20] This view was evident in Special Rapporteur Riphagen's Fifth Report, in which he proposed to deal with the *exceptio* in a separate provision, dealing with so-called 'reciprocal countermeasures', and allowing for the suspension of performance of 'obligations [which] correspond to, or are directly connected with, the obligation breached'. The ILC decided not to consider reciprocal countermeasures as a distinct category of countermeasures, on the basis that they 'did not deserve special treatment'. See Riphagen, Fourth Report, 18; Fifth Report, 3 (Draft Art. 8); Sixth Report, 10–11 (commentary to Draft Art. 8). For the ILC's reasons for rejecting a special category of so-called 'reciprocal countermeasures' see ILC Ybk 1992/II(2), 23; ARSIWA Commentary, Pt III, Ch. II, §5. See also Crawford, Third Report, 87.

[21] Crawford, Second Report, 87; ARSIWA Commentary, Pt III, Ch. II, §5.

[22] *Interim Accord*, 5 December 2011, ICJ, Separate Opinion of Judge Simma, §10. Generally see Simma, 'Reciprocity', (2008) MPEPIL.

[23] E.g. *Diversion of Water from the Meuse (Netherlands* v. *Belgium)*, (1937) PCIJ Ser. A/B No. 70, 4, 50 (Judge Anzilotti, diss.); 75–8 (Judge Hudson); *Namibia*, ICJ Rep. 1971 p. 16, 213–14 (Judge de Castro); *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, ICJ Rep. 1972 p. 46, 129 (Judge de Castro); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 380 (Judge Schwebel, diss.). In *Interim Accord*, 5 December 2011, ICJ, the Court declined to consider whether or not the principle forms part of current international law (§161); cf. the separate opinion of Judge Simma, the declaration of Judge Bennouna and the dissenting opinion of Judge ad hoc Roucounas for different views on the matter.

[24] Crawford and Olleson (2001), 56.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:26 Page Number: 679

obligations alike, or whether it can only justify non-performance of specific types of obligation.[25] The Vienna Convention on the Law of Treaties (VCLT) leaves most issues of performance to be dealt with under the law of state responsibility (the exception is Article 26, *pacta sunt servanda*).[26] However, Article 60 covers permissible responses to material breaches of treaty obligations; questions then arise over the extent to which the *exceptio* may justify non-performance in response to non-material breaches that fall outside the Article 60 framework.[27] Riphagen, for example, argued that in such circumstances the *exceptio* could apply if the responding state breached or suspended performance of a reciprocal obligation,[28] but this was not accepted by the ILC. In view of its exclusion from both codification projects of the ILC on the law of treaties and on the law of state responsibility, the status of the *exceptio* must appear questionable.

In cases where the *exceptio* applies, the reason why state A is entitled not to perform is simply that, in the absence of state B's performance of the related obligation, the time for state A's performance has not yet come. It is true that state A may withhold performance in order to induce state B to perform. But that is not the point of the *exceptio*, as it is of countermeasures. State A's motive is irrelevant; it may simply have no interest in performance in the absence of state B. Moreover, unlike countermeasures, there is no requirement of notice or of any attempt to settle the dispute by diplomatic or other means as a condition of continued application of the *exceptio*. The rationale of the principle is simply that, following an agreement, for example, concerning the exchange of prisoners of war or for the joint funding of some project, state A is not obliged to release its prisoners of war or to make its contribution unless state B is in turn ready to perform its part of the bargain. Thus the *exceptio* is to be seen either as a circumstance precluding wrongfulness in respect of a certain class of (synallagmatic) obligations, or as the consequence of an implied term in certain agreements.

[25] For the view that it is a general principle, see Fitzmaurice, Fourth Report on the Law of Treaties, ILC Ybk 1959/II, 43–7; *Interim Accord*, 5 December 2011, ICJ, Dissenting Opinion of Judge Roucounas, §66. For the view that it has no independent existence outside VCLT, Art. 60, see ibid., Separate Opinion of Judge Simma.

[26] Crawford and Olleson (2001), 59.

[27] On the relationship between Art. 60 and the *exceptio* see e.g. Simma and Tams, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 1351, 1353–7; Forlati, (2012) 25 LJIL 759.

[28] See the discussion in Crawford and Olleson (2001), 60–1.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:27 Page Number: 680

A lack of clarity over the precise formulation of the *exceptio* has contributed to the confusion.[29] As the ILC's debate on second reading made clear, at least two different forms of the *exceptio* may be discerned, with different sources supporting one version or the other.[30] The narrower form of the exception is not based on synallagmatic obligations but on the idea that state A may not complain of the non-performance of an obligation owed to it by state B where such performance has been *prevented* by the prior wrongful act of state A. This narrow version of the *exceptio* seems to overlap with the excuse of *force majeure* or impossibility or (in cases not involving actual impossibility of performance) with the general principle that a state ought not to be able to benefit from its own wrongful act. As explained by the Permanent Court in *Chorzów Factory*, this principle only applies where one state has, by its own unlawful act, actually prevented the other from complying with its side of the bargain; that is, from complying with the same or a related obligation.[31] In other words, the link is a direct causal link, and certainly not a question of one breach provoking another by way of reprisal or retaliation.[32]

The narrow version of the *exceptio* thus effectively operates as a distinct circumstance precluding wrongfulness capable of generating consequences in the field of state responsibility.[33] While the ILC did not consider it appropriate to deal explicitly with the narrow version of the *exceptio* in ARSIWA (for reasons valid enough in that context),[34] the legitimacy of the principle under general international law is nevertheless indirectly reaffirmed by ARSIWA Article 56.[35] Under general international law it is clear that this narrow principle cannot be assimilated with the more flexible notion of countermeasures.

The broader version of the *exceptio* – which also finds some support in recent international jurisprudence[36] – is concerned with synallagmatic or interdependent obligations, with each seen as effectively the

[29] Ibid., 62–6.
[30] See Crawford, Second Report, 81–2; Crawford, Third Report, 95–6; ILC Report 1999, UN Doc. A/54/10, 79–80 (for a summary of the debate).
[31] (1927) PCIJ Ser. A No. 9, 31.
[32] See Crawford, Second Report, 87; Crawford and Olleson (2001), 62.
[33] Crawford, Second Report, 78; Crawford, Third Report, 95–6. See also ARSIWA Commentary, Pt I, Ch. V, §9.
[34] For a summary of the debate in the Commission on Draft Article 30*bis*, see ILC Report (1999), UN Doc. A/54/10, 79–80; and for a summary of government views see UN Doc. A/CN.4/504, 16. See also Crawford, Third Report, 95–6 (dropping proposed draft Art. 30*bis*).
[35] See ARSIWA Commentary, Art. 56, §2.
[36] See e.g. *Interim Accord*, 5 December 2011, ICJ, Declaration of Judge Bennouna; Dissenting Opinion of Judge ad hoc Roucounas.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:27 Page Number: 681

counterpart of the other: continued compliance of the obligation by one state is conditioned on similar compliance by the other state. In such a case there is no direct causal link between non-performance by state A and non-performance by state B. It remains *possible* for state B to comply, but to require it to do so would contradict the expectations underlying the agreement: examples include ceasefire agreements, agreements for exchange of prisoners or mutual destruction of weapons.

There is little doubt that in its broader form the *exceptio* should be regarded as based on treaty interpretation, performance of the same or related obligations being treated as conditional.[37] Indeed, this was the approach ultimately adopted by the ILC: the Commission viewed the broader version of the principle as an aspect of treaty interpretation and as such distinct from the law of state responsibility.[38]

The role of the *exceptio* in the context of treaty relations was examined in depth by Judge Simma in his separate opinion in *Interim Accord*.[39] In connection with the arguments advanced by Greece in that case, the majority simply concluded that Greece had failed to establish that 'the conditions which it has itself asserted would be necessary for the application of the *exceptio*' were satisfied. It declined to determine whether the *exceptio* forms part of international law.[40] Judge Simma was critical of the Court's failure to clarify the point. Emphasizing the rationale of reciprocity underlying the *exceptio*,[41] he found that

> [t]he functional synallagma attached to treaties embodying reciprocal obligations finds its ... expression entirely in the primary rules of the law of treaties.[42]

That is, there is no room for recognition of the *exceptio* outside the exhaustive provisions on the consequences of breach in VCLT Article 60; Judge Simma pronounced the pre-VCLT *exceptio* dead.[43] By contrast, Judge ad hoc Roucounas expressed the view that the *exceptio*

> is the corollary of reciprocity and synallagmatic agreements. It follows that Article 60 of the Vienna Convention on the Law of Treaties is not the sole form of expression of the *exceptio*. As a defence to the non-performance of an obligation, it is a general principle of law, as enshrined in Article 38, paragraph 1 *(c)*, of the Statute of the Court. Yet, as the Court found in the case concerning *Military and Paramilitary Activities in and against Nicaragua,* general international law and treaty law constantly overlap. Article 60 does not deprive the injured party of the right to invoke the *exceptio*. In particular, it does not make provision for every

[37] See e.g. introductory commentary to Pt I, Ch. V, §9, in ILC Report 2001, UN Doc. A/56/10, 72; Crawford, Third Report, 95–6 (with further references).
[38] See ARSIWA Commentary, Pt I, Ch. V, §9. [39] *Interim Accord*, 5 December 2011, ICJ.
[40] Ibid., §161. [41] Ibid., Judge Simma sep. op., §10. [42] Ibid., §20. [43] Ibid., §26.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:27 Page Number: 682

scenario in which the injured party reacts to the non-performance by the other contracting party of its obligations.[44]

The status of the *exceptio* thus remains uncertain. It has not established an independent place as a rule or principle of international law. Regardless of its status outside the VCLT, it is clear that it cannot be used to justify the violation of human rights or humanitarian obligations.[45] For present purposes it will suffice to emphasize that neither version of the *exceptio* should be conflated with the distinct category of countermeasures.

21.2.3 Suspension of obligations

Difficulty has sometimes arisen because of (perhaps understandable) confusion between the taking of countermeasures otherwise in breach of an international obligation, on the one hand, and the suspension of an obligation, on the other. Commentators have stressed the significant constraints on the suspension (and termination) of treaties under the VCLT, and have asked how these can be seemingly evaded by reliance on countermeasures. After analysing the relationship between Article 60 VCLT and the concept of countermeasures, and noting that international practice clearly recognizes the parallel existence of both types of reaction, Simma and Tams conclude:

> Article 60 leaves the right of States to suspend treaty obligations by way of countermeasures unaffected. While those reactions have to conform with the conditions governing the law of countermeasures, they may also be taken against immaterial breaches and need not follow the procedure set out in Articles 65 to 68 – which of course allows parties to circumvent the Vienna Convention regime.[46]

By implication, the taking of countermeasures involving non-performance of treaty obligations is seen as equivalent to the suspension of an obligation.[47] The International Court seems to have given some credence to this position in *Gabčíkovo-Nagymaros*.[48] But the use of the

[44] Ibid., Dissenting Opinion of Judge Roucounas, §66.

[45] See VCLT, Art. 60(5); this was reinforced by the ICTY trial chamber in *Prosecutor* v. *Kupreškić*, ICTY Case No. IT-95-16, 14 January 2000, §520.

[46] Simma and Tams, in Corten and Klein (2011) 1351, 1376–7. See also ibid., 1354.

[47] Crawford, Third Report, 86–7, 110–11. For an example of this apparent confusion see Greig (1994) (VCLT, Art. 60 would be rendered a 'dead letter' if countermeasures were permissible in response to non-material breaches). For useful discussion and further references see Sicilianos, (1993) 4 EJIL 341.

[48] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 39. The Court said that '[it] cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:28 Page Number: 683

word 'suspend' in the passage cited above leads to confusion. There is an important conceptual difference between the suspension of a treaty and the refusal (whether or not justified) to comply with a treaty;[49] in other words, between the suspension of the obligation per se and the suspension for the time being of its performance.

In *Gabčíkovo-Nagymaros*, the Court clearly proceeded on the basis that non-performance of a treaty, adopted as a reaction to a prior breach of that treaty, could be justified as a countermeasure, quite apart from the conditions for *suspension* of a treaty under the VCLT.[50] Further, under ARSIWA, it is clear that the temporary non-performance of an unconnected treaty obligation may be justified as a response to the breach by a state of one of its obligations, subject to fulfilment of the requirement of proportionality and the other conditions for countermeasures there set out.

To look at it from the other angle, the suspension of a treaty (or of a severable part of a treaty), if it is legally justified, places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation. By contrast, conduct inconsistent with the terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending or terminating the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts.[51]

The Court in *Gabčíkovo-Nagymaros* affirmed this point in relation to necessity, but it is equally relevant to countermeasures as another circumstance precluding wrongfulness. The Court in that case stressed that

> even if a state of necessity is found to exist, it is not a ground for the termination of 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

at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".'

[49] See e.g. ARSIWA Commentary, Pt III, Ch. II, §4. For a summary of the main differences see ILC Ybk 2000/I, 268–9 (Crawford).

[50] ICJ Rep. 1997 p. 7, 56.

[51] See ARSIWA Commentary, Art. 22, §4. See also Crawford, Third Report, 86–7.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:28 Page Number: 684

treaty – it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[52]

The Court's position is borne out by the commentary to what became Article 60 VCLT, which emphasized that the right to terminate or suspend a treaty under the law of treaties arises 'independently of any right of reprisal'.[53] In any case, the termination of a treaty under VCLT Article 60 could never be justified as a countermeasure, because it does not meet the requirement of reversibility.

The basic distinction between the law of treaties and the law of state responsibility is explicitly safeguarded by Article 73 VCLT. The distinction is also apparent from a consideration of the different functions of each response: suspension of an obligation is a protective response, whereas a countermeasure involving non-performance of a treaty obligation is directed at the enforcement of a right.[54] International courts and tribunals have had no difficulty applying both sets of rules to the same factual situations depending on the context.[55]

21.2.4 Countermeasures by an injured state

The fourth category of unilateral self-help measure is countermeasures, covered in ARSIWA Part III, Chapter II.[56] The concept of countermeasures is recognized both by governments and international courts and tribunals as a legitimate form of peaceful self-help under general international law, a necessary feature of the framework of 'private justice' in a decentralized system.[57]

But countermeasures – especially collective countermeasures – remain deeply controversial, associated as they are with a history of power politics and gunboat diplomacy in international relations.[58] Indeed, the

[52] ICJ Rep. 1997 p. 7, 63. The inconsistent capitalization is in the original.
[53] ILC Ybk 1966/II, 255 (commentary to Draft Art. 57).
[54] Zemanek, (1987) 47 ZaöRV 32, 35.
[55] See *US–France Air Services Agreement*, (1978) 54 ILR 303; *Rainbow Warrior (New Zealand v. France)*, (1990) 82 ILR 499, 550–1; *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 38. See further Alland (2010), 1132–4; Forlati (2012).
[56] For the evolution of the chapter between first reading and final adoption, see Crawford, Second Report, 64, 89–96; Crawford, Third Report, 77–97; Crawford, Fourth Report, 14–19. See further essays by Alland, Sicilianos, Iwasawa and Iwatsuki, O'Keefe, Kamto, Borelli and Olleson, Leben and Boisson de Chazournes in Crawford, Pellet and Olleson (2010), 1127–214.
[57] See Lesaffre (2010). For the view that the ARSIWA provisions on countermeasures represent customary international law, see the decision of the NAFTA Chapter 11 tribunal in *Corn Products International* v. *Mexico*, (2008) 146 ILR 581, 624.
[58] For an overview of practice on reprisals during the nineteenth and early twentieth centuries see Colbert, *Retaliation in International Law* (1948), 60–103.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:28 Page Number: 685

term 'reprisals' was traditionally used to refer to otherwise unlawful measures of self-help, including the use of force, taken in response to a prior breach of international law.[59] More recently, the use of the term 'reprisals' has been restricted to action taken by belligerents in the context of international armed conflict – that is, belligerent reprisals. In the modern era of the UN Charter, with its general prohibition of the unilateral use of force, the term 'countermeasures' accordingly continues to deal with that part of the traditional category of reprisals which is not linked to armed conflict. A countermeasure is thus a *peaceful* unilateral self-help measure.

ARSIWA does not contain a definition of countermeasures as such.[60] Alland has defined them as

> pacific unilateral reactions which are intrinsically unlawful, which are adopted by one or more States against another State, when the former consider that the latter has committed an internationally wrongful act which could justify such a reaction.[61]

In other words, countermeasures involve non-compliance by one state with an international obligation owed towards another state, adopted in response to a prior breach of international law by that other state and aimed at inducing it to comply with its obligations of cessation and reparation.[62] They operate as a circumstance precluding wrongfulness in the law of state responsibility (ARSIWA Article 22).[63] Unlike the *exceptio*, which is limited to the suspension of performance of the same or a closely related obligation, a state adopting countermeasures may in principle choose which obligation to disregard, with no requirement of reciprocity.[64] It is a broad and flexible concept which affords states considerable discretion in inducing compliance with international law.

[59] See ARSIWA Commentary, Pt III, Ch. II, §3 (with further references).

[60] But see Draft Art. 47(1) adopted on first reading: 'For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.' This formulation did not survive the second reading; see Crawford, Third Report, 79–80, 86–8.

[61] Alland (2010), 1135.

[62] See e.g. ARSIWA, Arts. 22, 49. For support in international jurisprudence: *Naulilaa (Portugal v. Germany)*, (1928) 2 RIAA 1011, 1025–6; *Cysne*, (1930) 2 RIAA 1035, 1056; *US–France Air Services Agreement*, (1978) 54 ILR 303, 337–41; *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 55–7.

[63] See ARSIWA Commentary, Art. 22; Lesaffre (2010).

[64] ARSIWA draws no distinction between so-called 'reciprocal' countermeasures and other measures; see ARSIWA Commentary, Pt III, Ch. II, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:29 Page Number: 686

But, like other unilateral self-help measures, countermeasures are liable to abuse. This potential for abuse is not only aggravated by the flexible definition of countermeasures and the controversial history of reprisals with which the modern concept of countermeasures is historically associated, it is exacerbated by the factual inequalities between states. As a result, resort to countermeasures under international law is carefully limited by a number of substantive and procedural safeguards, codified in ARSIWA Articles 49–53.[65] Like the rest of the articles, the provisions on countermeasures are residual in character and remain subject to any special rules to the contrary.[66]

21.2.4.1 The scope and object of countermeasures

The object and limits of justified countermeasures are set out in ARSIWA Article 49:

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.

As already suggested, the existence of a prior breach of international law – entitling a state to invoke the responsibility of the wrongdoing state – is a 'fundamental prerequisite' of any lawful countermeasure.[67] A state that resorts to countermeasures on the basis of a bona fide belief that a breach has occurred does so at its own peril, and may incur responsibility for its own wrongful act in the event that its assessment is unfounded.[68]

[65] For a brief overview see §6. The provisions as finally adopted were the outcome of a lively debate on how best to strike the appropriate balance between recognizing the right to take countermeasures while curbing their misuse; see e.g. ILC Report 1999, UN Doc. A/54/10; Crawford, Third Report, 77–8; Crawford, Fourth Report, 14–15; ILC Report 2001, UN Doc. A/56/10, 22–3.

