



**British Institute of
International and
Comparative Law**

THE IMPACT OF THE ILC'S ARTICLES ON RESPONSIBILITY
OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

— PRELIMINARY DRAFT —

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THE IMPACT OF THE ILC'S ARTICLES ON RESPONSIBILITY
OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

— PRELIMINARY DRAFT —

Foreword

This is the preliminary draft of the outcome of a study carried out for the British Institute of International and Comparative Law.

The study is aimed at providing a portrayal of the impact and influence of the Articles on the Responsibility of States for Internationally Wrongful Acts ('the Articles'), since their adoption on second reading by the International Law Commission in 2001.

This preliminary draft is being circulated for information in advance of the debate to take place during the 62nd session of the General Assembly as to whether any further action should be taken in relation to the Articles,¹ and in particular as to whether a diplomatic conference should be convened in order to transform the Articles into a multilateral convention on State responsibility.

As mandated by the terms of General Assembly Resolution 59/35, the UN Secretariat produced a compilation of express references to the Articles and their Commentaries in international judicial practice.²

Although there is inevitably some overlap with the Secretariat compilation, the present study has a scope which is materially wider:³ first, it includes references to the Articles made in the separate or dissenting opinions of judges of both the International Court of Justice and other bodies; second, it aims to provide a greater amount of context to instances of express reference, so as to provide a better understanding of the circumstances in which reference has been made to the Articles; third, it aims to provide some comment upon, and where appropriate, criticism of, the way in which the Articles have been applied in specific instances; fourth, it includes the most important instances of reliance on the Articles by domestic courts.

However, most importantly, the study aims to provide a survey not only of express references to the Articles, but also to the most important judicial pronouncements (in particular those of the International Court of Justice) which, although made without express reference to the Articles, are relevant to matters falling within their subject matter and which are therefore relevant to an assessment of the impact of the Articles since their adoption.

The present study therefore aims to catalogue the major instances of relevant judicial and arbitral practice in relation to the international law of State responsibility between 9 August 2001, the date of completion of the ILC's work on the topic of State responsibility, and 10 October 2007, and in

¹ For the General Assembly's previous action in this regard, see General Assembly Resolution 56/83 (2001) and General Assembly Resolution 59/35 (2004).

² See 'Responsibility of States for internationally wrongful acts; Compilation of decisions of international courts, tribunals and other bodies; Report of the Secretary-General', UN doc. A/62/62 and Add.1.

³ Although in one respect it is narrower, as only practice postdating the adoption of the Articles by the International Law Commission is included.

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the process enable an assessment of the extent to which the Articles have both been expressly relied upon, and the extent to which they are consistent with the prevailing practice in relation to the law of State responsibility.

In doing so, the study includes a number of instances of express reliance on the Articles by international courts and tribunals which are not included in the Secretariat compilation; the majority of these instances have only been made publicly available since the completion of the Secretariat compilation.

Finally, it should be emphasised that the present study does not attempt to express a view as to whether the Articles as a whole, or any particular provision of them, represent customary international law. Nevertheless, where appropriate, attention is drawn to the views of courts and tribunals which have expressed an opinion in this regard.

* * *

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All views expressed (as well as all errors) are solely those of the author.

10 October 2007

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
GENERAL PRINCIPLES

The provisions contained in Chapter I of Part One of the Articles embody principles which are to a large extent axiomatic, reflecting fundamental conceptions of the international law of State responsibility. Article 1 sets out the basic proposition that every wrongful act of a State entails the international responsibility of that State, Article 2 provides that an internationally wrongful act occurs where conduct consisting of an act or omission is both attributable to the State under international law and constitutes a breach of an international obligation of the State, while Article 3 embodies the principle that the characterization of an act as internationally wrongful is governed by international law, and its characterization act as lawful under a State's internal law does not affect that characterization as a matter of international law.