[66] See ARSIWA Commentary, Pt III, Ch. II, §9; Art. 55. The countermeasures regime under WTO law provides one example of *lex specialis*: see Gomula (2010).

[67] ARSIWA Commentary, Art. 49, §2; Draft Articles Commentary, Art. 47, §1.

[68] See ARSIWA Commentary, Art. 49, §3.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:29 Page Number: 687

As the Court affirmed in *Gabčíkovo-Nagymaros*, a second basic condition of a lawful countermeasure is that it must be directed against the state responsible for the wrongful act.[69] It cannot be taken *urbi et orbi*. While some incidental or collateral effects on third states may be unavoidable in an interdependent world, a countermeasure cannot be specifically aimed at violating the individual rights of third states. This principle, initially affirmed by an arbitral tribunal in the *Cysne* case during the inter-war period,[70] is the equivalent in the law of countermeasures to the *pacta tertiis* rule on the relative effect of treaties, and its equivalent also for obligations under general international law. As the ILC has stressed, the wrongfulness of a countermeasure is accordingly precluded exclusively in relation to the wrongdoing state, a principle which continues to be recognized by international tribunals.[71] By extension, however, incidental or collateral effects on third states that fall short of violating obligations owed to those third states by the state taking countermeasures will not take the countermeasures outside the scope of ARSIWA.[72]

A third primary condition for the lawfulness of a countermeasure was noted by the International Court in *Gabčíkovo-Nagymaros*, although the Court was not required to make a decision on this particular point for the resolution of that case. The Court observed that the purpose of a countermeasure must be 'to induce the responsible state to comply with its international obligations, and that the measure must therefore be reversible'.[73] This raises two points. First, if the countermeasure is not taken for the purpose of requiring the responsible state to meet its obligations, it will not be lawful.[74] Thus the Court found in *Interim Accord* that the steps taken by Greece to object to Macedonia's admission to NATO could not be explained as an attempt to induce the latter to stop

[69] ICJ Rep. 1997 p. 7, 55.

[70] (1930) 2 RIAA 1035, 1056–7. The tribunal in that case was dealing with belligerent reprisals, but the same principle applies to non-forcible countermeasures; see ARSIWA Commentary, Art. 22, §5.

[71] See ARSIWA Commentary, Art. 22, §§4–5; Art. 49, §4. See further e.g. *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005, §4.335 n. 73; *Corn Products International* v. *Mexico*, (2008) 146 ILR 581, 625.

[72] ARSIWA Commentary, Art. 22, §4; Art. 49, §5.

[73] ICJ Rep. 1997 p. 7, 56–7.

[74] The formulation of the legitimate objects and purposes of countermeasures evolved in the course of the ILC's work, as they were progressively divorced from measures that are punitive rather than instrumental in character: see e.g. Ago, Eighth Report, ILC Ybk 1979/II(1), 39–47, discussing Draft Art. 30, which precluded the wrongfulness of 'legitimate application of a sanction', with the term 'sanction' understood as referring to 'an action the object of which is to inflict punishment or to secure performance'; Arangio-Ruiz, Third Report, 15–16; Crawford, Third Report, 78–9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:29 Page Number: 688

using a symbol prohibited by the Interim Accord, and it therefore declined to consider any further arguments on the law of countermeasures in that case.[75] Second, the question of reversibility is intimately linked to the instrumental function of countermeasures, to the extent that it implies a reversion to legality on both sides after the objectives of cessation and reparation have been met.[76] The requirement of reversibility, while not absolute,[77] thus reinforces the notion that countermeasures must have a temporary, essentially protective or remedial character, not a punitive one.[78] The essence of a countermeasure may be described as a 'shield rather than a sword'.[79]

21.2.4.2 Prohibited countermeasures

While the concept of countermeasures affords states flexibility in determining which obligations to disregard, it would be absurd if a state could choose to suspend *any* obligation of international law. Considerations of good order and humanity strongly suggest some limitation on the range of obligations whose performance a state may legitimately suspend by way of countermeasures. Already during the inter-war period, the arbitral tribunal in *Naulilaa* stressed, rather obscurely, that the use of countermeasures was 'limited *by the experiences of humanity and the rules of good faith*'.[80] More recently, the ICTY trial chamber observed in the *Kupreškić* case that 'barbarous means of seeking compliance with international law' are clearly unlawful.[81] But pronouncements like these do not spell out any clear basis for limitation of the obligations a state may legitimately suspend by way of countermeasures.

One obvious basis is provided by ARSIWA Article 26, which provides that nothing in Part I, Chapter V – which includes Article 22 on countermeasures – precludes the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm.[82] So countermeasures may not derogate from peremptory norms. Clearly,

[75] *Interim Accord*, 5 December 2011, ICJ, §164. [76] See ILC Ybk 2000/I, 265 (Crawford).
[77] As the commentary points out, it may not be possible in all cases to reverse all of the effects of countermeasures; ARSIWA Commentary, Art. 49, §9.
[78] For a similar conclusion see ibid., §§1, 7. On the time factor in the application of countermeasures see Kamto, in Crawford, Pellet and Olleson (2010) 1169.
[79] See ARSIWA Commentary, Pt I, Ch. V, §2.
[80] (1928) 2 RIAA 1011, 1026: 'limitée *par les expériences de l'humanité et les règles de la bonne foi*' (emphasis in original).
[81] ICTY Case No. IT-95-16-T, 14 January 2000, §528 (discussing reprisals against civilians).
[82] See Crawford, Third Report, 83–5, 90–1; Leben, in Crawford, Pellet and Olleson (2010) 1197.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:30 Page Number: 689

'a genocide cannot justify a counter-genocide',[83] whether by reference to countermeasures or any other rule or doctrine of international law. This exclusion of measures in breach of peremptory norms from the remit of lawful countermeasures is a starting point for a list of prohibited countermeasures, set out in ARSIWA Article 50. But ARSIWA Article 50 also provides that countermeasures shall not affect certain other obligations whose peremptory status is less evident. As a result, the precise rationale for the exclusion of these obligations requires clarification.

The critique that the ILC's treatment of prohibited countermeasures does not appear to be based on principle[84] finds support in the rather disparate list of excluded countermeasures. ARSIWA Article 50 provides as follows:

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 UN Charter;
   (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.

In relation to ARSIWA Article 50(1), the ILC commentary provides that 'by reason of their character ... [these obligations] are sacrosanct'.[85] Whether or not this sacrosanct character is expressed by their peremptory status, the ILC deemed it essential to single out these inviolable obligations for specific mention. By contrast, the exclusions in ARSIWA Article 50(2) are said to be based 'not so much [on] the substantive

[83] See ARSIWA Commentary, Art. 26, §4; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-claims, Order, 17 December 1997, [1997] ICJ Rep. 243, 258.
[84] ILC Ybk 2001/I, 6; Crawford, Fourth Report, 16. For similar criticism see also ILC Ybk 2001/I, 113 (Pellet).
[85] See ARSIWA Commentary, Art. 50, §§1–2.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:30 Page Number: 690

character of the obligation[s] but [their] function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures'.[86]

The apparent absence of any common rationale behind the list of exclusions in ARSIWA Article 50 has a straightforward and pragmatic explanation: beyond the principle of peremptory norms,[87] it was not possible in the ILC and among states to find agreement on a more rigorous basis. As the Drafting Committee explained in 2001, the Article was drafted with a view to state practice, and accordingly it contained 'specific provisions, not general principles that could be subjected to different interpretations . . .'.[88] The list of specific exclusions was accordingly adopted without prejudice to the peremptory status of each individual obligation.[89]

The ILC still found it necessary to include a general catch-all category covering peremptory norms in order to safeguard possible future developments and reinforce the basic notion – formally adopted in ARSIWA Article 26 – that countermeasures derogating from such fundamental obligations were, by definition, impermissible.[90] Leaving this general exclusion aside, the following subsections briefly assess each of the specific exclusions in ARSIWA Article 50 in turn.

(i) The obligation to refrain from the threat or use of force. The exclusion of forcible countermeasures in ARSIWA Article 50(1)(a) is uncontroversial: the rules embodied in the UN Charter relating to the use of force are widely regarded as peremptory norms.[91] The Charter era provides ample authority to support an exclusion of forcible

[86] See ibid., §§11, 15.

[87] It should be noted, however, that even the peremptory status of some of the proposed exclusions in ARSIWA, Art. 50(1) was controversial. See e.g. UN Doc. A/CN.4/488, 133 (Ireland, United States and France); UN Doc. A/CN.4/515, 78 (United Kingdom), 79 (US).

[88] ILC Ybk 2001/I, 117 (Tomka); cf. ILC Ybk 2000/I, 397 (Gaja).

[89] ILC Ybk 2001/I, 117 (Tomka). For a similar approach on first reading see Draft Articles Commentary, Art. 50, §1.

[90] Crawford, Third Report, 90; ILC Ybk 2000/I, 397 (Gaja); ILC Ybk 2001/I, 111 (Tomka); ARSIWA Commentary, Art. 50, §9; Art. 40, §§4–6. A similar position had been adopted on first reading, see ILC Ybk 1993/I, 145 (Mikulka); Draft Articles Commentary, Art. 50, §§1, 26.

[91] See e.g. §§1 and 3 of the commentary to what became VCLT, Art. 53, ILC Ybk 1966/II, 247–8; ARSIWA Commentary, Art. 40, §4 (with further references); ILC Ybk 1993/I, 145 (Mikulka); Draft Articles Commentary, Art. 50, §3. For judicial affirmation see *Nicaragua*, ICJ Rep. 1986 p. 14, 100–1, 127; 153 (Judge Nagendra Singh); 199 (Judge Sette-Camara); *Oil Platforms (Iran v. US)*, ICJ Rep. 2003 p. 161, 327–8, 329–30 (Judge Simma), 291 (Judge Elaraby, diss.), 269 (Judge Al-Khasawneh, diss.); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136, 254 (Judge Elaraby);

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:31 Page Number: 691

countermeasures. The International Court unequivocally affirmed this prohibition in *Corfu Channel* in 1949.[92] From the 1950s onwards, the prohibition of forcible countermeasures has also been repeatedly recognized by the UN Security Council,[93] as well as by the ILC.[94] In 1970, the UN General Assembly adopted the Friendly Relations Declaration, which affirmed that 'States have a duty to refrain from acts of reprisal involving the use of force'.[95] The customary law status of that resolution was later recognized by the International Court in the *Nicaragua* case.[96]

In 1978, the arbitral tribunal in the *Air Services* case introduced the modern concept of countermeasures and reaffirmed:

> If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures'.[97]

The Court observed in the *Nicaragua* case that '[w]hile an armed attack would give rise to an entitlement of collective self-defence, a use of force of a lesser degree cannot ... produce any entitlement to take collective counter-measures involving the use of force.'[98] Similarly, in *Nuclear Weapons*, the Court noted that 'armed reprisals in time of peace ... are considered to be unlawful'.[99] These antecedents form the basis of the prohibition in ARSIWA Article 50(1)(a). This prohibition was reaffirmed in the *Guyana/Suriname* arbitration with express reference to Article 50(1)(a).[100]

(ii) Obligations under international human rights and humanitarian law. The classical *Naulilaa* formula excluding those countermeasures

Armed Activities on the Territory of the Congo (DRC v. Uganda), ICJ Rep. 2005 p. 168, 223–7. See further Leben (2010).

[92] *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4, 35.

[93] See Draft Articles Commentary, Art. 50, §5 n. 758, which refers to the following examples: SC Res. 111 (1956); SC Res. 171 (1962); SC Res. 188 (1964); SC Res. 316 (1972); SC Res. 332 (1973); SC Res. 573 (1985); SC Res. 1322 (2000).

[94] For an early affirmation see Fitzmaurice, Fourth Report on the Law of Treaties, ILC Ybk 1959/II, 67 (commenting on his Draft Art. 18 on reprisals).

[95] See the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Principle 1, §6.

[96] ICJ Rep. 1986 p. 14, 101. See also ARSIWA Commentary, Art. 50, §5; UN Doc. A/CN.4/488, 129 (Ireland).

[97] *US–France Air Services Agreement*, (1978) 54 ILR 303, 337.

[98] ICJ Rep. 1986 p. 14, 127. See also ARSIWA Commentary, Art. 50, §5 n. 757.

[99] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 p. 226, 246.

[100] *Guyana/Suriname* (2007) 139 ILR 566, 702.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:31 Page Number: 692

which do not meet the requirements of humanity[101] has become firmly entrenched in international law.[102] But some ambiguity remains over precisely what this entails. Human rights obligations are not, in the first instance at least, owed to particular states, and it is accordingly difficult to see how a human rights obligation could itself be the subject of legitimate countermeasures. In any event, as a minimum, it is clear from ARSIWA Articles 22 and 50(1)(d) that a state cannot lawfully take countermeasures that violate those human rights obligations that qualify as peremptory norms. The question then becomes whether the entire body of human rights law or only a small part of it has attained peremptory status. Judge Tanaka represents the former view. In *Second South West Africa*, he suggested:

> If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law of human rights may be considered to belong to the *jus cogens*.[103]

But Judge Tanaka's suggestion that peremptory norms cover the whole body of human rights law remains a minority view.[104]

In truth, beyond a core of basic human rights, there is no agreement about the peremptory status of individual human rights obligations.[105] The ILC commentaries to ARSIWA Articles 26 and 40 adopt the same approach and limit themselves to an illustration of obligations that clearly have attained peremptory status: the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the obligation to respect the right to self-determination.[106] The question facing the ILC was accordingly whether, beyond the narrow list of established peremptory norms, other human rights obligations should in principle also be excluded by way of countermeasures.

[101] (1928) 2 RIAA 1011, 1026. See also IDI Res. 1934/III (Paris), Art. 6(4).

[102] See Crawford, Third Report, 84–5, 90; ARSIWA Commentary, Art. 50, §§6–8; Borelli and Olleson, in Crawford, Pellet and Olleson (2010) 1177.

[103] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa),* Second Phase, ICJ Rep. 1966 p. 6, 298 (Judge Tanaka, diss.). For a similar (contemporaneous) position see also Verdross, (1966) 60 AJIL 59.

[104] For commentators indirectly supporting Judge Tanaka's position see e.g. Riphagen, Preliminary Report on State Responsibility, ILC Ybk 1980/II(1), 127; Zemanek (1987), 39–40 (referring to the totality of the Universal Declaration of Human Rights, GA Res. 217A(III), 10 December 1948, as part of *jus cogens*); Parker and Neylon, (1989) 12 Hastings ICLR 411, 441–3.

[105] For discussion see e.g. Orakhelashvili (2006), 53–60 (with many further references).

[106] See ARSIWA Commentary, Art. 26, §5; Art. 40, §§4–5. The ILC adopted the same approach in relation to *erga omnes* obligations: ibid., Art. 48, §9.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:31 Page Number: 693

The ILC answered this question in the negative. The Drafting Committee in 2000 explained that 'given the wide meaning acquired by the concept of human rights, resort to countermeasures would be severely limited unless the reference to human rights was qualified'.[107] It added that 'the important thing was that the effects of countermeasures should essentially be limited to the injured State and the responsible State and should have only minimal effects on individuals'.[108] The Drafting Committee evidently referred to state practice which appeared to have respected certain humanitarian limitations in cases where the use of countermeasures might have had indirect consequences on the nationals of the target state.[109] In short, collective punishment of the population of the target state should be avoided.[110]

The ILC ultimately adopted this approach. Further, to emphasize that Article 50(1)(b) deals not only with direct violations of the state's human rights obligations but equally with indirect breaches, the provision provides that 'countermeasures shall not *affect* obligations for the protection of fundamental human rights' (emphasis added).[111] The commentary to this provision explains that violations of non-derogable human rights obligations under relevant human rights treaties as well as indirect human rights violations causing 'collateral infliction of suffering upon the most vulnerable groups within the targeted country' are excluded from the group of permissible countermeasures.[112] This clarification was widely supported by states.[113]

Compared with the uncertainty that has surrounded the relationship between countermeasures and human rights obligations, the position

[107] ILC Ybk 2000/I, 397 (Gaja). [108] Ibid.

[109] It should be noted, however, that not all of these humanitarian exceptions necessarily involved conduct by the acting state or states which was required of them under international human rights law. See Crawford, Third Report, 84.

[110] See Draft Articles Commentary, Art. 14, §§20–2; see also Crawford, Third Report, 84; Riphagen, Preliminary Report on State Responsibility, ILC Ybk 1980/II(1), 127 (referring to the humanitarian exception affirmed in the *Namibia* case).

[111] The 'fundamental human rights' terminology is largely identical in meaning to the notion of 'basic human rights' used by the International Court in *Barcelona Traction, Light & Power Company, Limited (Spain v. Belgium)*, Second Phase, ICJ Rep. 1970 p 3: see ILC Ybk 2000/I, 397 (Gaja). See further Borelli and Olleson (2010), 1182–8.

[112] See commentary to Art. 50 ARSIWA, §7, citing Committee on Economic, Social and Cultural Rights, General Comment 8, 5 December 1997, UN Doc. E/C.12/1997/8, §1. It may be noted that state practice does not suggest that the acting state or states (notably through the imposition of comprehensive trade embargos) have indirectly breached basic human rights obligations. In any case, serious problems of causality could arise under such a scenario; accordingly, the necessary attribution of wrongful conduct to the state or states taking (collective) countermeasures could be problematic.

[113] UN Doc. A/CN.4/513, 28.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:32 Page Number: 694

under humanitarian law seems clearer. In *Nuclear Weapons*, the International Court affirmed that 'a great many rules of humanitarian law applicable in armed conflict ... constitute intransgressible principles of international customary law'.[114] In the same case, President Bedjaoui agreed with this finding and strongly suggested that the term 'intransgressible' was shorthand for peremptory norms.[115] In the *Kupreškić* case, the ICTY trial chamber reiterated that 'most norms of international humanitarian law ... are also peremptory norms of international law'.[116] As the ILC commentary to ARSIWA Article 40 suggests, it seems generally accepted that the basic rules of international humanitarian law are peremptory in character.[117] On that basis, the suspension of most norms of international humanitarian law by way of countermeasures would be excluded under ARSIWA Article 26. Moreover, Article 50(1)(c) excludes 'obligations of a humanitarian character prohibiting reprisals'. The prohibition of reprisals against civilians is well established[118] and the separate articulation of this principle within the context of Article 50 is consistent with the ILC's desire to ensure that effects of countermeasures on individuals should be kept to a minimum.

In *Prisoners of War – Eritrea's Claim 17*, heard by the Eritrea–Ethiopia Claims Commission in 2003, Eritrea relied on Article 50 to support its arguments that Ethiopia had violated its international obligations by failing to repatriate promptly some 1,300 prisoners of war:

> Ethiopia's suspension of prisoner of war exchanges cannot be justified as a non-forcible counter-measure under the law of State responsibility because, as Article 50 [ARSIWA] emphasizes, such measures may not affect 'obligations for the protection of fundamental human rights', or 'obligations of a humanitarian character prohibiting reprisals'.[119]

The Commission held that Eritrea's arguments were well founded.[120]

(iii) The separability of dispute settlement provisions. Where binding third-party dispute settlement procedures are available to states it seems reasonable to assume that the role of countermeasures is diminished, if not entirely excluded. Evidently, dispute settlement provisions

[114] *Nuclear Weapons*, ICJ Rep. 1996 p. 226, 257. See also *Wall*, ICJ Rep. 2004 p. 136, 199.
[115] ICJ Rep. 1996 p. 226, 273. See also 496 (Judge Weeramantry, diss.); 574 (Judge Koroma, diss.).
[116] *Kupreškić*, ICTY Case No. IT-95-16, 14 January 2000, §520.
[117] See ARSIWA Commentary, Art. 40, §5.
[118] See ibid., Art. 50, §8; for more detailed discussion of the conventional and customary rules see Borelli and Olleson (2010), 1188–95.
[119] *Prisoners of War – Eritrea's Claim 17*, (2003) 135 ILR 199, 247. [120] Ibid., 247.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:32 Page Number: 695

in treaties apply precisely in circumstances where a breach has occurred or is asserted. A principle of separability therefore seems appropriate also in the context of the law of countermeasures. It finds strong support under general international law.

The non-reciprocal or autonomous character of dispute settlement provisions is explicitly recognized in VCLT Article 60(4), which provides that 'the foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach'.[121] In his capacity as Special Rapporteur on the law of arbitral procedure, Scelle had pointed out that it was well established that the 'undertaking to arbitrate' was 'inviolable' and therefore rightly constituted the 'most vital principl[e] of arbitration'.[122]

The ICJ has affirmed this principle on several occasions. In *Appeal Relating to the Jurisdiction of the ICAO Council*, the Court emphasized that

> a merely unilateral suspension [could not] *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[123]

The Court continued:

> The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses ... Such a result, destructive of the whole object of adjudicability, would be unacceptable.[124]

In similar vein, the Court reaffirmed in *Hostages*:

> 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 the pacific settlement of disputes ... It is precisely when difficulties arise that the treaty assumes its greatest importance.[125]

[121] The laconic reference in §10 of the commentary to what became VCLT, Art. 60 (Draft Art. 57), underlines the uncontroversial character of this provision: see ILC Ybk 1966/II, 253, 255. See further Simma and Tams (2011), 1357.

[122] Scelle, Fourth Report on the Law of Arbitral Procedure, ILC Ybk 1958/II, 3. See further the preamble to the ILC's Model Rules on Arbitral Procedure, ibid. at 83; and for the approval of the draft rules see GA Res. 1262(XIII), 14 November 1958.

[123] *ICAO Council*, ICJ Rep. 1972 p. 46, 53. See also *Namibia*, ICJ Rep. 1971 p. 16, 47 for an affirmation of the customary law status of VLCT, Art. 60 as a whole.

[124] *ICAO Council*, ICJ Rep. 1972 p. 46, 64. See also Schwebel, *International Arbitration: Three Salient Problems* (1987), 13–59.

[125] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, ICJ Rep. 1980 p. 3, 28 (§§53–4).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:32 Page Number: 696

In short, there is ample support under general international law for the separability or autonomy of dispute settlement provisions. Article 50(2)(a) ARSIWA largely reaffirms this position in providing that '[a] state taking countermeasures is not relieved from fulfilling its obligations ... under any dispute settlement procedure applicable between it and the responsible State.'

(iv) Obligations safeguarding diplomatic and consular inviolability. The preamble to the Vienna Convention on Diplomatic Relations (VCDR) explains that the granting of privileges and immunities to diplomatic representatives is not so much intended to benefit individuals as 'to ensure the efficient performance of the functions of diplomatic missions as representing States'.[126] The effective and smooth operation of at least a basic level of diplomatic channels of communication is integral to peaceful coexistence among states – *a fortiori* in times of crisis, as evidenced by VCDR Article 45.[127] As the Court was careful to stress in *Hostages*, the institution of diplomacy is essential for effective international co-operation and for enabling states to achieve mutual understanding and resolve their differences by peaceful means.[128] The *raison d'être* of diplomatic law thus strongly suggests some limitation on the use of countermeasures under this regime.

Much of the debate in the ILC (and elsewhere) on this issue has focused on a somewhat unfortunate passage in the Court's judgment in *Hostages*. In that case, the Court was addressing the issue of whether the Iranian violations of diplomatic law – that is, through their connivance in the hostage taking of US diplomatic and consular officials in Tehran, Tabriz and Shiraz – could be justified as a countermeasure in response to alleged US violations of diplomatic law towards the host state, Iran. The Court rejected the Iranian contention that special circumstances justified its actions,[129] holding that 'diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.[130] In a much criticized passage it continued:

[126] 18 April 1961, 500 UNTS 95, preamble.

[127] Cf. Draft Articles Commentary, Art. 50, §14; Crawford, Third Report, 89; Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (1998), 1. VCDR, Art. 45 provides that a receiving state must respect and protect the premises of a mission, together with its property and archives, 'even in the case of armed conflict'.

[128] *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Provisional Measures, 15 December 1979, ICJ Rep. 1979 p. 7, 19. To similar effect: *Tehran Hostages*, ICJ Rep. 1980 p. 3, 43.

[129] See further ibid., 37. [130] Ibid., 38.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:33 Page Number: 697

The rules of diplomatic law, in short, constitute a self-contained régime 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. These means are, by their nature, entirely efficacious . . .[131]

A literal interpretation of this passage suggests that the Court excluded *a priori* the use of countermeasures from the regime governing diplomatic relations. But most commentators agree that this impression is unfounded.[132] The Court in *Hostages* was concerned to make a narrower point: that is, that non-compliance with certain core obligations in the field of diplomatic law cannot be justified by reference to the notion of countermeasures.

The ILC broadly supported this interpretation of the *Hostages* dictum, excluding only inviolable or core obligations of diplomatic and consular law from the remit of legitimate countermeasures. This was also in response to observations by various members of the ILC that certain countermeasures, such as breaking off diplomatic relations or restricting the freedom of movement of diplomatic agents, were frequently used in practice, and could be very effective; as such, recourse to countermeasures in the area of diplomatic law should be limited but not wholly prohibited.[133] ARSIWA Article 50(2)(b) accordingly prohibits any countermeasure which does not 'respect the inviolability of diplomatic or consular agents, premises, archives and documents'.[134] Conversely, any countermeasure that does not affect inviolable obligations under diplomatic and consular law remains legitimate.[135]

21.2.4.3 Proportionality

Even if it is established that a proposed countermeasure is not among the categories of prohibited actions, the right to take countermeasures is not unlimited. It has long been recognized that international law requires

[131] Ibid., 40.

[132] See e.g. ILC Ybk 1984/I, 304 (Sinclair); Zemanek (1987), 40; Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (1990), 350–1; ILC Ybk 1992/I, 159 (Al-Khasawneh); Cannizzaro, (2001) 12 EJIL 889, 897–8; Simma and Pulkowski, (2006) 17 EJIL 483, 514.

[133] See ILC Ybk 1992/II(2), 34; ARSIWA Commentary, Art. 50, §14; Boisson de Chazournes, in Crawford, Pellet and Olleson (2010) 1205, 1208.

[134] That is, e.g., any countermeasure inconsistent with VCDR, Arts. 22, 24, 29, 44 and 45. For a detailed analysis of these provisions see Denza (1998), 112–48, 157–64, 210–20, 389–91, 392–402 respectively.

[135] See ARSIWA Commentary, Art. 50, §§14–15.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:33 Page Number: 698

that countermeasures respect the important principle of proportionality;[136] that is, 'the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question'.[137] This rule is reflected in ARSIWA Article 51, which requires in addition that states take into account the gravity of the internationally wrongful act.

The principle regulates both the types of countermeasure that may be applied and their intensity. Franck describes it as a 'brake on escalating cycles of transactional violence';[138] such a brake is particularly important when the target state denies the unlawfulness of its own act that purportedly triggered another state's decision to take countermeasures against it.[139] It is clear that disproportionate countermeasures could result in responsibility on the part of the state taking them.[140] Indeed, a state might sometimes choose to limit its response to retorsion, even where it would be entitled to take countermeasures, on the basis that countermeasures would be disproportionate to the injury suffered.[141] As the tribunal in the *Air Services* arbitration observed, judging proportionality is not always easy, and it 'can at best be accomplished by approximation'.[142] Still, despite its indeterminacy, the operation of the principle does have a practical influence on the conduct of interstate relations.[143]

Proportionality is crucial for 'controlling the exercise of the decentralised power conferred on states to react individually to internationally wrongful acts'; it provides a functional connection between the aims and the means of self-help measures.[144] There is no requirement of reciprocity for countermeasures to be deemed proportionate, but countermeasures will be more likely to satisfy the proportionality test if they are

[136] See e.g. *Naulilaa*, (1928) 2 RIAA 1011, 1026; *US–France Air Services Agreement*, (1978) 54 ILR 303, 338; *Nicaragua*, ICJ Rep. 1986 p. 14, 127. See also IDI Res. 1934/III (Paris), Art. 6(2): 'Dans l'exercice des représailles, l'Etat doit se conformer aux règles suivantes: . . . (2) Proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi'. Translation: 'In the exercise of reprisals, the State must comply with the following rules: . . . (2) The pressure employed must be proportionate to the seriousness of the act denounced as illegal and the significance of the damage suffered.'

[137] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 56. On proportionality in the context of countermeasures see generally Cannizzaro (2001); Franck, (2008) 102 AJIL 715; O'Keefe, in Crawford, Pellet and Olleson (2010) 1157 (including further references at 1168).

[138] Franck, (2008) 102 AJIL 715, 715.

[139] O'Keefe, in Crawford, Pellet and Olleson (2010) 1157, 1160.

[140] ARSIWA Commentary, Art. 51, §1.

[141] Giegerich (2011), §4.

[142] *US–France Air Services Agreement*, (1978) 54 ILR 303, 338. See further Cannizzaro (2001); O'Keefe (2010), 1165–6.

[143] Franck (2008), 717–18.

[144] Cannizzaro (2001), 915.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:34 Page Number: 699

taken in relation to the same or a closely related obligation.[145] It is also clear that proportionality imposes a restriction on countermeasures 'over and above that implied by their stated object':[146] that is, a claim that an action was necessary to induce the responsible state to comply with its obligations will not be enough to support the lawfulness of that action if it was not also proportionate – but there is also the point that if a measure is clearly disproportionate, it would be difficult to sustain an argument that it was necessary.[147]

That the proportionality of countermeasures should be assessed not purely on quantitative grounds but also on qualitative ones has been a recurring theme.[148] The countermeasures at issue in *Air Services* were not exactly equivalent in effect to the original conduct, but the tribunal approached the determination of proportionality as a matter of principle, not simply a quantitative exercise.[149] The same approach – combining a quantitative assessment with a qualitative one – was adopted in *Gabčíkovo-Nagymaros*, where the Court concluded that the diversion of the Danube carried out by Czechoslovakia was unlawful on grounds of disproportionality.[150] The step of taking into account the gravity of the internationally wrongful act and the rights in question, as required by Article 51, is part of ensuring that the measures adopted are compared against the proper function of the action of self-redress; Cannizzaro describes this as the essence of proportionality. Not only must the means chosen be appropriate to the aim of the respondent state, but also that aim must itself be reasonable and appropriate, in the context of the structure of the breached norm and of the legal consequences deriving from the breach.[151]

ARSIWA Article 51 has thus been recognized by international tribunals as an authoritative statement of customary international law.[152]

[145] See Crawford, Third Report, 87–8; ARSIWA Commentary, Art. 49, §6.

[146] O'Keefe (2010), 1158.

[147] See discussion in ibid., 1157–9; see further ARSIWA Commentary, Art. 51, §7.

[148] See e.g. Arangio-Ruiz, Third Report, 21 n. 141; Arangio-Ruiz, Fourth Report, ILC Ybk 1992/II (1), 23; ARSIWA Commentary, Art. 51, §§3–4, 6. See further O'Keefe (2010), 1160–5.

[149] See ARSIWA Commentary, Art. 51, §3. The United States suspended Air France's thrice-weekly flights to Los Angeles in response to a mere prohibition of change of gauge on the London–Paris sector, in commercial terms a much less onerous condition.

[150] *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 56.

[151] Cannizzaro calls this 'external proportionality'; by contrast, he argues that 'internal proportionality' is a separate logical operation which requires an appraisal of the appropriateness of the content of the measures adopted in relation to the result that they seek to achieve (Cannizzaro (2001)).

[152] E.g. the WTO Appellate Body in *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002,

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:34 Page Number: 700

21.2.4.4 Procedural incidents of countermeasures

The right to take countermeasures does not flow automatically from another state's wrongful act; certain steps must be taken first to activate that right. The procedural conditions for countermeasures are particularly important given that the wrongfulness of the act of the target state that provoked them will not usually have been objectively determined at the time they are taken.[153] With a view to establishing reasonable procedural conditions for resort to countermeasures in a context where compulsory third-party dispute settlement may not be available, but without interfering with such dispute settlement mechanisms as are available,[154] ARSIWA Article 52 builds on the observations of the *Air Services* tribunal.[155] Article 52(1) sets out two basic requirements:

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

   (a) Call on 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.

It is evident from the chapeau of Article 52(1) that each of the conditions must be satisfied prior to the commencement of countermeasures. The conditions are cumulative.[156] First of all, the injured state is required to give the responsible state an opportunity to respond to the allegation of wrongful conduct and to revert to a posture of legality. This fundamental condition was emphasized by the International Court in *Gabčíkovo-Nagymaros*: 'the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it'.[157]

Second, a state intending to take countermeasures must notify the target state and attempt to negotiate. Countermeasures could have serious consequences for the responsible state, and it may choose to

§259; a NAFTA Chapter 11 tribunal in *ADM and Tate & Lyle* v. *Mexico*, (2008) 146 ILR 439, 495–7.

153 Iwasawa and Iwatsuki, in Crawford, Pellet and Olleson (2010) 1149, 1149.

154 ARSIWA Commentary, Art. 52, §2.

155 *US–France Air Services Agreement*, (1978) 54 ILR 303, 339–41. See ARSIWA Commentary, Art. 52, §§3–5.

156 Kamto (2010), 1170.

157 *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 56. This is referred to as 'sommation'.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:35 Page Number: 701

reconsider its position; countermeasures should be 'a wager on the wisdom, not on the weakness of the other Party'.[158] There is no strict temporal relationship between the conditions in paragraphs (a) and (b), and in practice it will frequently be the case that negotiations over a dispute will have been ongoing for some time before an injured state reaches a decision to take countermeasures.[159] As Judge Bennouna observed in *Interim Accord*, Greece did not comply with the procedural conditions for implementing countermeasures in ARSIWA Article 52, notably Article 52(1)(b), and was thus prevented from invoking the right to take countermeasures on this ground also.[160]

Notwithstanding the requirements of notification and negotiation in Article 52(1)(b), however, Article 52(2) recognizes that injured states may take 'such urgent countermeasures as are necessary' to preserve their rights.[161] This corresponds to the notion of 'interim countermeasures' included in earlier drafts of what became Article 52(2).[162] Such urgent measures might include things like temporary suspension of licences or stay orders, or freezing of assets; such actions are inherently reversible, and moreover they may only be effective if taken promptly.[163] The provision for urgent countermeasures helps to ensure that injury to states is not exacerbated by hampering their ability to respond in a timely manner, including, for example, if that inability is caused by delay or prevarication on the part of a responsible state. The purpose of such measures must be the maintenance of the *status quo*.[164] The specific reference in Article 52(2) to paragraph (b) of Article 52(1) makes it clear that the right to take urgent countermeasures does not override the primary obligation to call on the responsible state to rectify its wrongful act in paragraph (a).

Article 52(3) provides for situations in which the wrongful act has ceased and the dispute is pending before a competent court or tribunal with authority to make a decision with binding effect for the parties. In such a case 'countermeasures may not be taken, and if already taken must be suspended without undue delay'.[165] The rationale is that once the tribunal or court is properly constituted and in a position to deal

[158] *US–France Air Services Agreement*, (1978) 54 ILR 303, 339–40.
[159] ARSIWA Commentary, Art. 52, §§4–5.
[160] *Interim Accord*, 5 December 2011, ICJ, Declaration of Judge Bennouna.
[161] See ARSIWA Commentary, Art. 52, §6.
[162] Crawford, Third Report, 80, 93–4 (on Draft Articles, Art. 48(1)). [163] Ibid., 80.
[164] See Iwasawa and Iwatsuki (2010), 1154.
[165] See ARSIWA Commentary, Art. 52, §§7–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:35 Page Number: 702

with the case, such that the dispute is 'pending' for the purposes of Article 52(3)(b), the injured state could seek provisional measures for its protection and countermeasures would no longer be necessary. It is worth observing that any third-party dispute settlement procedure, regardless of designation, is covered by the words 'court or tribunal', but political organs or other bodies such as the UN Security Council are excluded, as are tribunals with jurisdiction only between a private party and the responsible state.[166]

Earlier incarnations of these provisions were highly controversial in the ILC, with widespread disagreement over the extent to which compliance with dispute settlement procedures should be a prerequisite for initiating countermeasures.[167] The final text emphasizes that countermeasures are instrumental not punitive in character, and that unilateral action cannot be justified once a dispute settlement process is under way.[168] The conditions in Article 52(3)(a) and (b) reinforce the temporary character of countermeasures and that they are not intended to interfere with machinery for the peaceful settlement of disputes. But under Article 52(4) the restrictions in paragraph 3 are inapplicable if the responsible state fails to implement the dispute settlement procedures in good faith.[169] In general, the procedural conditions for countermeasures are guided by the principles of necessity and non-aggravation of disputes.[170]

21.2.4.5 Termination of countermeasures

Countermeasures are permitted only for as long as the circumstances justifying their use obtain – that is, while the injured state is seeking to induce compliance with the responsible state's obligations of cessation and reparation. The temporary, provisional character of countermeasures is central to the legal regime.[171]

Article 49(2) ARSIWA uses the words 'for the time being'; it is evident that the underlying obligations of the state taking countermeasures are not themselves suspended or terminated, and the wrongfulness of its conduct is only precluded provided that, and for so long as, the necessary conditions for taking countermeasures are satisfied.[172] As the commentary to Article 49 suggests, where countermeasures have been effective

[166] Ibid., §8.
[167] See Crawford, Third Report, 80–2, 94 (on Draft Articles, Art. 48); Crawford, Fourth Report, 16–17 (on Draft Art. 53).
[168] See Crawford, Peel and Olleson, (2001) 12 EJIL 963, 982–4.
[169] See ARSIWA Commentary, Art. 52, §9. [170] Iwasawa and Iwatsuki (2010), 1152–5.
[171] See Kamto (2010). [172] ARSIWA Commentary, Art. 22, §4.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:35 Page Number: 703

in securing their instrumental function, they must be discontinued and the performance of the obligation must be resumed.[173] Article 53 ARSIWA makes this requirement clear by explicitly providing that a countermeasure shall be terminated as soon as international legality has been restored.[174] No delay is tolerated; countermeasures must be terminated 'forthwith' and a failure to do so has the potential to engage the responsibility of the injured state.[175]

21.2.5 Collective countermeasures

If the question of unilateral countermeasures by an injured state has been controversial, the notion of countermeasures by states that have not themselves been directly injured by an internationally wrongful act has been even more so. 'Collective countermeasures' is the term used to describe not just countermeasures by a plurality of injured states or on behalf of such injured states, but also countermeasures by third states asserting a right to respond in the public interest to a breach of a multilateral obligation to which they are privy.[176] The legal position in respect of both situations has been and remains uncertain; a review of state practice on resort to collective countermeasures did not lead to clear conclusions.[177]

On the first question – whether two or more states have the right to co-operate to initiate countermeasures against a responsible state or states – it seems that where there is a clearly identifiable injured state, other states have sometimes participated in collective countermeasures at the request and on behalf of that state, and the injured state's own reaction is treated as legally relevant by those other states.[178] In *Nicaragua*, however, while acknowledging that an armed attack might give rise to a right of collective self-defence at the request of the victim, the Court denied that a use of force of a lesser degree of gravity could produce any entitlement to take collective countermeasures involving the use

[173] ARSIWA Commentary, Art. 49, §§7, 9.