Nevertheless, despite the elementary nature of the rules contained therein, the provisions of Chapter I of Part One, as well as the ILC's accompanying Commentaries, have been referred to in judicial and arbitral practice on a number of occasions since the adoption of the Articles in 2001. In this regard, reference has been made in particular to the ILC's Commentaries, in order to elucidate particular aspects of their application and basic concepts of the law of State responsibility. Further, the basic principles contained in Chapter I of Part One have been implicitly affirmed by a number of decisions by judicial and arbitral bodies.

Part One – The Internationally Wrongful Act

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 1 lays down the fundamental proposition of the international law of State responsibility that every internationally wrongful act of a State entails its international responsibility. The rules relating to the determination of whether an internationally wrongful act of a State has taken place are the subject of the remainder of Part One, while the content of the international responsibility of a State arising as the result of the commission of an internationally wrongful act is dealt with in Part Two of the Articles.

Given its axiomatic nature, it might have been expected that little express reference should have been made to Article 1 in judicial and arbitral practice since the adoption of the Articles; However, there have been a number of instances of express reference to Article 1, while other judicial pronouncements confirm the principle contained therein.

In its decision on annulment in *CMS Gas Transmission Company v Argentine Republic*,¹ the ad hoc Committee made reference to 'the well-known principle of international law recalled in Article 1 of the ILC Articles'.² That reference was made in support of the Committee's conclusion that, given that the Tribunal in the decision the subject of the application for annulment had concluded that Argentina had breached its obligations under the applicable BIT, 'Argentina was responsible for the wrongful measures it had taken' and compensation was therefore payable.³

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*⁴ the International Court of Justice stated, albeit without reference to Article 1:

The Court, having established that Uganda committed internationally wrongful acts entailing its international responsibility [...], turns now to the determination of the legal consequences which such responsibility involves.⁵

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁶ the International Court of Justice, in the context of its discussion of attribution of conduct of the organs of a State referred to

[...] the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.⁷

¹ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007.

² *Ibid.*, para. 149

³ *Ibid.*

⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁵ *Ibid.*, para. 251.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁷ *Ibid.*, para. 385.

Although made without express reference to the Articles, that statement constitutes a synthesis and affirmation of the principles contained in Articles 1, 2 and 4.

Similarly, earlier on in its judgment, the Court had stated:

[t]he Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.⁸

In its decision on the merits in *Ilasçu and others v Russia and Moldova*,⁹ a case concerning the responsibility of Russia and Moldova for the detention and ill-treatment of individuals by the rebel administration in the break-away 'Trans-Dniestrian Republic' on the territory of Moldova, the Grand Chamber of the European Court of Human Rights observed, without express reference to any specific provision of the Articles, that:

[a]nother recognised principle of international law is that of State responsibility for the breach of an international obligation, as evidenced by the work of the ILC.¹⁰

The *Guyana/Suriname* arbitration,¹¹ related principally to delimitation of the maritime boundary between the two States. However, Guyana invoked the responsibility of Suriname in relation to various actions alleged to constitute a threat of force by members of the Surinamese armed forces in a portion of the disputed maritime area which the Tribunal ruled appertained to Guyana. The Tribunal made express reference to Article 1 of the Articles in summarising Guyana's arguments in response to the objections taken by Suriname to its claim

The Tribunal found that the actions of Suriname constituted a threat of the use of force, contrary to its international obligations,¹² dismissed various objections to the admissibility of Guyana's claims, and, as discussed below in the context of Article 50, also dismissed Suriname's argument that the actions of its armed forces could be qualified as a lawful countermeasure.¹³

Guyana had requested that the Tribunal order the payment of compensation and order that Suriname should refrain from further threats of force. In response, Suriname had referred to the judgment of the International Court of Justice in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*,¹⁴ in which the Court had dismissed a similar request for relief in relation to State responsibility arising from the actions of Nigerian forces in areas which had been found to form part of Cameroon's territory, on the basis 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. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.¹⁵

⁸ Ibid., para. 179.