[174] For the drafting history of ARSIWA, Art. 53 see UN Doc. A/CN.4/488, 133 (the French proposal); Crawford, Third Report, 94–6 (the proposed Draft Art. 50*bis*); ILC Ybk 2000/I, 400 (Gaja).

[175] See Kamto (2010), 1176.

[176] A/CN.4/507/Add.4, 101–2. Countermeasures by non-directly injured states may also be described as 'third-party countermeasures': see Dawidowicz (2006), 333 (esp. n. 1).

[177] See Crawford, Third Report, 102–4; ARSIWA Commentary, Art. 54, §§3–6; cf. Dawidowicz (2006), 408–9; Sicilianos, in Crawford, Pellet and Olleson (2010) 1137, 1145–8.

[178] Crawford, Third Report, 105; ARSIWA Commentary, Art. 54, §5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:36 Page Number: 704

of force. It was clear to the Court that the alleged intervention by Nicaragua – if proven – could not have justified countermeasures taken by a state other than the injured state, and particularly could not have justified the use of force.[179] The Court did not address what the position would be if the victim had *requested* that other states assist it in taking collective (non-forcible) countermeasures against Nicaragua; it seems reasonable to conclude, by analogy with collective self-defence, that the position would be different.[180] There seems to be no reason in principle why a state injured by a breach of a multilateral obligation should be left alone to seek redress for the breach. Bilateral countermeasures strongly favour states that are more powerful; if weaker states are forced to resort to bilateral countermeasures without the support of interested third states, serious breaches may go unremedied.[181] Of course, any countermeasures taken collectively must abide by the rules governing resort to individual countermeasures; proportionality will be a key concern.[182]

With respect to the second form of collective countermeasures, the most controversial issues arise in connection with serious breaches of obligations owed to the international community as a whole.[183] ARSIWA Article 48 recognizes that states other than an injured state may have an interest in compliance with particular obligations that 'transcend the sphere of bilateral relations of the States parties'.[184] However, the extent to which these states may legitimately assert a right to react against unremedied breaches has been a thorny issue. The fear is that treating large numbers of states or even all states as having the right to react to such breaches by taking countermeasures against the responsible state conflicts with traditional conceptions of the law of state responsibility, largely founded on bilateral relations, and risks undermining the primary role of the UN Security Council for the maintenance of international peace and security.[185] The position under Draft Articles 40 and 47 as adopted on first reading was unacceptably uncontrolled and unco-ordinated, effectively giving the impression that individual countermeasures are a corollary to all kinds of injury broadly defined.[186]

Thus in 2000 the ILC provisionally adopted on second reading an article governing countermeasures by states other than the injured

[179] *Nicaragua*, ICJ Rep. 1986 p. 14, 127.
[180] See *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 55; Crawford, Third Report, 105.
[181] Dawidowicz (2006), 337. [182] Huesa Vinaixa (2010), 954.
[183] See Dawidowicz (2006); Gaja (2010) 957, 962; Sicilianos (2010).
[184] See ARSIWA Commentary, Art. 48, §7. [185] Sicilianos (2010), 1137–42.
[186] Crawford, Third Report, 102, 106.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:36 Page Number: 705

state.[187] It was drafted in an attempt to *limit* rather than expand the circumstances in which these might be taken.[188] Draft Article 54 dealt rather succinctly with two different situations. The first concerned countermeasures taken by a state entitled to invoke responsibility under what is now Article 48 'at the request and on behalf of any State injured by the breach' (para. 1). The second concerned countermeasures taken in response to serious breaches covered by what is now Article 40, in the interest of the beneficiaries of the obligation breached (para. 2). Paragraph 3 dealt with the co-ordination of countermeasures taken by more than one state. The effect was as follows: within the general limits of Chapter II, an Article 48 state could take countermeasures in support of an injured state, or independently in the case of a serious breach. Otherwise such states would be limited to the invocation of responsibility under Article 48(2). By contrast, under former Article 40, any state could have taken countermeasures in the case of an 'international crime', a breach of human rights or the breach of certain collective obligations, irrespective of the position of any other state, including the state directly injured by the breach.

Draft Article 54 provoked a strong reaction, many governments claiming that the effect of such a provision would be destabilizing and that it had no basis in international law.[189] In this situation the ILC was caught between a rock and a hard place: on the one hand, deleting the provision on collective countermeasures altogether would leave the impression that countermeasures were restricted to unilateral measures by injured states, narrowly defined, with no room for the law in this area to evolve. This might give the appearance that states had abdicated their right of individual action in respect of obligations owed to the international community as a whole, with the effect that such obligations, or others in the collective interest, would be seen as somehow second-class in relation to bilateral treaty obligations.[190] On the other hand, given that state practice supporting the inclusion of the provision remained at an embryonic phase of development, the draft provision was too controversial to survive.[191] Ultimately, acknowledging that there is no clearly recognized entitlement of states referred to in Article 48 to take countermeasures in the

[187] For the text see Report of the Drafting Committee, UN Doc. A/CN.4/L.600, 15 (Draft Art. 54). See further Crawford, Third Report, 105–6; Sicilianos (2010), 1143–4.
[188] Crawford, Fourth Report, 15. [189] Ibid., 18. [190] Ibid.
[191] See ILC Ybk 2001/II(2), 23.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:36 Page Number: 706

collective interest,[192] the ILC replaced the draft provision with a saving clause in the following terms:

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.[193]

Thus the articles in their final form do not regulate countermeasures by states other than an injured state. Article 54 has been described as being 'of an ambiguity worthy of the oracle at Delphi' in that it leaves all options open.[194] It is a compromise intended to reserve the position and leave the resolution of the matter to further developments in international law and practice.[195]

One of the general objections that led to the deletion of Draft Article 54 on collective countermeasures was that it did not sufficiently explain the link between the actions covered by that provision and sanctions taken under the UN Charter or regional arrangements.[196] The question thus becomes the role of these sanctions in the implementation of state responsibility.

21.3 Issues of responsibility in the Security Council and other international forums

All the categories of self-help measures discussed in this chapter share an emphasis on unilateral action; that is, they are taken by states acting alone (or alongside other like-minded states) to seek protection or performance of international legal rights and obligations.[197] The measures are adopted as a consequence of the view of the reacting state that the target state has committed an internationally wrongful act.[198]

But the most important means of dealing with major international crises and disputes do not fall within the scope of the secondary rules on

[192] ARSIWA Commentary, Art. 54, §6; see also Art. 22, §6; Pt III, Ch. II, §8.

[193] Institutional reactions in the framework of international organizations are excluded from the scope of this provision; see ARSIWA Commentary, Art. 54, §2.

[194] Sicilianos (2010), 1144.

[195] Crawford, Peel and Olleson (2001), 980–2.

[196] Crawford, Fourth Report, 18. See further Dawidowicz (2006); Sicilianos (2010), 1140–2; Gowland-Debbas (2010).

[197] See Zemanek (1987); Alland (2010), 1129.

[198] See *US–France Air Services Agreement*, (1978) 54 ILR 303, 337; Leben, (1982) 28 AFDI 9, 21–4; Alland (2010), 1129.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:37 Page Number: 707

state responsibility. States have the option of placing their disputes in the hands of certain international organizations, with a view to obtaining authorization of institutional measures or sanctions against the responsible state or states. The ILC chose to exclude such sanctions from the scope of ARSIWA,[199] rejecting Special Rapporteur Ago's formulation 'the legitimate application of a sanction' in favour of reserving that term for decisions of international organizations, especially of the UN.[200] As Alland explains,

> Sanctions adopted by international organizations do not display the essential characteristic of countermeasures, that is, their intrinsic contrariety to what is normally required from them by international engagements . . . [I]t is often the case that measures decided by an international organization escape the subjectivity of the lone reacting State, for they are decided within the framework of a system more or less centralized, which is precisely the element that justifies their being distinguished from countermeasures.[201]

In other words, institutional sanctions create 'vertical' relationships of enforcement, whereas in the case of decentralized countermeasures the relationships between the responsible and reacting states are horizontal.[202]

The UN is the foremost example of an international organization with authority to impose sanctions.[203] In the context of the UN the notion of sanctions has come to be synonymous with Charter mechanisms for maintaining peace, rather than being limited to addressing non-compliance with pre-existing obligations so as to restore legality.[204] Under Article 24 of the UN Charter, the Security Council is entrusted with primary responsibility for the maintenance of international peace and security, and it has special powers to enable it to carry out that function. In particular, Chapter VII provides that once the Council has determined the existence of a threat to the peace, breach of the peace, or act of aggression in terms of Article 39, it has the authority to impose provisional measures (Article 40) or to take non-forcible (Article 41) or

[199] See ARSIWA Commentary, Art. 54, §2. The articles are without prejudice to any question of the responsibility of international organizations and to the UN Charter (ARSIWA, Arts. 57 and 59, respectively). Note, however, that action duly taken as between the parties to regional arrangements would be covered by either Art. 20 (consent) or Art. 55 (*lex specialis*).

[200] See Leben (1982), 17; Lesaffre (2010), 472; see further ICL Ybk 1979/I, 54–63.

[201] Alland (2010), 1135.

[202] Sicilianos (2010), 1140.

[203] On Security Council sanctions generally, see Gowlland-Debbas (2010); Pellet and Miron, 'Sanctions', (2011) MPEPIL.

[204] Gowlland-Debbas (2010), 126–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:37 Page Number: 708

forcible (Article 42) measures for the maintenance or restoration of international peace and security. The decisions of the Security Council have binding force on members of the UN by virtue of Article 25.

In the decades since 1945 the Security Council has used its powers to impose provisional, peaceful and forcible measures on states in response to a wide variety of wrongful acts.[205] Early examples ranged from authorizing the use of force to repel the armed attack on South Korea by North Korea in 1950,[206] to imposing trade embargoes against Rhodesia (now Zimbabwe) after its unilateral declaration of independence from the UK in 1965 in order to establish white minority rule,[207] to (belatedly) demanding a ceasefire in the 1980–8 conflict between Iraq and Iran in express reliance on Article 40.[208] It even used Chapter VII as the source of authority for establishing the UN Compensation Commission to compel Iraq to comply with its obligations of reparation following the invasion of Kuwait in August 1990.[209] Since the end of the deadlock produced by the Cold War, Security Council action under Chapter VII has increased,[210] with examples including arms embargoes in response to illegal seizures of power in Haiti[211] and Sierra Leone,[212] sanctions aimed at preventing the proliferation of nuclear weapons,[213] and the authorization of the use of force for

[205] It should be noted, however, that most measures taken by the Security Council under Chapter VII are a response to an Art. 39 determination that there has been a threat to the peace; this is an increasingly flexible and elastic notion. In some cases the Council's response to the threat will aim to prevent unlawful acts from occurring, rather than trying to implement state responsibility and restore legality as is the object of individual countermeasures. See Pellet and Miron (2011), §§21–5.

[206] SC Res. 82 (1950), which was only made possible because the USSR, which would have exercised its power of veto, was absent from the Security Council during voting (in protest at the representation of China in the UN by the government of the Republic of China (Taiwan)).

[207] E.g. SC Res. 232 (1966); SC Res. 253 (1968); SC Res. 314 (1972); SC Res. 409 (1977).

[208] SC Res. 598 (1987).

[209] See Petrović, in Crawford, Pellet and Olleson (2010) 849. Other Chapter VII measures taken by the Security Council against Iraq in response to the invasion included a demand, in reliance on Art. 40, that Iraq withdraw (SC Res. 660 (1990)), the imposition of economic sanctions (SC Res. 661 (1990)) and the authorization of force to uphold SC Res. 660 (SC Res. 678 (1990)).

[210] See Gray (2008), 264–72; Carisch and Rickard-Martin, 'Global threats and the role of United Nations sanctions' (2011), available at library.fes.de/pdf-files/iez/08819.pdf, esp. the table of UN Security Council sanctions from 1990–2011 at 10.

[211] SC Res. 841 (1993); SC Res. 861 (1993); SC Res. 873 (1993); SC Res. 875 (1993); see also SC Res. 944 (1994), which terminated the sanctions.

[212] SC Res. 1132 (1997); SC Res. 1171 (1998).

[213] Against North Korea: SC Res. 1718 (2006). Against Iran: SC Res. 1737 (2006).

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:37 Page Number: 709

humanitarian purposes in the context of human rights violations inflicted by Libya on its own nationals.[214]

The Charter does not refer to the principles that constrain resort to unilateral self-help measures as a check on the Council's collective security activities.[215] Nonetheless, it is accepted that the Council's discretion in imposing sanctions is not absolute; it will be limited by certain of the same principles, for example the importance of avoiding collateral infliction of suffering on vulnerable groups within the targeted state.[216] Efforts are being made to improve the sanctions system to address concerns in this and other respects.[217] Meanwhile, the relationship between Security Council sanctions such as the examples above and the right of states to take countermeasures, particularly collectively, remains unclear. The jurisdiction *ratione materiae* of the Council is limited, and its ability to respond to wrongful acts efficiently and effectively is frequently hampered by political disagreement and by the threat or use of the veto by one of the five permanent members. It is precisely in situations when the Security Council fails to act or its actions are ineffective in enforcing serious illegalities, such as the large-scale human rights violations in Rwanda, Sudan, Syria and so on, that the demand for a right of collective action by states is strongest.[218] It would seem that the triggering of Chapter VII action must end any power of states not directly injured to react as they choose at the individual level, but the commentary to ARSIWA Article 59 (which provides that ARSIWA are without prejudice to the UN Charter) is not explicit on the point, 'allowing ambiguities between the institutional and the individual to linger'.[219]

While the Council's responsibility for the maintenance of international peace and security is 'primary', it is not exclusive. The General Assembly may also be required to take steps for the maintenance of international peace and security, for example in situations where the Security Council is prevented by the veto from acting, or has otherwise been ineffective.[220] In keeping with the established prohibition of

[214] E.g. in Libya: SC Res. 1973 (2011), §4. [215] See Gowlland-Debbas (2010), 134–7.
[216] See Crawford, Third Report, 92, referring to Committee on Economic, Social and Cultural Rights, General Comment No. 8, UN Doc. E/C.12/1997/8.
[217] See Gray (2008), 270–2; Pellet and Miron (2011), §§26–54.
[218] Dawidowicz (2006), 335.
[219] Sicilianos (2010), 1142. On the safeguard clause in Art. 59 see further Gowlland-Debbas (2010), 117–22.
[220] See UN Charter, Art. 14; Uniting for Peace Resolution, GA Res. 377(V), 3 November 1950; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ Rep. 1962 p. 151, 162–5.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:38 Page Number: 710

forcible countermeasures by individual states, however, sanctions involving the use of force can only be adopted by the Security Council, acting in pursuance of its Chapter VII powers.[221]

Under Article 52 of the Charter, the powers of the Security Council do not preclude the existence of regional arrangements or agencies for dealing with region-specific peace and security matters. Thus, for example, the European Union and the African Union have their own autonomous systems for imposing sanctions against wrongdoing states.[222] In addition, these and other regional and subregional economic communities such as the Economic Community of West African States (ECOWAS), the Organization of American States (OAS), the League of Arab States (LAS) and the Association of Southeast Asian Nations (ASEAN), may co-operate with the UN in securing the effective implementation of sanctions in their regions. The legitimacy and credibility of the action in Libya, for example, was greatly boosted by the support of the Arab League, and the role of the African Union's High-level Implementation Panel was a significant factor in the adoption of SC Resolution 2046 (2012) addressing the conflict between Sudan and South Sudan. However, the willingness within some regions to co-operate with UN sanctions may be dampened by the outdated imbalance of regional power that persists in the structure of the Security Council, with its over-representation of European and Western states compared with other regions.[223]

In a different category again, another major international forum for disputes concerning state responsibility is the Dispute Settlement Body of the WTO. The WTO dispute settlement system is widely perceived as operating as a *lex specialis* outside the scope of the secondary rules in ARSIWA.[224] This is not to say that the entire WTO system is a

[221] See generally e.g. Sarooshi (1999); Gray (2008), 254–369; Orakhelashvili (2011).

[222] For the European system see the Common Foreign and Security Policy (CFSP) set out in the Treaty on European Union, 24 December 2002, [2002] OJ C325/5, Art. 11. The African system is a pragmatic one largely focused on sanctions on 'unconstitutional changes of government': see the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration), OAU Doc. AHG/Decl.5 (XXXVI) (2000); Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3, Arts. 4 (p), 30; Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002, available at www.unhcr.org/refworld/docid/3f4b1d374.html, Art. 7(1)(g); African Charter on Democracy, Elections and Governance, AU Doc. Assembly/AU/Dec. 147 (VIII) (2007), Ch. 8.

[223] See Carisch and Rickard-Martin (2011), 19–21.

[224] ARSIWA Commentary, Art. 55, §3. See further Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003),385–416; Gomula (2010); Simma and Pulkowski (2010), 155–8.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: 21 Title Name: CRAWFORD
Date:16/3/13 Time:12:11:39 Page Number: 711

'self-contained regime'; it is a part of public international law and thus ARSIWA have relevance for the resolution of issues of state responsibility arising in the context of WTO disputes – subject to the specificities of the WTO dispute settlement process.[225] One of the cornerstones of GATT and WTO dispute resolution is that recourse to individual countermeasures alongside or instead of the WTO system in order to resolve disputes in respect of WTO rights and obligations is not permitted.[226] This obligation has been confirmed in a number of decisions of the Dispute Settlement Body.[227] Nonetheless, sanctions pursuant to Article 22 of the Dispute Settlement Understanding (also called retaliation or suspension of concessions) function in a similar manner to countermeasures,[228] and the SCM Agreement specifically uses the term 'countermeasures' in providing for member states to respond to prohibited or actionable subsidies. Panels and the Appellate Body have been guided and inspired by the rules governing countermeasures within the law on state responsibility in their decisions.[229]

[225] See Gomula (2010), 791–3.
[226] See García-Rubio, *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs* (2001), 54.
[227] See the discussion by Gomula (2010), 799–801.
[228] Although technically they are perhaps better construed as a variant of the *exceptio non adimpleti contractus*; see Simma and Pulkowski (2010), 156.
[229] See further Mavroidis, (2000) 11 EJIL 763; Pauwelyn, (2000) 94 AJIL 335; Charnovitz, (2001) 95 AJIL 792; Desmedt, (2001) 4 JIEL 441.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 1 Title Name: CRAWFORD
Date:16/3/13 Time:21:06:08 Page Number: 712

Appendix 1 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001)

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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.

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 1 Title Name: CRAWFORD
Date:16/3/13 Time:21:06:08 Page Number: 713

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.

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Date:16/3/13 Time:21:06:08 Page Number: 714

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:

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Date:16/3/13 Time:21:06:09 Page Number: 715

(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.

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Date:16/3/13 Time:21:06:09 Page Number: 716

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.

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Date:16/3/13 Time:21:06:10 Page Number: 717

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,

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Date:16/3/13 Time:21:06:10 Page Number: 718

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.

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Date:16/3/13 Time:21:06:10 Page Number: 719

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) Specifically 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.

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Date:16/3/13 Time:21:06:11 Page Number: 720

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:

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Date:16/3/13 Time:21:06:11 Page Number: 721

(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.

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Date:16/3/13 Time:21:06:12 Page Number: 722

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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 1 Title Name: CRAWFORD
Date:16/3/13 Time:21:06:12 Page Number: 723

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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Date:16/3/13 Time:23:53:13 Page Number: 724

Appendix 2 General Assembly resolutions concerning the Articles on state responsibility for internationally wrongful acts

1. General Assembly resolution 56/83, 12 December 2001

Resolution adopted by the General Assembly

[on the report of the Sixth Committee, UN Doc A/56/589 & Corr.1]

56/83. Responsibility of States for internationally wrongful acts

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,[1] which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,[2]

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1(a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1).
[2] Ibid., paras. 72 and 73.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 2 Title Name: CRAWFORD
Date:16/3/13 Time:23:53:13 Page Number: 725

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled 'Responsibility of States for internationally wrongful acts'.

85th plenary meeting
12 December 2001

Annex: Articles on the Responsibility of States for Internationally Wrongful Acts

2. GENERAL ASSEMBLY RESOLUTION 59/35, 2 DECEMBER 2004

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee, UN Doc A/59/505]

59/35. RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1(a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

1. *Commends* once again the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-second session;

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 2 Title Name: CRAWFORD
Date:16/3/13 Time:23:53:14 Page Number: 726

4. *Decides* to include in the provisional agenda of its sixty-second session the item entitled 'Responsibility of States for internationally wrongful acts'.

65th plenary meeting
2 December 2004

3. GENERAL ASSEMBLY RESOLUTION 62/61, 6 DECEMBER 2007

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee, UN Doc A/62/446]

62/61. RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and further recalling its resolution 59/35 of 2 December 2004 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1(a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,[3]

1. *Commends once again* the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-fifth session;

4. *Decides* to include in the provisional agenda of its sixty-fifth session the item entitled 'Responsibility of States for internationally wrongful acts' and to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

62nd plenary meeting
6 December 2007

[3] UN Doc. A/62/62 and Corr.1 and Add.1.

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Date:16/3/13 Time:23:53:16 Page Number: 727

4. GENERAL ASSEMBLY RESOLUTION 65/19, 6 DECEMBER 2010

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee, UN Doc A/65/463]

65/19. RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and its resolutions 59/35 of 2 December 2004 and 62/61 of 6 December 2007 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Taking into account the comments and observations of Governments1[4] and the discussions held in the Sixth Committee, at the fifty-sixth, fifty-ninth, sixty-second and sixty-fifth sessions of the General Assembly, on responsibility of States for internationally wrongful acts,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary- General,[5]

1. *Acknowledges* the importance of the articles on responsibility of States for internationally wrongful acts, and commends them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit further written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-eighth session;

4. *Decides* to include in the provisional agenda of its sixty-eighth session the item entitled 'Responsibility of States for internationally wrongful acts' and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

57th plenary meeting
6 December 2010

[4] See UN Doc. A/62/63 and Add.1; UN Doc. A/65/96 and Add.1
[5] See Un Doc. A/62/62 and Corr.1 and Add.1; UN Doc. A/65/76.

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Date:16/3/13 Time:21:27:49 Page Number: 728

Appendix 3 ILC Articles on Diplomatic Protection (2006)

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PART ONE GENERAL PROVISIONS

Article 1 Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Article 2 Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

PART TWO NATIONALITY

CHAPTER I GENERAL PRINCIPLES

Article 3 Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

CHAPTER II NATURAL PERSONS

Article 4 State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 3 Title Name: CRAWFORD
Date:16/3/13 Time:21:27:50 Page Number: 729

Article 5 Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6 Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7 Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Article 8 Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

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Date:16/3/13 Time:21:27:50 Page Number: 730

CHAPTER III LEGAL PERSONS

Article 9 State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Article 10 Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11 Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Article 12 Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13 Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

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Date:16/3/13 Time:21:27:50 Page Number: 731

PART THREE LOCAL REMEDIES

Article 14 Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. 'Local remedies' means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 15 Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;
(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
(d) The injured person is manifestly precluded from pursuing local remedies; or
(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

PART FOUR MISCELLANEOUS PROVISIONS

Article 16 Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17 Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18 Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of

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Date:16/3/13 Time:21:27:51 Page Number: 732

nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19 Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
(b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
(c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

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Date:18/3/13 Time:10:22:55 Page Number: 733

Appendix 4 ILC Draft Articles on State Responsibility (as proposed by F. V. García-Amador, 1961[1])

Revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens

TITLE I GENERAL PRINCIPLES

CHAPTER I RIGHTS OF ALIENS AND CONSTITUENT ELEMENTS OF RESPONSIBILITY

Article 1 Rights of aliens

1. For the purpose of the application of the provisions of this draft, aliens enjoy the same rights and the same legal guarantees as nationals, but these rights and guarantees shall in no case be less than the 'human rights and fundamental freedoms' recognized and defined in contemporary international instruments.

2. The 'human rights and fundamental freedoms' referred to in the foregoing paragraph are those enumerated below:

(a) The right to life, liberty and security of person;
(b) The right to own property;
(c) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;
(d) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the substantiation of any criminal charge or in the determination of rights and obligations under civil law;
(e) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to present his defence personally or to be defended by a counsel of his choice; the

[1] ILC Ybk 1961/II, 46.

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Date:18/3/13 Time:10:22:55 Page Number: 734

right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

3. The enjoyment and exercise of the rights and freedoms specified in paragraph 2 (a) and (b) are subject to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

Article 2 Constituent elements of responsibility

1. For the purposes of this draft, the 'international responsibility of the State for injuries caused in its territory to the person or property of aliens' involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression 'international obligations of the State' shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The expression 'international obligations of the State' also includes the prohibition of the 'abuse of rights', which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State.

The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

TITLE II ACTS AND OMISSIONS GIVING RISE TO RESPONSIBILITY

CHAPTER II DENIAL OF JUSTICE AND OTHER SIMILAR ACTS AND OMISSIONS

Article 3 Acts and omissions involving denial of justice

1. The State is responsible for the injuries caused to an alien by acts or omissions which involve a denial of justice.

2. For the purposes of the foregoing paragraph, a 'denial of justice' shall be deemed to occur if the courts deprive the alien of any one of the rights or safeguards specified in article 1, paragraph 2 (c), (d) and (e), of this draft.

3. For the same purposes, a 'denial of justice' shall also be deemed to occur if a manifestly unjust decision is rendered with the evident intention of causing injury to the alien. However, judicial error, whatever the result of the decision, does not give rise to international responsibility on the part of the State.

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Date:18/3/13 Time:10:22:55 Page Number: 735

4. Likewise, the alien shall be deemed to have suffered a denial of justice if a decision by a municipal or international court in his favour is not carried out, provided that the failure to carry out such decision is due to a clear intention to cause him injury.

Article 4 Deprivation of liberty

1. The State is responsible for the injuries caused to an alien by reason of his arrest, detention or imprisonment, if carried out on grounds not provided for in the municipal law or in a manner manifestly incompatible with the procedure established for the purpose by municipal law.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved in cases where the detention order was based on *bonafide* suspicion, if, when the error was noticed, the alien was released.

Article 5 Expulsion and other forms of interference with freedom of movement

1. The State is responsible for the injuries caused to an alien who has been expelled from the country, if the expulsion order was not based on grounds specified in municipal law or if, in the execution of the order, serious irregularities were committed in the procedure established by municipal law.

2. The State is also responsible for the injuries caused to an alien in cases where he was prevented from leaving the country or from moving freely within the country, if the act or omission of the authorities is manifestly arbitrary or unjustified.

Article 6 Maltreatment and other acts of injury to the person

Maltreatment and other acts of inhumanity committed by the authorities against the person of an alien shall constitute an aggravating circumstance for the purposes of an international claim under article 22, paragraph 2, of this draft.

CHAPTER III NEGLIGENCE AND OTHER ACTS AND OMISSIONS IN CONNEXION WITH THE PROTECTION OF ALIENS

Article 7 Negligence in the performance of the duty of protection

1. The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.

2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State.

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Date:18/3/13 Time:10:22:56 Page Number: 736

3. The State is also responsible if the inexcusable negligence of the authorities in apprehending the individuals who committed the injurious act deprives the alien of the opportunity to bring a claim against the said individuals for compensation for the loss or injury or if he is deprived of such opportunity by virtue of a general or specific amnesty.

Article 8 Other acts and omissions in connexion with the obligation to protect aliens

1. In the cases of responsibility referred to in the preceding article, the connivance, complicity or participation of the authorities in the injurious act of the individual shall constitute an aggravating circumstance for the purposes of an international claim under article 22, paragraph 2, of this draft.

2. Independently of the existence of any of the circumstances referred to in the foregoing paragraph, the State is likewise responsible, for the purpose aforesaid, if the authorities were manifestly and inexcusably negligent in the prosecution, trial and punishment of the persons guilty of the injurious act.

CHAPTER IV MEASURES AFFECTING ACQUIRED RIGHTS

Article 9 Measures of expropriation and nationalization

1. The State is responsible if it expropriates property of an alien and the expropriation is not in conformity with the provisions of the municipal law in force at the time when the property in question was acquired by the owner concerned.

2. In the case of nationalization or expropriation measures which are of a general nature and which are not directed against a particular person or against particular persons, the State is responsible if the measures are not taken on grounds of public interest, if they involve discrimination between nationals and aliens to the detriment of the latter in the matter of compensation for the property in question, or if unjustified irregularities which are prejudicial to aliens are committed in the interpretation or application of the said measures.

Article 10 Non-performance of contractual obligations in general

1. The State is responsible for the non-performance of obligations stipulated in a contract entered into with an alien or in a concession granted to him, if the non-performance is not justified on grounds of public interest or of the economic necessity of the State, or if there is imputable to the State a 'denial of justice' within the meaning of article 3 of this draft.

2. The foregoing provision shall not apply if the contract or concession contains a clause of the nature described in article 19, paragraph 2.

3. If the contract or concession is governed by international law, or by legal principles of an international character, the State is responsible by reason of the

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Date:18/3/13 Time:10:22:56 Page Number: 737

mere fact of the non-performance of the obligations stipulated in the said contract or concession.

Article 11 Public debts

The State is responsible if it repudiates or cancels its public debts, if the measure is not justified on grounds of public interest or if it discriminates between nationals and aliens to the detriment of the latter.

CHAPTER V IMPUTABILITY OF ACTS OR OMISSIONS

Article 12 Acts and omissions of organs and officials in general

1. An act or omission which contravenes international law is imputable to the State if the organs or officials concerned acted within the limits of their competence.

2. 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.

3. Notwithstanding the provisions of the foregoing paragraph, the act or omission shall not be imputable to the State if the act exceeding the competence of the officials or organs concerned was by its nature totally outside the scope of their functions and powers, even though they may to some extent have relied on their official position or used the means at their disposal by reason of that position.

4. Similarly, the act or omission shall not be imputable to the State if it was so manifestly outside the competence of the organ or official concerned that the alien should have been aware of the fact and could, in consequence, have avoided the injury.

5. For the purposes of the provisions of this article, the act or omission shall be proved in conformity with the municipal law of the State to which it is imputed.

Article 13 Acts and omissions of the legislature

1. The provisions of the preceding article shall apply, *mutatis mutandis,* to the imputability of any legislative (or, as the case may be, constitutional) measures which are incompatible with international law and to the failure to adopt the measures which are necessary for the performance of the international obligations of the State.

2. Notwithstanding the provisions of the foregoing paragraph, the act or omission shall not be imputable to the State if, without amending its legislation (or its constitution), the State can avoid the injury or make reparation therefor and if it does so in due time.

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Date:18/3/13 Time:10:22:56 Page Number: 738

Article 14 Acts and omissions of political subdivisions

1. The acts and omissions of political subdivisions, whatever their internal organization may be and whatever degree of legislative, judicial or administrative autonomy they enjoy, shall be imputable to the State.

2. The imputability of acts or omissions of political subdivisions shall be determined in conformity with the provisions of the two preceding articles.

Article 15 Acts and omissions of a third State or of an international organization

Acts and omissions of a third State or of an international organization shall be imputable to the State in whose territory they were committed only if the latter could have avoided the injurious act and did not exercise such diligence as was possible in the circumstances.

Article 16 Acts and omissions of successful insurgents

The imputability of acts and omissions committed by insurgents during the conflict shall, if the insurrection is successful and a new government is installed, be determined in conformity with the provisions of articles 7 and 8 of this draft.

Article 17 Exonerating and extenuating circumstances

1. An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.

2. Likewise, an act shall not be imputable to the State if it is the consequence of a state of necessity involving a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury.

3. Similarly, the act or omission shall not be imputable to the State if it was provoked by some fault on the part of the injured alien himself.

4. *Force majeure,* state of necessity and the fault imputable to the alien, if not admissible as grounds for exoneration from responsibility, shall operate as extenuating circumstances for the purposes mentioned in article 26, paragraph 4, of this draft.

TITLE III THE INTERNATIONAL CLAIM AND THE REPARATION OF THE INJURY

CHAPTER VI ADMISSIBILITY OF CLAIMS

Article 18 Exhaustion of local remedies

1. An international claim brought for the purpose of obtaining reparation for injuries sustained by an alien, or for the purposes mentioned in article 27 of this draft, shall not be admissible until, in respect of each one of the grounds of the

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 4 Title Name: CRAWFORD
Date:18/3/13 Time:10:22:57 Page Number: 739

said claim, all the remedies and proceedings established by municipal law have been exhausted.

2. For the purposes of the provisions of the foregoing paragraph, local remedies shall be deemed to have been 'exhausted' when the decision of the competent body or official that rendered it is final and without appeal.

3. Consequently, except in the cases of 'denial of justice' referred to in article 3 of this draft, it shall not be admissible to plead, as an excuse for the failure to resort to all or any of the remedies under municipal law, that the organ or official concerned is not competent to deal with the case and to adjudicate the same or that it is useless to apply to the municipal courts on the alleged grounds that for technical or other reasons such remedies are ineffective.

4. The foregoing provisions shall not apply if the respondent State has expressly agreed with the State of nationality of the injured alien that recourse to any one or to all of the local remedies shall not be necessary.

5. If the respondent State and the alien have entered into an agreement of the nature of those mentioned in article 21 of this draft, the rule concerning the exhaustion of local remedies shall likewise not be applicable, unless the said agreement expressly lays down the observance of the said rule as a condition to be fulfilled before an international claim can be brought.

Article 19 Waiver of diplomatic protection

1. Notwithstanding the provisions of the preceding article, if the States concerned have agreed to restrict the exercise of diplomatic protection for their respective nationals, an international claim shall not be admissible except in the cases and circumstances specified in the said agreement.

2. Similarly, in the case of the non-performance of obligations stipulated in a contract or concession, the international claim shall not be admissible if the alien concerned has waived the diplomatic protection of the State of his nationality and the circumstances are in conformity with the terms of the waiver.

3. An international claim shall likewise not be admissible if the alien concerned has spontaneously reached a settlement or arrangement with the local authorities concerning the reparation of the injury sustained by him.

4. The waiver of diplomatic protection and the settlements or arrangements reached by the alien with the local authorities shall not deprive the State of nationality of the right to bring an international claim in the circumstances and for the purposes described in article 22, paragraph 2, and article 27 of this draft.

Article 20 Settlement of questions relating to the admissibility of claims

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of nationality, regarding any of the aspects relating to the admissibility of the international claim shall be submitted to the

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Date:18/3/13 Time:10:22:57 Page Number: 740

methods of settlement provided for in articles 21 and 22 in the form of a preliminary question and settled by means of a summary procedure.

CHAPTER VII SUBMISSION OF THE INTERNATIONAL CLAIM

Article 21 Right of the injured alien to bring a claim

1. The alien may submit an international claim to obtain reparation for the injury sustained by him to the body in which competence for this purpose has been vested by an agreement between the respondent State and the State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the foregoing paragraph was established by an agreement between the respondent State and the alien, the consent of the State of nationality shall not be necessary for the purpose of the submission of the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in title, unless they possessed or have acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercisable by foreign juristic persons in which nationals of the respondent State hold the controlling interest.

Article 22 Right of the State of nationality to bring a claim

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 21, paragraph 1; or
(b) If the respondent State has expressly agreed that the State of nationality should substitute itself for the alien in his place and title for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim in the case and for the purposes mentioned in article 27 of this draft, irrespective of any agreement entered into by the injured alien with the respondent State.

Article 23 Nationality of the claim

1. A State may exercise the right to bring a claim referred to in article 22 on condition that the alien possessed its nationality at the time of sustaining the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the exercise of the right of the State to bring a claim shall be subject to the same conditions.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 4 Title Name: CRAWFORD
Date:18/3/13 Time:10:22:57 Page Number: 741

3. A State may not bring a claim on behalf of an individual if the legal bond of nationality is not based on a genuine connexion between the two.