⁹ *Ilasçu and others v Russia and Moldova* (App. No. 48787/99), Reports 2004–VII.

¹⁰ Ibid., para. 320.

¹¹ *Guyana/Suriname*, Award of 17 September 2007.

¹² See *ibid.*, paras. 439–440 and see the *dispositif*, para 488(3): Suriname's actions 'constituted a threat of the use of force in breach of [UNCLOS], the UN Charter, and general international law...'

¹³ Ibid., para. 446.

¹⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Merits, ICJ Reports 2002, p. 303.

¹⁵ Ibid., at p. 452, para. 319.

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Relying on that passage, Suriname sought to argue that, similarly:

[...] even if the Tribunal in this case concludes that the incident occurred in waters that are now determined to be under Guyana's jurisdiction, the Tribunal should decline to pass upon Guyana's claim for alleged unlawful activities by Suriname.¹⁶

In response, as recorded by the Tribunal, Guyana argued that Suriname by its argument:

[...] has disregarded the rule set forth in Article 1 of the ILC Draft Articles that every internationally wrongful act of a State entails the responsibility of that State. [...] Suriname's reliance on the *Cameroon/Nigeria* case was misplaced. In that case, it held, the Court did not enumerate a general principle that State responsibility is irrelevant to boundary disputes but limited itself solely to the relief sought by Cameroon.¹⁷

The Tribunal observed that it 'agrees with Guyana's characterization of the ICJ's judgment in *Cameroon/Nigeria*'.¹⁸ However, as discussed below in relation to Article 37, the Tribunal followed the approach adopted by the Court in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, concluding that the Guyana's claim was 'sufficiently addressed'¹⁹ by its finding as to delimitation and that:

[i]n a like manner, [the Tribunal] will not seek to ascertain whether and to what extent Suriname's responsibility to Guyana has been engaged [...]. This dictum of the ICJ is all the more relevant in that as a result of this Award, Guyana now has undisputed title to the area where the incident occurred – the injury done to Guyana has thus been 'sufficiently addressed'.²⁰

The Commentary to Article 1, which explains a number of more general concepts of the law of State responsibility, has also attracted a certain degree of attention. The Commentary to Article 1 deals with the nature of international responsibility, including whether the relations resulting from an internationally wrongful act are bilateral,²¹ as well as clarifying that the term 'act' in Article 1 includes omissions (a proposition also made clear by Article 2),²² and that an internationally wrongful act may consist of one or more actions or omissions, or a combination of both (a concept further developed by Article 15).²³

In his Separate Opinion appended to the judgment of the Inter-American Court of Human Rights in *Miguel Castro Castro Prison*,²⁴ having referred to his Separate Opinion in *Gómez Paquiyauri Brothers* in which he had expressed the view that:

¹⁶ *Guyana/Suriname*, Award of 17 September 2007, para. 448, quoting Suriname Rejoinder, para. 4.3.

¹⁷ *Guyana/Suriname*, Award of 17 September 2007, para. 449.

¹⁸ *Ibid.*, para. 450; That Tribunal's Award may be read as affirming Guyana's reliance on Article 1 of the Articles and the principle that every breach by a State of an international obligation entails its international responsibility, although admittedly that conclusion is somewhat undermined by the Tribunal's use and adaption of the formulation of the International Court of Justice that it would not seek to ascertain 'whether and to what extent Suriname's responsibility to Guyana has been engaged...' (*ibid.*, para. 451; emphasis added). It may also be noted in this regard that, in contrast to the International Court of Justice in *Cameroon/Nigeria*, the Tribunal in *Guyana/Suriname* actually found that Suriname had breached its international obligations: see the *dispositif*, *ibid.*, para. 488(3).

¹⁹ *Ibid.*, para. 450.

²⁰ *Ibid.*, para. 451.

²¹ Commentary to Article 1, paragraphs (3)–(6).

²² Commentary to Article 1, paragraph (8).

²³ Commentary to Article 1, paragraph (1).

²⁴ *Miguel Castro Castro Prison (Peru)*, *Merits, Reparations and Costs*, I-A.C.H.R., Series C, No. 160, judgment of 25 November 2006, Separate Opinion of Judge Cançado Trindade.

[i]n International Law on Human Rights, *the State's international responsibility arises exactly when the violation of the rights of a human being occurs*, that is, at the time when the international illegal act attributable to the State occurs. Within the framework of the American Convention on Human Rights, the State's international responsibility may arise due to acts or omissions of any power or body or agent of the State, regardless of their hierarchy, that violates the rights protected by the Convention.²⁵

Judge Cançado Trindade stated:

[i]n synthesis [...] there cannot be any doubt, according to the most lucid doctrine on International Law, that the State's international responsibility (as a subject of International Law) arises when the illegal act (act or omission), which violates an international obligation, attributable to the State occurs.²⁶

In an accompanying footnote, he made reference to, inter alia, the Commentary to Article 1 of the Articles.²⁷

In *Eureko BV v Republic of Poland*,²⁸ the Tribunal addressed, as a preliminary question to its assessment of the conduct of the Respondent in the light of its obligations under the applicable BIT, the issue of whether omissions alleged to have been committed by the Respondent were capable of resulting in its international responsibility under the BIT. The Tribunal concluded that, as a matter of interpretation of the provision in question, the term 'measures' contained in Article 5 of the Netherlands-Poland BIT was intended to include not only acts but also omissions.²⁹ As a subsidiary argument in support of that conclusion, the Tribunal observed that:

[...] several contemporary sources of international law, including the UN International Law Commission in its fundamental and extended labors on State Responsibility confirm that 'measures taken' include omissions.³⁰

In that regard, the Tribunal made reference to two passages from the Commentary to Articles 1 of the Articles (in addition to referring to a passage taken from the Commentary to Article 2) in which the Commission had noted that '[a]n internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both' and that 'the term 'act' is intended to encompass omissions'.³¹

²⁵ Ibid., para. 31, quoting '*Gómez Paquiyauri Brothers v Peru*, I-A.C.H.R., Series C, No. 110, judgment of 7 August 2006, Separate Opinion of Judge Cançado Trindade, para. 14 (emphasis in original).

²⁶ *Miguel Castro Castro Prison (Peru)*, Merits, Reparations and Costs, I-A.C.H.R., Series C, No. 160, judgment of 25 November 2006, Separate Opinion of Judge Cançado Trindade, para. 32.

²⁷ Ibid., note 21, referring to Commentary to Article 1, paragraph (2).

²⁸ *Eureko BV v Republic of Poland*, Partial Award of 19 August 2005.

²⁹ Ibid., para. 186.

³⁰ Ibid., para. 187.

³¹ Ibid., para. 188, quoting Commentary to Article 1, paragraphs (1) and (8).

Part One – The Internationally Wrongful Act

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 2 sets out the two positive conditions for an internationally wrongful act, namely, that conduct (consisting of either an action or omission) must be attributable to the State, and that that conduct must constitute a breach of an international obligation incumbent on the State. The circumstances in which conduct is attributable to a State is dealt with in Chapter II of Part One (Articles 4 to 11); the rules concerning when conduct is to be considered to be a breach of an international obligation, and related questions concerning the point at which a breach occurs, and extension in time of breaches, are contained in Chapter III of Part One (Articles 12 to 15).

As with Article 1, the proposition contained in Article 2 is a fundamental structural concept of the general international law of State responsibility. The provision has been the subject of sparse express judicial reference, although, as with Article 1, a number of cases implicitly provide support for the International Law Commission's formulation of the two positive conditions for the existence of State responsibility for an internationally wrongful act.