4. A State may likewise not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest.

5. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other links.

Article 24 Inadmissible restrictions of the right to claim

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of coercion exerted upon him by the authorities of the respondent State.

2. The right to bring a claim shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

Article 25 Limitation of time affecting the right to bring a claim

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

CHAPTER VIII NATURE AND MEASURE OF THE REPARATION

Article 26 Restitution and pecuniary damages

1. The reparation of the injury caused to an alien may take the form of restitution in kind *(restitutio in integrum)* or of pecuniary damages, whichever may best serve to wipe out the consequences of the act or omission imputable to the respondent State.

2. Notwithstanding the provisions of the foregoing paragraph, the reparation shall not take the form of restitution if restitution would involve the repeal of a law, the annulment of a judicial decision or the non-application of an executive or administrative measure and it would be incompatible with or cause difficulties under the municipal law of the respondent State.

3. The amount of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person or property of the alien or, in the event of his death, of his heirs or successors in title. Consequently, irrespective of

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 4 Title Name: CRAWFORD
Date:18/3/13 Time:10:22:58 Page Number: 742

the nature of the reparation or of the purpose for which it is made, the pecuniary damages shall not result in the undue enrichment of the injured alien.

4. In the determination of the nature and measure of the reparation, the fault imputable to the injured alien and any of the other circumstances described as extenuating circumstances in article 17, paragraph 4, of this draft shall be taken into account.

Article 27 Measures to prevent the repetition of the injurious act

1. Even in the case of an act or omission the consequences of which extend beyond the injury caused to the alien, a fact constituting an aggravating circumstance, the reparation shall not take a form of 'satisfaction' to the State of nationality, which would be offensive to the honour and dignity of the respondent state.

2. Notwithstanding the provisions of the foregoing paragraph, in any such case as aforesaid the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.

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Date:16/3/13 Time:23:56:18 Page Number: 743

Appendix 5 ILC Draft Articles on State Responsibility (as adopted on first reading, 1996)

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PART ONE ORIGIN OF INTERNATIONAL RESPONSIBILITY

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 Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

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.

Article 4 Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

CHAPTER II THE 'ACT OF THE STATE' UNDER INTERNATIONAL LAW

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

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:18 Page Number: 744

State concerned under international law, provided that organ was acting in that capacity in the case in question.

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.

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.

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; or
(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.

Article 9 Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

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Date:16/3/13 Time:23:56:19 Page Number: 745

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.

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 the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12 Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter 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.

Article 13 Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:19 Page Number: 746

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.

CHAPTER III BREACH OF AN INTERNATIONAL OBLIGATION

Article 16 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.

Article 17 Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18 Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:20 Page Number: 747

obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Article 19 International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(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.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:20 Page Number: 748

Article 20 Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21 Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, 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 State also fails by its subsequent conduct to achieve the result required of it by that obligation.

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.

Article 23 Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:21 Page Number: 749

Article 25 Moment and duration of the breach of an international obligation by an act of the State extending in time

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.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26 Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

CHAPTER IV IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

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.

Article 28 Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:21 Page Number: 750

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other provisions of the present articles, of the State which has committed the internationally wrongful act.

CHAPTER V CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29 Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present articles, a peremptory norm of general international law is a norm 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 30 Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

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.

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 that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:21 Page Number: 751

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.

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.

Article 34 Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self defence taken in conformity with the Charter of the United Nations.

Article 35 Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

PART TWO CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY

CHAPTER I GENERAL PRINCIPLES

Article 36 Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this Part.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:22 Page Number: 752

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 Lex specialis

The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

Article 38 Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Article 39 Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

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 State party 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

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:22 Page Number: 753

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.

CHAPTER II RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 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.

Article 42 Reparation

1. 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.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) the injured State; or

(b) a national of that State on whose behalf the claim is brought; which contributed to the damage.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:22 Page Number: 754

Article 43 Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;
(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;
(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or
(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 44 Compensation

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.

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.

Article 45 Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;
(b) nominal damages;
(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;
(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:23 Page Number: 755

Article 46 Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III COUNTERMEASURES

Article 47 Countermeasures by an injured State

1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State.

Article 48 Conditions relating to resort to countermeasures

1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter.

2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:23 Page Number: 756

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.

Article 50 Prohibited countermeasures

An injured State shall not resort by way of countermeasures to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;
(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;
(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;
(d) any conduct which derogates from basic human rights; or
(e) any other conduct in contravention of a peremptory norm of general international law.

CHAPTER IV INTERNATIONAL CRIMES

Article 51 Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52 Specific consequences

Where an internationally wrongful act of a State is an international crime:

(a) an injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;
(b) an injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53 Obligations for all States

An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as lawful the situation created by the crime;
(b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:24 Page Number: 757

(c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
(d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

PART THREE SETTLEMENT OF DISPUTES

Article 54 Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its later recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:24 Page Number: 758

Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 Arbitration

1. Failing a reference of the dispute to the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Article 59 Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact finding it deems necessary for the determination of the facts of the case.

Article 60 Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:24 Page Number: 759

ANNEX I THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:
  (i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
  (ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 5 Title Name: CRAWFORD
Date:16/3/13 Time:23:56:26 Page Number: 760

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

ANNEX II THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2 shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:44 Page Number: 761

Appendix 6 ILC Draft Articles on the Responsibility of International Organizations (2010)

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PART ONE INTRODUCTION

Article 1 Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Article 2 Use of terms

For the purposes of the present draft articles,

(a) 'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) 'rules of the organization' means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) 'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization;

(d) 'agent of an international organization' means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:44 Page Number: 762

PART TWO THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I GENERAL PRINCIPLES

Article 3 Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Article 4 Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and
(b) constitutes a breach of an international obligation of that organization.

Article 5 Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

CHAPTER II ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 6 Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

Article 7 Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:44 Page Number: 763

Article 8 Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 9 Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

CHAPTER III BREACH OF AN INTERNATIONAL OBLIGATION

Article 10 Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

Article 11 International obligation in force for an international organization

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

Article 12 Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization 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 an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization 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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:45 Page Number: 764

Article 13 Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and 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 AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Article 14 Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that organization.

Article 15 Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that organization.

Article 16 Coercion of a State or another international organization

An international organization which coerces a State or another international organization 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 or international organization; and
(b) the coercing international organization does so with knowledge of the circumstances of the act.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:45 Page Number: 765

Article 17 Circumvention of international obligations through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Article 18 Responsibility of an international organization member of another international organization

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

Article 19 Effect of this Chapter

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

CHAPTER V CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20 Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 21 Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:46 Page Number: 766

Article 22 Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;
(b) the countermeasures are not inconsistent with the rules of the organization; and
(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 23 Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization 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 organization, 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 organization invoking it; or
(b) the organization has assumed the risk of that situation occurring.

Article 24 Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization 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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:46 Page Number: 767

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 organization 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 an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and
(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or
(b) the organization has contributed to the situation of necessity.

Article 26 Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of an international organization 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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:46 Page Number: 768

PART THREE CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I GENERAL PRINCIPLES

Article 28 Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two 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 international organization to perform the obligation breached.

Article 30 Cessation and non-repetition

The international organization 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 international organization 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 an international organization.

Article 32 Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Article 33 Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:47 Page Number: 769

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 an international organization, which may accrue directly to any person or entity other than a State or an international organization.

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

An international organization 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 international organization 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 international organization 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 international organization.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:47 Page Number: 770

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 international organization or of any person or entity in relation to whom reparation is sought.

Article 40 Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

CHAPTER III SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 41 Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization 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 international organization to fulfil the obligation.

Article 42 Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:47 Page Number: 771

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 FOUR THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 43 Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;
(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:
  (i) specially affects that State or that international organization; or
  (ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 44 Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization 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 Three.

Article 45 Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:48 Page Number: 772

responsibility of another international organization if any available and effective remedy has not been exhausted.

Article 46 Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;
(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47 Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 48 Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;
(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 49 Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or

PROOF

Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:48 Page Number: 773

organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and
(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 50 Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

CHAPTER II COUNTERMEASURES

Article 51 Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

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.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:49 Page Number: 774

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Article 52 Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in article 51 are met;
(b) the countermeasures are not inconsistent with the rules of the organization; and
(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 53 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 human rights;
(c) obligations of a humanitarian character prohibiting reprisals;
(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;
(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Article 54 Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:49 Page Number: 775

Article 55 Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;
(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization 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 international organization fails to implement the dispute settlement procedures in good faith.

Article 56 Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 57 Measures taken by States or international organizations other than an injured State or organization

This Chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

PART FIVE RESPONSIBILITY OF A STATE IN CONNECTION WITH THE CONDUCT OF AN INTERNATIONAL ORGANIZATION

Article 58 Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Appendix 6 Title Name: CRAWFORD
Date:17/3/13 Time:00:04:49 Page Number: 776

(a) the 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.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Article 59 Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the 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.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

Article 60 Coercion of an international organization by a State

A State which coerces an international organization 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 international organization; and
(b) the coercing State does so with knowledge of the circumstances of the act.

Article 61 Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

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Date:17/3/13 Time:00:04:51 Page Number: 777

Article 62 Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or
(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 63 Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

PART SIX GENERAL PROVISIONS

Article 64 Lex specialis

These draft 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 an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 65 Questions of international responsibility not regulated by these draft articles

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

Article 66 Individual responsibility

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

Article 67 Charter of the United Nations

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

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Date:19/3/13 Time:04:40:08 Page Number: 778

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Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Bibliography Title Name: CRAWFORD
Date:19/3/13 Time:04:40:22 Page Number: 807

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PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:12 Page Number: 808

Index

absence of state authority *see* authority
'abuse of rights'
  meaning, 734
accountability
  levels of, 84
  and responsibility, 83–5
acquiescence *see* claims
acts or omissions
  affecting aliens' rights *see* aliens, injury to
  as aid or assistance, 403–5
  breach of obligations, 217–19
  exonerating and extenuating circumstances, 738
  giving rise to responsibility, 734–8
  imputability, 737–8
  instantaneous and continuing acts distinguished, 262–4
ad hoc judges
  appointment, 671–2
admissibility of claims *see* invocation of responsibility
'agent of an international organization'
  meaning, 761
Ago, Roberto
  committee chairman, 36
  counsel, 269–70
  Hague Lectures 1939, 26
  judgments, 149
  Special Rapporteur, 35–6, 54–5, 126, 143, 266, 270, 327, 490, 706–7
    see also Table of reports of Special Rapporteurs
  theory of responsibility, 64, 270–1, 398–9, 405–6, 417
aid or assistance for wrongful act
  ARSIWA Article 16, 401–3
  complicity
    and international organizations, 410–12
    pacta tertiis rule, 409–10
    'subjective' element, 405–8
  customary international law, 400–1
  definition, 401–ENF
  development of ARSIWA Article 16, 400–1, 775–6
  general principles, 405
  from international organization, 764
  omissions as, 403–5
  from other state
    ARSIWA, 714
    Draft Articles 1996, 749
  secondary responsibility, 399
Al-Jedda case
  contributing state responsibility, 200–3
aliens, injury to
  claims
    admissibility, 738–40
    alien torts, 81–3
    dispute settlement as to admissibility, 739–40
    exhaustion of local remedies, 738–9
    inadmissible restrictions on right to claim, 741
    nationality of, 740–1
    right to bring, 740
    by state of nationality, 740–1
    submission, 740–1
    time limits, 741
    waiver of diplomatic protection, 739
  damages, 741–2
  denial of justice, 734–5
  deprivation of liberty, 735
  expropriation measures, 736
  expulsion, 735
  interference with freedom of movement, 735
  maltreatment, 735
  nationalization measures, 736
  negligence in protection, 735–6

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:14 Page Number: 809

non-performance of contractual obligations, 736–7
non-repetition measures, 742
pecuniary damages, 741–2
public debts, repudiation/cancellation, 737
reparation, 741–2
restitution, 741–2
rights of aliens, 733
state responsibility
acts or omissions giving rise to, 734–8
see also acts or omissions
Draft Articles 1961, 733
elements of responsibility, 734
Alland, Denis
on sanctions, 706–7
ancillary responsibility *see* secondary responsibility
Anzilotti, Dionisio
representation theory of indirect responsibility, 397
writings on responsibility, 23–4, 490
applicable law
'approximate application' principle, 109
cause of action distinguished, 603–8
humanitarian law as, 152–3
international law, 100–3
lex specialis, 103–5
other legal consequences, 108–10
overview, 99–100
peremptory norms, 106–8
'self-contained regimes', 103–5
UN Charter, 106–8
Arangio-Ruiz, Gaetano
Special Rapporteur, 37–8, 475, 495, 501–2, 509, 531–2
see also Table of reports of Special Rapporteurs
Arbitral Tribunal
Draft Articles 1996, 760
terms of reference, 758
arbitration
ad hoc, 591
choice of, 589, 624–5
class actions, 637–40
compulsory, 97
consent to, 589, 613–14, 637–9
Draft Articles 1996, 758
force majeure, 295–6
imperative, 106–7
investment protection *see* investment protection
inviolability of undertaking, 695
limit on recourse to, 1248
loss of access to international arbitration, 624–5
multiparty, 637–40
optional, 98
referral to, 601
settlement by, 75, 95
treaty provision, 549, 601, 603, 624–5, 1248
types of, 589–90
undertaking to arbitrate, 695
unilateral, 97–8
validity of award, 758
voluntary, 95, 553–4
see also dispute settlement
ARSIWA *see* ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA)
assurance of non-repetition *see* repetition of breach
attribution
bases in ARSIWA, 115
cases of, 166
corporations *see* corporations
direction and control *see* direction and control over wrongful act
entities exercising governmental authority *see* entities exercising governmental authority
ex post facto *see* conduct
excess of authority *see* excess of authority
general principles, 113
insurrectional movements *see* insurrectional movements
international organizations *see* international organizations
process, 113–15
secondary responsibility distinguished, 211
state organs *see entries at* organs
states *see entries at* state
terrorism *see* terrorism
ultra vires *see* excess of authority
Austin, J. L. (John Langshaw)
philosophy of excuses, 274, 278–9
authority
definition of 'governmental authority', 129–32
exercise in absence of state
ARSIWA, 713
development of ARSIWA Article 9, 166–8
operation of provision, 168–70

Behrami and Saramati cases
contributing state responsibility, 197–200
Belli of Alba, Pierino
writings on responsibility, 3–6
Bodin, Jean
writings on responsibility, 3–4

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:15 Page Number: 810

Borchard, Edwin M.
Harvard Draft Research, 32
writings on responsibility, 24
Bosnian Genocide case
direction and control, 154–ENF
breach of obligations
anticipatory breach, 233–5
cessation *see* cessation
circumstances precluding wrongfulness *see* justification
claims *see* claims
complex breach, 269–73
components of, 94
composite breach
ARSIWA, 714
character of, 265–8
determining scope of, 268–9
DARIO 2010, 764
continuing breach
completion, BNF–264
concept, 258–62
instantaneous breach distinguished, 262–4
countermeasures *see* countermeasures
Draft Articles 1996, 746
duration, 253–4, 1590-1592
excuses *see* justification
exhaustion of local remedies, 748
existence, 746
ARSIWA, 714
DARIO 2010, 763
extending in time, 749
generally, 93–4
instantaneous breach
concept, 254–8
continuing breach distinguished, 262–4
international crimes and delicts, 747
international organizations *see* international organizations
intertemporal law
application of, 241–ENF
and codification of responsibility, 244–5
evolutive interpretation of treaties, 246–50
Island of Palmas case, 241–2
and law of treaties, 242–4
new peremptory norms, 250–1
retrospective acceptance of responsibility, 245–6
irrelevance of origin of obligation, 746
justification *see* justification
material element generally, 215–16
'non-violation complaints', 238–9
not extending in time, 748
obligation in force
ARSIWA, 714, 763
obligation requiring particular conduct, 748
obligation requiring specified result, 748
to prevent given event, 748–9
reparation for *see* reparation
requirement that obligation be in force, 746–7
responsibility *see* responsibility; state responsibility
time
ARSIWA, 714
DARIO 2010, 763
of occurrence, 1590-1592
temporal element generally, 240–1
see also intertemporal law *above*
Broniowski case
judicial implementation of responsibility, 630–7
burden of proof
justification and, 320–1
Bynkershoek, Cornelius van
writings on responsibility, 11, 15–17

causation *see* injury
cause of action
applicable law distinguished, 603–8
cessation
continued duty of performance distinguished, 464–5
'continuing' wrongful acts, 462–4
obligation of
ARSIWA, 717
DARIO 2010, 768
restitution distinguished, 469
restoration of legal relations *see* restoration of relations
Chorzów principle
jurisdiction, 599–603
Christakis, Théodore
on circumstances precluding wrongfulness, 279–80
circumvention of international obligations
DARIO 2010, 765, 776
claims
aliens *see* aliens, injury to
applicable law *see* applicable law
on behalf of others
diplomatic protection *see* diplomatic protection
generally, 566–7
by international organizations, 593–ENF
by third states, 593–ENF
counterclaims, jurisdiction, 609–14
dispute settlement, 95–9
entitlement to claim
ARSIWA, 719–20

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:16 Page Number: 811

concerned states or other entities, 549–53
DARIO 2010, 771–2
generally, 541–2
injured state, 542–8
other injured parties, 549
generally, 95
joinder, 669–71
lapse of, 72–4, 560–3
loss of right
acquiescence, 558–60
adjudication of claim, 1151-1162
ARSIWA, 720
DARIO 2010, 772
effects on related or derivative claims, 563–5
generally, 557–8
lapse of claim, 72–4, 560–3
lapse of time, 560–3
settlement of claim, 1151-1162
waiver, 558–60
multiple parties *see* multiple parties
nationality of
diplomatic protection, 573–80
Draft Articles 1961, 740–ENF
inadmissibility of claims, 69
process, 549–53
waiver
and acquiescence, 558–60
inadmissibility of claim, 70–2
Monetary Gold principle, 668–9
see also arbitration; dispute settlement; remedies
class actions
investment arbitration, 637–40
coercion
considerations as to, 421
definition, 419–21
DARIO 2010, 764, 776
generally, 419
of international organization, 422
collective countermeasures
use of, 703–6
collective responsibility *see* joint or collective responsibility
commercial and contract law
applicable law, 99–100
arbitration, 295–6
concerted conduct, 334–5
diplomatic protection, 75
exhaustion of local remedies, 70
interest *see* interest
non-performance as to aliens, 736–7
see also corporations, investment protection
communitarian norms
breaches of, 365
development of ARSIWA Article 48, 365–70
future development of law of, 389–90
invocation of, 370–6
relation to other norms, 376–8
see also peremptory norms
companies *see* commercial and contract law; corporations
compensation
basic principle, 516–17
criminal proceedings, 641–3
double recovery rule, 673–4
entitlement, 754
international courts' practice, 518–19
justification and, 318–20
loss of profits, 522–3
meaning, 754
obligation
ARSIWA, 718
DARIO 2010, 769
proportionality, 482–4
punitive damages, 523–6
quantification of damage, 519–22
reservation as to, 751
complex breach *see* breach of obligations
compliance with peremptory norms
as justification
ARSIWA, 716
DARIO 2010, 767
complicity *see* aid or assistance for wrongful act
composite breach *see* breach of obligations
conciliation
Draft Articles 1996, 757
Conciliation Commission
Draft Articles 1996, 759–60
task of, 757–8
conduct
acknowledged and adopted by international organization
DARIO 2010, 714
acknowledged and adopted by state
ARSIWA, 714
carried out in absence or default of official authorities *see* authority
collective conduct *see* joint or collective responsibility
directed or controlled by state *see* direction and control over wrongful act
ex post facto adoption
case law, 182
development of ARSIWA Article 11, 181–2
Eichmann case, 183
Gabčíkovo-Nagymaros case, 186–7
Lighthouses Arbitration, 182–3

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:17 Page Number: 812

conduct (cont.)
operation of provision, 187–8
Teheran Hostages case, 183–6
joint conduct *see* joint or collective responsibility
obligations of conduct and result, 220–6
consent
as justification
ARSIWA, 715
Draft Articles 1996, 750
DARIO 2010, 765
generally, 283–9
consular inviolability
obligations as to, 696–7
consular notification and access
as human rights, 592
contemporaneity
principle of, 242–3
continued duty of performance *see* obligations
continuing breach *see* breach of obligations
continuous nationality
corporation, 730
natural person, 729
contract *see* commercial and contract law
contravention of instructions *see* excess of authority
contribution to injury *see* injury
control over wrongful act *see* direction and control over wrongful act
co-operation
obligation of, 386–9
corporate criminal responsibility
non-state actors, 80–1
corporations
attribution and state-owned corporations, 161–5
continuous nationality, 730
diplomatic protection, 730
direction and control, 161–5
state of nationality, 730
see also state-owned corporations
counterclaims
jurisdiction, 609–14
countermeasures
collective countermeasures, 703–6
conditions
ARSIWA, 722
Draft Articles 1996, 755
DARIO 2010, 774–5
generally, 700–2
consular and diplomatic inviolability, obligations as to, 696–7
dispute settlement provisions, separability of, 694–6
DARIO 2010, 773–5
generally, 95, 684–6
human rights/humanitarian obligations, 691–4
international oversight, 706–11
as justification
ARSIWA, 715
Draft Articles 1996, 750
DARIO 2010, 766
generally, 292–5
limits
ARSIWA, 721
DARIO 2010, 773–4
object and scope, 686–8
object of
ARSIWA, 721
DARIO 2010, 773–4
obligation to refrain from threat or use of force, 690–1
obligations not affected
ARSIWA, 721
DARIO 2010, 774
prohibited countermeasures, 688–90, 756
proportionality, 697–9
ARSIWA, 722
Draft Articles 1996, 756
DARIO 2010, 774
separability of dispute settlement provisions, 694–6
by state or international organization other than injured state or organization
ARSIWA, 722
DARIO 2010, 775–ENF
taking of, meaning, 755
termination
ARSIWA, 722
DARIO 2010, 775
generally, 702–3
UN Security Council oversight, 706–11
Crawford, James
Special Rapporteur, 39–40
see also Table of reports of Special Rapporteurs
crimes against humanity
charges, 149–50
claims, 82
communitarian norms, 369
continuing breach of provisions, 260
individual responsibility, 79–80
insurrectional movements, 180–1
peremptory norms, 316–17, 380
see also war crimes
criminal responsibility
compensation, 641–3
corporate, 80–1
as to human rights *see* human rights and fundamental freedoms

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:19 Page Number: 813

as to humanitarian law *see* humanitarian law
individual, 79–80
international crimes of state, 390–ENF
Monetary Gold principle, 667–8

damage
level for invocation of responsibility, 54–60
quantification of, 519–22
damages
double recovery rule, 673–4
injury to aliens, 741–2
mitigation of, 1027-1029
punitive, 523–6
reservation as to, 751
de facto organs
attribution, 124–6
defunct states
Monetary Gold principle, 666–7
'delegated' powers question
human rights and fundamental freedoms, 134
'delictual capacity', 62
denial of justice
aliens, 734–5
investment protection, 270–1
deprivation of liberty
aliens, 735
diplomatic inviolability
obligations as to, 696–7
diplomatic protection
alternatives to, 569, 584–5, 731
character of, 568–73
corporations, 730
countermeasures, 696–7
definition, 728
Draft Articles 2006 *see* ILC Draft Articles on Diplomatic Protection
dual nationality, 729
generally, 567–8
institution of, 75–7
interaction with international law rules, 731
in international law, 74–5
by international organizations, 77–8
invocation
generally, 584–5
human rights, 585–7
investment protection, 587–92
other routes, 592–3
legal persons, 730
local remedies, 580–4, 731
multiple nationality, 729
nationality of claims, 573–80
natural persons, 729
recommended practice, 732
refugees, 729
right to exercise, 728
rights in international law, 74–5
role of, 568–73
scope, 728
shareholders, 730
ships' crews, 731
and special rules of international law, 731
by state of nationality, 728
stateless persons, 729
by third states, 78–9
waiver as to aliens, 739
see also entries at consular; investment protection
direction and control over wrongful act
additional requirements for liability, 416–17
ARSIWA Article 17, 412–14
Bosnian Genocide case, 154–ENF
codification, 143–4
definition, 414–16
development of law, 141
DARIO 2010, 776
early cases, 141–3
'effective control' and 'overall control' distinguished, 146–7
of international organization, 417–18
international organizations, 764
knowledge of obligation, 416
Nicaragua case, 147–9
opposability of obligation, 416
persons acting on state instruction, 144–6
standards as to secondary responsibility, 397–9
by state, 144–6, 715
state-owned corporations, 161–5
Tadić case, 149–54
terrorism *see* terrorism
see also coercion by state or other international organization
'disposal'
definition, 133–5
dispute settlement
as to admissibility of claims, 739–40
Draft Articles 1996, 757–8
generally, 95–9
separability of provisions, 694–6
see also arbitration
distress
as justification
ARSIWA, 716
Draft Articles 1996, 750–1
DARIO 2010, 766–7
generally, 301–5
domestic law *see* internal law
Draft Articles *see entries at* ILC Draft Articles

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:20 Page Number: 814

dual nationality
diplomatic protection
claim against state of nationality, 729
claim against third state, 729
due diligence
obligation, 226–32
Dugard, John
on diplomatic protection, 75–7, 569–73, 586
on insurrectional movements, 173
on *Monetary Gold* principle, 663
Dumberry, Patrick
on insurrectional movements and attribution, 178–9
on succession to responsibility, 440, 437–ENF
duty of protection
negligence as to aliens, 735–6

Eagleton, Clyde
writings on responsibility, 24–6, 398
effective control
definition, 203–5
Dutchbat case, 205–10
'overall control' distinguished, 146–7
test, 156–7
Eichmann case
ex post facto adoption of conduct, 183
'empowered by the law' of the state
definition, 132
entities exercising governmental authority
attribution
ARSIWA, 713
Draft Articles 1996, 1579-1579i
generally, 126–9
definition of 'governmental authority', 129–32
'empowered by the law' of the state, definition of, 132
erga omnes obligations
concept, 66–7
related concepts, 66–7
European Court of Human Rights
see human rights and fundamental freedoms
ex post facto adoption of conduct
see conduct
exception of non-performance (exceptio inadimpleti contractus)
ILC Draft Articles 1961, 678–82
self-help measures, 678–82
excess of authority
attribution
ARSIWA, 713
generally, 136–40
excuses for breaches of obligations
see justification
executive
definition, 119–20
expropriation measures
affecting aliens, 736
expulsion
aliens, 735
extra-judicial implementation of responsibility
generally, 675–6
self-help measures *see* self-help measures

federal subdivisions *see* political subdivisions
Fitzmaurice, Malgosia
on circumstances precluding wrongfulness, 275–6
contemporaneity principle, 242–3
on law of treaties, 367
force
obligation to refrain from, 690–1
force majeure
as justification
ARSIWA, 716
Draft Articles 1996, 750
DARIO 2010, 766
generally, 295–301
fork-in-the-road clauses
election of remedies, 624
fortuitous event
as justification, 750
freedom of movement
interference with aliens', 735
fundamental freedoms *see* human rights and fundamental freedoms

Gabčíkovo-Nagymaros case
ex post facto adoption of conduct, 186–7
negative succession rule, 446
Gaja, Giorgio
on aid or assistance, 405
on assurances and guarantees, 471–2
on diplomatic protection by third-state nationals, 78–9
García-Amador, F. V.
Special Rapporteur, 34–6, 567
see also Table of reports of Special Rapporteurs
theory of responsibility, 275–6
general international law *see* international law
Gentili, Alberico
writings on responsibility, 3–4, 6–8
Germany
reunification and negative succession rule, 449–51
Versailles Treaty and responsibility, 27–8

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:21 Page Number: 815

good offices
Draft Articles 1996, 757
governing law *see* applicable law
governmental authority *see* authority
Grotius, Hugo
writings on responsibility, 3–4, 8–11, 378–9
guarantee of non-repetition *see* repetition of breach
guarantees
joint or collective responsibility, 354–5

Hague Codification Conference 1930
development of law of responsibility, 28–32
and Harvard Draft Research, 32
harm
level for invocation of responsibility, 54–60
Hart, H. L. A. (Herbert Lionel Adolphus)
distinction between primary and secondary rules, 64
Harvard Draft Research
1929 Draft, 32–3, 123–4, 397–8
1961 Draft, 34–5
and Hague Codification Conference 1930, 32
Heffter, August Wilhelm
writings on responsibility, 21–2
Higgins, Rosalyn
on assurances and guarantees, 477, 479
on *non ultra petita* rule, 628–9
on state responsibility, 328
human rights and fundamental freedoms
'abuse of rights', meaning, 734
aid or assistance, 410
alien torts, 81–3
of aliens, 733
as alternative to diplomatic protection, 569, 584–5
applicable law, 100–1
applicable obligations, 460–1
assurances and guarantees, 474
attribution
dual, 204
joint, 196–7
Broniowski case, 630–7
claims, 100
communitarian norms, 364, 366–8, 370–6
compensation
obligation to make reparation, 481
proportionality, 482–4
quantification of damage, 519–22
right of election, 508
consent to waiver, 287
consular notification and access as, 592
continuing breach, 261–2, 463
contributing state responsibility, 197–203
countermeasures, 689, 691–4, 704–5
crimes against humanity *see* crimes against humanity
criminal responsibility, 79
damage quantification, 519–22
damage requirement, 55, 57
damages, punitive, 526
definition, 733
'delegated' powers question, 134
denial, 53–4
derogation, 291
diplomatic protection, 585–7
dispute settlement, 98
'equivalent' protection by international organizations, 430–3
erga omnes obligations, 67
evolutive interpretation, 248–50
independent responsibility, 335–6
'injured state', meaning of, 535–6
instantaneous breach, 258
insurrectional movements, 173–4, 180
'integral obligations', 547
interest
post-judgment, 535–6
judicial implementation of responsibility, 630–7
level of responsibility, 84
lex specialis, 104–5
'material damage', 55
'military necessity', 315
'moral damage', 55, 58
non-state party responsibility, 549
peremptory norms, 384, 387, 390
primary and secondary obligations distinguished, 216, 221
state contribution to international organizations, 346–54
state responsibility for acts of subdivisions, 124
systematic remedies, 630–7
time of start of state liability, 892-895
treaty mechanisms, 596
use of force as to violations, 704–5
violation, 618–19, 682, 709
waiver, 287
humanitarian intervention
aid or assistance, 401
consent, 284
distress, 302–3, 305
force majeure, 297–8
peacekeeping by international organizations, 193–7
recourse to use of force, 277–8

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:22 Page Number: 816

humanitarian law
alignment with state responsibility, 155
applicable law, 152–3
conduct of private persons, 360–1
countermeasures, 688–9, 691–4
intransgressible rules of, 291–2
jurisdictional immunity of state, 467–8
lawfulness of forcible, 315
level of responsibility, 84
lex specialis, 291–2
'military necessity', 315
necessity, 306–7
peremptory norms, 382–3
use of force, 708–9
violation, 147–9, 618–19, 641, 682
see also crimes against humanity

ILC
development of law of responsibility, 35–44
first reading, 1949–1996, 35–9
responses to ARSIWA, 42–4
second reading, 1998–2001, 39–42
ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA)
bases for attribution, 115–16
concept of state responsibility, 49–ENF
content, 45–9
development during second reading 1998–2001, 39–42
General Assembly resolutions as to, 724–7
interaction with UN Charter, 723
responses to, 42–4
text, 1475-1513
typology of state responsibility, 51–4
ILC Draft Articles on Diplomatic Protection 2006
specific provisions *see* diplomatic protection
text, 1524-1541
ILC Draft Articles on State Responsibility 1996
development during first reading 1949–1996, 35–9
text, 1574-1626
ILC Draft Articles on the Responsibility of International Organizations 2010, 777
lex specialis, 777
scope of articles, 761
specific provisions *see* international organizations
terminology, 761
text, 1627-1680
and United Nations Charter, 777
implementation of responsibility *see* claims; diplomatic protection; extra-judicial implementation of responsibility; invocation of responsibility; judicial implementation of responsibility
inadmissibility of claims *see* invocation of responsibility
indemnities
joint or collective responsibility, 354–5
independent responsibility
exceptions, 336–9
principle, 333–6
indirect responsibility
Anzilotti's representation theory of, 397
individual criminal responsibility
non-state actors, 79–80
individuals
responsibility of
ARSIWA, 723
injury, 682–4
to aliens *see* aliens, injury to
causation
concurrent causes, 495–500
contribution to injury, 500–3
expanded scope of, 492–4
mitigation of damage and reparation, 1027-1029
claims *see* claims
countermeasures *see* countermeasures
definition, 485–6
'injured state'
meaning, 752–3
plurality, 503–5
invocation of responsibility *see* invocation of responsibility
joint or collective contribution, 355–8
'legal injury', 487
material and moral injury, 486–7
non-repetition measures, 742
plurality of injured states
ARSIWA, 720
reparation *see* reparation
secondary responsibility, 429–30
to shareholders, 730
instantaneous breach *see* breach of obligations
Institut de Droit International
work on state responsibility, 32, 328
insurrectional movements
attribution
ARSIWA, 713
creation of new government, 174–6
creation of new state, 176–9
development of ARSIWA Article 10, 170–4

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:23 Page Number: 817

Draft Articles 1996, 745–6, 1582i–1583
failed insurgency, 179–81
imputability of acts or omissions, 738
'integral obligations'
human rights and fundamental freedoms, 547
interest
basic principle, 531–3
calculation, 536–8
period in which payable, 1101-1104
pre-judgment and post-judgment interest distinguished, 533–4
rate, 536–8
reparation
ARSIWA, 718
DARIO 2010, 770
internal law
irrelevance as justification
ARSIWA, 717
internal subdivisions *see* political subdivisions
international crimes
consequences, 756
development of Draft Article 19, 390–ENF
Draft Articles 1996, 756–7
obligations for all states, BNF–757
specific consequences, 756
international forums
oversight of countermeasure, 706–11
international law
as applicable law
ARSIWA, 723
DARIO 2010, 777
generally, 100–3
diplomatic protection *see* diplomatic protection
peremptory norms *see* peremptory norms
International Law Commission *see* ILC
'international obligations of the state'
meaning, 734
international organizations
accountability, 84
agents
conduct, 1634-1634i
contravention of instructions, 763
excess of authority, 763
meaning, 761
attribution
ARSIWA, 744
to contributing states, 197–203
DARIO 2010, 745, 762–3
secondary responsibility distinguished, 211
breach of international obligation
composite act, 764
DARIO 2010, 763–4
existence, 763
requirement that obligation be in force, 763
serious breach, 770–1
time, 763
coercion of, 422
complicity, 410–12
conduct
acknowledged and adopted, 763
joint or collective, 343–54
contributing state responsibility
Al-Jedda case, 200–3
Behrami and Saramati cases, 197–200
case law, 197
countermeasures against
conditions, 774–5
DARIO 2010, 773–5
limits, 773–4
object of, 773–4
obligations not affected, 774
proportionality, 774
by states or international organizations other than injured state or organization, 775–ENF
termination, 775
diplomatic protection by, 77–8
direction and control of, 417–18
Draft Articles *see* ILC Draft Articles on the Responsibility of International Organizations 2010
early theory and practice, 190–3
'effective control'
definition, 203–5
Dutchbat case, 205–10
'equivalent' human rights protection by, 430–3
functional protection by, 593–ENF
imputability of acts or omissions, 738
internationally wrongful acts
aid or assistance for, 764, 775–6
cessation, 768
characterization, 762
circumvention of international obligations, 765, 776
coercion by state or other international organization, 764, 776
compensation, 769
continued duty of performance of obligation, 768
contribution to injury, 770
countermeasures *see* countermeasures against *above*
direction and control over, 764, 776
DARIO 2010, 764–5
elements, 762
fulfilment of reparation obligation, 770
interest, 770

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:24 Page Number: 818

international organizations (cont.)
international organization member of other international organization, 765
justification, 765–7
legal consequences, 768
non-repetition, 768
relevance of rules of organization, 768
reparation, 768–70
responsibility, 723, 762
restitution, 769
satisfaction, 769
scope of obligations, 768
state connection with, 775–7
state member of organization, 777
joint or collective responsibility, 343–54
meaning, 761
organs
conduct, 745, 1634-1634i
contravention of instructions, 763
excess of authority, 763
meaning, 761
placed at disposal of other organization, 762
placed at disposal of state, 744
peacekeeping, 193–7
reparation by
DARIO 2010, 768–70
forms of, 769
fulfilment of obligation, 770
obligation, 768
responsibility
of individuals, 777
responsibility of
applicability of international law rules, 777
ARSIWA, 723
connection with act of state or other international organization, 764–5
DARIO 2010, 1627-1680
implementation, 771–5
invocation, 771–3
rules
meaning, 761
relevance, 768
secondary responsibility
acceptance, 428–9
attribution distinguished, 211
basic rule, 423–4
exceptions, 428–30
injured party reliance, 429–30
judicial confirmation of basic rule, 424–7
member state responsibility, 422–3
separate personality, abuse of, 430–4
states, attribution to, 188–90
international responsibility
as state responsibility, 3
internationally wrongful acts
aid or assistance for *see* aid or assistance for wrongful act
of another state
responsibility, 749–50
attribution *see* attribution
cessation
ARSIWA, 717
Draft Articles 1996, 753
characterization
ARSIWA, 712
Draft Articles 1996, 743
circumstances precluding wrongfulness *see* justification
coercion by other state
ARSIWA, 715
continued duty of performance *see* obligations
countermeasures *see* countermeasures
customary international law, 752
direction and control over *see* direction and control over wrongful act
elements
ARSIWA, 712
Draft Articles 1996, 743
ILC Articles *see* ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA)
international organizations *see* ILC Draft Articles on the Responsibility of International Organizations 2010; international organizations
justification *see* justification
legal consequences
ARSIWA, 717–ENF
Draft Articles 1996, 751–3
lex specialis see lex specialis
non-repetition
ARSIWA, 717
reparation
ARSIWA, 717
responsibility
of any state, 743
applicability of international law rules, 723, 777
ARSIWA, 712
Draft Articles 1996, 743
of individuals, 723
of international organizations, 723
obligations arising from *see* obligations
plurality of responsible states, 720
see also breach of obligations, international crimes

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:25 Page Number: 819

interpretation of treaties
intertemporal law and, 246–50
intertemporal law *see* breach of obligations
interventions *see* humanitarian intervention
investment protection
as alternative to diplomatic protection, 569
applicable law, 100–2
attribution, 164
as basis for law of state responsibility, 24, 34–5
Chorzów principle, 600–3
claims, 100
class actions, 630, 637–40
compensation, 519, 620–1
consent, 287
counterclaims, 611–14
denial of justice, 270–1
diplomatic protection and, 569, 587–92
exhaustion of local remedies, 581–2
fork-in-the-road clauses, 624
'hybrid' character, 102
interest, 535–8
investor-state arbitration, 74–5, 128–9
nationality of claims, 577–80
obligation to make reparation, 481
primary rules, 33
recourse to, 549
secondary obligations applicable, 460–1
see also arbitration
invocation of responsibility
admissibility of claims *see* claims
'delictual capacity' principle, 62
erga omnes obligations *see erga omnes* obligations
formal requirements, 67–8
inadmissibility of claims *see* claims
international organizations, 771–3
level of harm, damage or injury required, 54–60
liability, concept of, 62–ENF
multiple parties *see* multiple parties
notice of claim
ARSIWA, 720
DARIO 2010, 771
'objective responsibility' principle, 60–1
obligations
erga omnes see erga omnes obligations
primary and secondary distinguished, 64–6
plurality of injured states or international organizations
ARSIWA, 720
DARIO 2010, 772
plurality of responsible states or international organizations
ARSIWA, 720
DARIO 2010, 772
prerequisites for, 54–61
primary and secondary rules distinguished, 64–6
responsibility, concept of, 62–ENF
by state other than injured state or international organization
ARSIWA, 720–1
DARIO 2010, 772–3

Jagota, S. P.
on necessity, 306–7
joint or collective responsibility
attribution to multiple states, 333–6
breach of communitarian norms *see* communitarian norms
claims, 358–61
contribution between persons collectively responsible, 355–8
generally, 325
guarantees and indemnities, 354–5
historical development, 326–8
implication in act of another state, 336–9
independent responsibility
exceptions, 336–9
principle, 333–6
international organizations, 343–54
joint organs, 339–41
other bases for solidary responsibility, 341–3
private law analogies, 328–32
by states, 333
see also secondary responsibility; succession to responsibility
judges
ad hoc appointment, 671–2
judicial implementation of responsibility
class actions in investment arbitration, 637–40
criminal compensation, 641–3
election of remedies
claimant's right to elect, 621–4
election during proceedings, 621–4
fork-in-the-road clauses, 624
non ultra petita rule, 626–9
generally, 598
human rights *see* human rights and fundamental freedoms
jurisdiction
Chorzów principle, 599–603
counterclaims, 609–14
distinction between cause of action and applicable law, 603–8
remedial discretion, 615–21
judiciary
definition, 121–3

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:26 Page Number: 820

jurisdictional immunity of state
humanitarian law, 467–8
justice
denial *see* denial of justice
justification
ARSIWA, 715–17
Austin's philosophy of excuses, 274, 278–9
burden of proof, 320–1
category of 'circumstances precluding wrongfulness', 274–80
compensation and, 318–20
consequences of invoking
ARSIWA, 717
DARIO 2010, 767
Draft Articles 1996, 750–1
DARIO 2010, 765–7
generally, 274
irrelevance of internal law
ARSIWA, 717
obligations arising from peremptory norms, 315–18
reservation as to compensation for damage, 751
termination or suspension of obligations, 281–3
types of, 283–315

Lauterpacht, Hersch
'approximate application' principle, 109
on interest, 536
on reparation, 537–8
work on state responsibility, 34
law of treaties
as applicable law, 281
exception of non-performance, 678–9, 681
intertemporal law and, 242–4
law of state responsibility distinguished, 684
obligations under, 216–17
reports on, 367
suspension or termination of treaty, 684
Vienna Convention *see Table of treaties*
legal persons
diplomatic protection, 730
legislature
definition, 120–1
imputability of acts or omissions, 737
lex specialis
applicable law, 103–5
ARSIWA, 722
Draft Articles 1996, 752
liability, concept
of invocation of responsibility, 62–ENF
liberty
deprivation of aliens', 735
Lighthouses Arbitration
ex post facto adoption of conduct, 182–3
negative succession rule, 443–5
local remedies
diplomatic protection, 731
exceptions to local remedies rule, 731
exhaustion of
diplomatic protection, 580–4, 731
Draft Articles 1961, 738–9, 748
inadmissibility of claims, 69–70
loss of profits
compensation, 522–3
Lowe, Vaughan
on circumstances precluding wrongfulness, 280

maltreatment
aliens, 735
mediation
Draft Articles 1996, 757
'military necessity'
treaty provision, 315
Monetary Gold Principle
application, 660–6
criminal prosecution, 667–8
defunct states, 666–7
exceptions, 666
generally, 655–7
jurisprudence, 1355-1356
scope, 657, 664–5
waiver of claim, 668–9
multiple nationality
diplomatic protection
claim against state of nationality, 729
claim against third state, 729
multiple parties
ad hoc judges, 671–2
claimants, 645–8
double recovery rule, 673–4
generally, 644–5
intervention by third states, 650–5
see also Monetary Gold Principle
joinder of claims, 669–71
respondents, 648–50

Namibian independence
negative succession rule, 453–5
national law *see* internal law
nationality of claims *see* claims
nationalization measures
affecting aliens, 736
natural persons
continuous nationality, 729
diplomatic protection, 729
state of nationality of, 728

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:28 Page Number: 821

necessity
as justification
ARSIWA, 716
Draft Articles 1996, 751
DARIO 2010, 767
generally, 305–15
negative succession rule
case law, 442–3
critiques of, 438–42
early theory and practice, 437–8
Gabčíkovo-Nagymaros case, 446
generally, 435–7
Lighthouses Arbitration, 443–5
state practice
dissolution of Yugoslavia, 451–2
German reunification, 449–51
Namibian independence, 453–5
role of, 447–8
separation from USSR, 452–3
succession where predecessor ceases to exist, 448–9
succession where predecessor continues to exist, 452
summary of issues, 455
negotiation
Draft Articles 1996, 757
new government
creation of, 174–6
new state
creation of, 176–9
Nicaragua case
direction and control, 147–9
non-assistance
obligation of, 385–6
non-performance exception (exceptio inadimpleti contractus)
ILC Draft Articles 1961, 736–7
self-help measures, 678–82
non-recognition
obligation of, 381–5
non-repetition
assurances and guarantees, 755
injury to aliens, 742
obligation of
ARSIWA, 717
DARIO 2010, 768
non-state actors
claims against, 81–3
corporate criminal responsibility, 80–1
individual criminal responsibility, 79–80
non ultra petita rule
election of remedies, 626–9
norms *see* communitarian norms; peremptory norms
'objective responsibility' principle, 60–1
obligations
acts or omissions *see* acts or omissions
arising from peremptory norms, 315–18
breach *see* breach of obligations
of cessation and non-repetition
ARSIWA, 717
classification of, 219–20
of conduct and result, 220–6
continued duty of performance
ARSIWA, 717
cessation distinguished, 464–5
DARIO 2010, 768
of co-operation, 386–9
due diligence, 226–32
illusory, 235–8
'integral obligations', 547
knowledge of, 416
of non-assistance, 385–6
of non-recognition, 381–5
opposability of, 416
of prevention, 226–32
primary
autonomy of, 216–17
secondary obligations distinguished, 64–6
termination of, 251–3
procedural, 232
reparation *see* reparation
scope of
ARSIWA, 717
secondary
primary obligations distinguished, 64–6
serious breach *see* peremptory norms
substantive, 232
suspension as self-help measure, 682–4
termination or suspension
as justification, 281–3
of primary obligation, 281–3
O'Connell, Daniel P.
on succession to responsibility, 435–6, 442
officials
imputability of acts or omissions, 737
organs acting outside competence or instructions
attribution, 745
organs of another state
attribution, 745
organs of international organization *see* international organizations
organs of the state
attribution
ARSIWA, 712
Draft Articles 1996, 743

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:29 Page Number: 822

organs of the state (cont.)
irrelevance of position in state organization, 744
other empowered entities or persons *see* entities exercising governmental authority
responsibility generally, 116–18
de facto, 124–6
definition, 118
'delegated' powers question, 134
imputability of acts or omissions, 737
and international organizations *see* international organizations
joint or collective responsibility, 339–41
see also entities exercising governmental authority
organs placed at disposal of another state
attribution
additional requirements, 135–6
ARSIWA, 713
Draft Articles 1996, 744
generally, 132–3
definition of 'disposal', 133–5
organs placed at disposal of international organization
attribution
DARIO 2010, 762
'overall control'
'effective control' distinguished, 146–7

pacta tertiis rule
complicity and, 409–10
Pauwelyn, Joost
instantaneous and continuing acts distinguished, 262–4
peacekeeping *see* humanitarian intervention
pecuniary damages
injury to aliens, 741–2
peremptory norms
applicable law, 106
compliance as justification
ARSIWA, 716
DARIO 2010, 767
consequences of serious breach
generally, 380–1
obligation of co-operation, 386–9
obligation of non-assistance, 385–6
obligation of non-recognition, 381–5
definition of, 378–80
serious breach
ARSIWA, 719
DARIO 2010, 770–1
particular consequences, 719, 770–1
see also communitarian norms
persons exercising governmental authority *see* entities exercising governmental authority
persons not acting on behalf of state
attribution, 745
political subdivisions
definition, 123–4
imputability of acts or omissions, 738
prevention of event
breach of obligation of, 226–32, 749
primary obligation
continuation after restoration of relations, 461
primary rules
autonomy of, 216–17
secondary rules distinguished, 64–6
profits, loss of
compensation for, 522–3
proof *see* burden of proof
proportionality
compensation, 482–4
of countermeasures *see* countermeasures
protection, duty of *see* duty of protection
public debts
repudiation/cancellation measures affecting aliens, 737
Pufendorf, Samuel von
writings on responsibility, 3–4, 11–15
punitive damages
as compensation, 523–6

Rachel, Samuel
writings on responsibility, 11
refugees
diplomatic protection, 729
relief operations *see* humanitarian intervention
remedies
election of *see* judicial implementation of responsibility
judicial discretion as to, 615–21
reparation and, 506–10
see also compensation; interest; restitution; satisfaction
reparation
assurances and guarantees against repetition of breach distinguished, 475–6
available forms of, 506–8
basic principle, 480–1
claims *see* claims
contribution to injury
ARSIWA, 719
DARIO 2010, 770
election, right of, 508–9
entitlement, 753

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:30 Page Number: 823

forms of
ARSIWA, 718
DARIO 2010, 769
see also compensation; restitution; satisfaction
'full' reparation
ARSIWA, 481–3
case law, 483–5
generally, 94
hierarchy of, 509–10
interest *see* interest
by international organization *see* international organizations
mitigation of, 1027-1029
obligation
ARSIWA, 717
DARIO 2010, 768
fulfilment, 770
remedies and, 506–10
right of election, 508–9
see also injury; remedies
repetition of breach
assurances and guarantees against
appropriateness of, 476–9
generally, 469
obligation to offer, 469
reparation distinguished, 475–6
rescue operations *see* humanitarian intervention
responsibility
19th and early 20th century developments, 20–35
and accountability, 83–5
concept of, 62–ENF
criminal responsibility *see* criminal responsibility
in early international law writings, 4–20
Hague Codification Conference 1930 *see* Hague Codification Conference 1930
Harvard Draft Research *see* Harvard Draft Research
historical development, 3–44
ILC's work on *see* ILC Articles on Diplomatic Protection 2006; ILC Draft Articles on State Responsibility 1996
implementation *see* claims, diplomatic protection, invocation of responsibility
independent responsibility *see* independent responsibility
indirect responsibility *see* indirect responsibility
retrospective acceptance, 245–6
secondary responsibility and attribution distinguished, 211
succession to *see* negative succession rule
wrongful acts *see* internationally wrongful acts
see also state responsibility
restitution
basic principle, 510–11
cessation distinguished, 469
disproportionate burden of, 514–15
flexible approach to, 515–16
forms of, 511–12
impossibility of, 512–13
injury to aliens, 741–2
in kind, 754
limitations, 512–15
obligation
ARSIWA, 718
restoration of relations
assurances and guarantees against repetition *see* repetition of breach
cessation of breach *see* cessation
continuation of primary obligation, 461
generally, 459–60
legal effects of breach, 460–1
secondary obligations applicable, 460–1
retorsion
use of, 676–8
rights
aliens *see* aliens, injury to
human rights *see* human rights and fundamental freedoms
injury to *see* injury
Riphagen, William
Special Rapporteur, 36–7, 464, 475
see also Table of reports of Special Rapporteurs
rules
primary and secondary rules distinguished, 64–6
'rules of the organization'
meaning, 761

satisfaction
basic principle, 527
case law, 529–30
entitlement, 754
forms of, 527–9, 754
limitations, 530–1
obligation
ARSIWA, 718
DARIO 2010, 769
secondary responsibility
aid or assistance for breach *see* aid or assistance for wrongful act
attribution distinguished, 211

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:31 Page Number: 824

secondary responsibility (cont.)
direction and control *see* direction and control over wrongful act
of international organizations *see* international organizations
restoration of relations, 460–1
scope of, 395–6
scope of state responsibility, 395–9
secondary rules
primary rules distinguished, 64–6
'self-contained regimes'
lex specialis and, 103–5
self-defence
as justification
ARSIWA, 715
Draft Articles 1996, 751
DARIO 2010, 765
generally, 289–92
self-help measures
countermeasures by injured state *see* countermeasures
exception of non-performance (exceptio inadimpleti contractus), 678–82
retorsion, 676–8
suspension of obligations, 682–4
serious breach of obligations under peremptory norms *see* peremptory norms
shareholders
diplomatic protection, 730
direct injury to, 730
Shelton, Dinah
on punitive damages, 526
ships' crews
diplomatic protection, 731
Simma, Bruno
on assurances and guarantees, 469–70
on communitarian norms, 372–4
on *erga omnes* obligations, 389
on exception of non-performance, 681
on insurrectional movements, 173
on joint-and-several liability doctrine, 331
on 'legal injury', 487
on multiple responsibility, 328–9
on obligations arising from peremptory norms, 317
on right to take countermeasures, 105
on suspension of obligations, 682
Soviet Union, separation from
negative succession rule, 452–3
state
absence of *see* authority
creation of new, 176–9
see also negative succession rule
injured *see* injury
jurisdictional immunity, 467–8
see also third state
state direction and control *see* direction and control over wrongful act
state of nationality
claims on behalf of aliens, 740–1, 740–ENF
of corporation, 730
definition, 728
diplomatic protection by, 728
of natural person, 728
state of necessity *see* necessity
state officials *see* officials
state organs *see entries at* organs
state-owned corporations
direction and control, 161–5
state responsibility
acts or omissions giving rise to *see* acts or omissions
concept, 49–ENF
as to conduct of international organization, 775–7
convention, 90–ENF
critiques of
governmental, 85–7
scholarly, 87–90
direction and control *see* direction and control over wrongful act
Draft Articles 1961 *see* ILC Draft Articles on State Responsibility 1961
Draft Articles 1996 *see* ILC Draft Articles on State Responsibility 1996
ILC Articles 2001 *see* ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA)
international responsibility seen as, 3
investment protection as basis for law of, 24, 34–5
invocation *see* invocation of responsibility
law of treaties distinguished, 684
terminology, 51–ENF
typology, 51–4
and UN Charter *see* United Nations Charter
stateless persons
diplomatic protection, 729
Suárez, Francisco
writings on responsibility, 3–4
successor states *see* negative succession rule

Tadić case
direction and control, 149–54
Tams, Christian J.
on right of claim, 564–5
on suspension of obligations, 682
Teheran Hostages case
ex post facto adoption of conduct, 183–6

PROOF

Comp. by: SUNDARAVARADARAJULU Stage: Proof Chapter No.: Index Title Name: CRAWFORD
Date:19/3/13 Time:05:02:36 Page Number: 825

terrorism
direction and control
bases of responsibility, 157–61
effective control test, 156–7
Textor, Johann Wolfgang
writings on responsibility, 11
third state
diplomatic protection by, 78–9
diplomatic protection claims against, 729
functional protection by, 593–ENF
imputability of acts or omissions, 738
intervention in multi-party claims, 650–5
see also Monetary Gold Principle
threat or use of force
obligation to refrain from, 690–1
time
breach of obligation *see* breach of obligations
contemporaneity principle, 242–3
intertemporal law *see* breach of obligations
start of state liability, 892-895
submission of claims, 741
tort
alien torts, 81–3
treaty interpretation
intertemporal law and, 246–50
Treaty of Versailles 1919
German responsibility, 27–8
Triepel, Heinrich
writings on responsibility, 22–3

ultra vires see excess of authority
unilateral self-help measures *see* self-help measures
United Nations Charter
applicable law, 106
and ARSIWA, 723
and Draft Articles 1996, 723
and DARIO 2010, 777
United Nations General Assembly
resolutions as to ARSIWA, 724–7
United Nations Security Council
oversight of countermeasure, 706–11
use or threat of force
obligation to refrain from, 690–1
USSR, separation from
negative succession rule, 452–3

Vattel, Emerich de
writings on responsibility, 18–20, 76, 170, 181, 569–70
Vitoria, Francisco de
writings on responsibility, 3–4

waiver of claim *see* claims
war crimes
charges, 149–50
Wheaton, Henry
writings on responsibility, 20–1
Whiteman, Marjorie M.
on interest, 537
Wolff, Christian
writings on responsibility, 11, 17–19
wrongfulness
circumstances precluding *see* justification
internationally wrongful acts *see* internationally wrongful acts

Yugoslavia, dissolution of
negative succession rule, 451–2

Zouche, Richard
writings on responsibility, 3–4, 11, 11–12

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Comp. by: Vpugazhenthi Stage: Proof Chapter No.: Series List Title Name: CRAWFORD
Date:19/3/13 Time:17:54:16 Page Number: 826

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