The Tribunal in *Total S.A. v Argentine Republic*³² made express reference to the two positive conditions for responsibility contained in Article 2, as well as referring to the Commentary thereto, in rejecting an argument that Total had suffered no damage, and that there was therefore no dispute between the Parties. Having concluded that there was evidently a dispute between the Parties, the Tribunal added:

[f]inally the Tribunal observes that the Claimant has requested a declaratory judgment that Argentina has breached the BIT. In this respect the issue of the damages is immaterial.³³

In the footnote accompanying that passage, the Tribunal noted, referring to the Commentary to Article 2 (and implicitly to Article 2 itself), that:

[a] basic issue in the present dispute is whether Argentina has committed an internationally wrongful act, that is whether it has breached the international obligations contained in the BIT by conduct attributable to it. As held by the I.L.C. these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused damage is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation not to cause damages [...]³⁴

³² *Total S.A. v Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Objections to Jurisdiction, 25 August 2006.

³³ *Ibid.*, para. 89.

³⁴ *Ibid.*, note 51, referring to Commentary to Article 2, paragraph (9).

As noted above in relation to Article 1, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,³⁵ the International Court of Justice referred to

[...] the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.³⁶

Although made without reference to Article 2, and phrased only in terms of conduct of State organs, that statement reflects the conception of State responsibility for internationally wrongful acts contained in Article 2 as consisting of conduct attributable to a State, which is in breach of one or more of that State's international obligations.

Similarly, earlier in its judgment, having found that the only actions constituting genocide in relation to which the necessary specific intent had been established were the massacres at Srebrenica, the Court formulated the issue it had to address in relation to the responsibility of the Respondent for those acts in the following way:

[f]irst, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide.³⁷

Again, the Court's approach clearly endorses the approach adopted by the International Law Commission in Article 2, namely that the international responsibility of a State arises where conduct contrary to the obligations of a State is attributable to that State.

Also of interest in this regard, is the Court's later observation in relation to an argument by the applicant that, due to the particular nature of the crime of genocide, the rules for attribution in that regard were different from those under customary international law:

[t]he Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in [*Military and Paramilitary Activities in and against Nicaragua*]. 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

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

³⁶ *Ibid.*, para. 385.

³⁷ *Ibid.*, para. 379.

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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.³⁸

A further affirmation of the basic conception of the law of State responsibility contained in Article 2 is provided by the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.³⁹ Having concluded that conduct of the Ugandan Peoples' Defence Forces (a part of the Ugandan armed forces) was attributable to Uganda, the Court observed as follows:

[t]he Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations.⁴⁰

In its decision on annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, the ad hoc Committee commented in passing upon the terminology utilized by the Tribunal in the Award the subject of the application for annulment in its discussion of whether conduct of the Argentine province of Tucumán was attributable to Argentina; the Committee noted that:

[i]n considering the Tribunal's findings on the merits, it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims 'based directly on alleged actions or failures to act of the Argentine Republic' and, on the other hand, claims relating to conduct of the Tucumán authorities which are nonetheless brought against Argentina and 'rely ... upon the principle of attribution'.⁴¹

In that regard, the ad hoc Committee observed in a footnote, with reference to, inter alia, Article 2(a) that:

[t]he terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. See ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Resolution 54/83, 12 December 2001 (hereafter 'ILC Articles'), Articles 2 (a), 4 and the Commission's commentary to Article 4, paras. (8)–(10). A similar remark may be made concerning the Tribunal's later reference to 'a strict liability standard of attribution' [...]. Attribution has nothing to do with the standard of liability or responsibility. The question whether a state's responsibility is 'strict' or is based on due diligence or on some other standard is a separate issue from the question of attribution (cf. ILC Articles, Arts. 2, 12). It does not, however, appear that either of these terminological issues affected the reasoning of the Tribunal, and no more need be said of them.⁴²

The Committee also later affirmed, in the context of its discussion of the distinction between breaches of contract and breaches of treaty, that

³⁸ Ibid., para. 401.

³⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁴⁰ Ibid., para. 215.

⁴¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para. 16.

⁴² Ibid., note 17.

[...] in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities.⁴³

As noted above in the context of Article 1, in *Eureko BV v Republic of Poland*, the Tribunal referred to the Commentaries to Articles 1 and 2 of the Articles in relation to the issue of whether the term ‘measures’ contained in Article 5 of the applicable BIT included not only acts but also omissions. Having rejected the Respondent’s argument that the term ‘measures’ was limited to positive acts and excluded omissions, the Tribunal referred, in support of that conclusion, to the fact that:

[...] several contemporary sources of international law, including the UN International Law Commission in its fundamental and extended labors on State Responsibility confirm that ‘measures taken’ include omissions.⁴⁴

The Tribunal then cited passages from the Commission’s Commentaries to Articles 1 and 2, including the following passage from the Commentary to Article 2:

[c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two [...]⁴⁵

A similar point was made by the Tribunal in *Fireman’s Fund Insurance Company v United States of Mexico*.⁴⁶ In discussing the notion of expropriation under Article 1110 NAFTA, the Tribunal observed:

NAFTA does not give a definition for the word ‘expropriation.’ In some ten cases in which Article 1110(1) of the NAFTA was considered to date, the definitions appear to vary. Considering those cases and customary international law in general, the present Tribunal retains the following elements.

(a) Expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by the NAFTA. [...]⁴⁷

In an accompanying footnote, the Tribunal observed, with reference to Article 2 of the Articles that:

[a] failure to act (an ‘omission’) by a host State may also constitute a State measure tantamount to expropriation under particular circumstances, although those cases will be rare and seldom concern the omission alone.⁴⁸

Judge Skotnikov in his Declaration in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*.⁴⁹ made reference to the Commentary to Article 2 in explaining his disagreement with the Court’s approach to the question of State responsibility for genocide. He stated:

⁴³ Ibid., para. 96.

⁴⁴ *Eureko BV v Republic of Poland*, Partial Award of 19 August 2005, para. 187.

⁴⁵ Ibid., para. 188 quoting Commentary to Article 2, paragraph (4).

⁴⁶ *Fireman’s Fund Insurance Company v United States of Mexico* (ICSID Additional Facility Case No. ARB(AF)/02/01), Final Award of 11 July 2007

⁴⁷ Ibid., para. 176.

⁴⁸ Ibid., note 155.

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, Declaration of Judge Skotnikov.

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The Court, while concluding that ‘the Contracting Parties to the Convention are bound not to commit genocide’ makes a clarification that the Parties are under the obligation not to do so ‘through the actions of their organs or persons or groups whose acts are attributable to them’ [...].

The Court states that ‘if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred’. This is absolutely true. A State’s responsibility is engaged when a crime of genocide is committed by an individual whose acts are legally attributable to it. No ‘unstated obligation’ for States not to themselves commit genocide is needed for this responsibility to be incurred through attribution.

Therefore, I cannot accept the Court’s reasoning that, unless the Convention is read as containing an obligation on State parties not to commit genocide themselves, States would not be ‘forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law’ [...]. The ILC stated the obvious when it said:

‘The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An ‘act of the State’ must involve some action or omission by a human being or group: ‘States can act only by and through their agents and representatives’.’

It would indeed be extraordinary to read the Genocide Convention as allowing States ‘as such’ to commit genocide, or any of the other Article III acts, for their responsibility will be incurred when a crime of genocide is committed by persons capable of engaging State responsibility. Generally, as a matter of principle, wherever international law criminalizes an act, if that act is committed by an individual capable of engaging State responsibility, the State can be held responsible. The fact that some international conventions criminalizing certain acts contain ‘escape clauses’, as in the cases of the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of Acts of Nuclear Terrorism, excluding armed forces during an armed conflict from the scope of these conventions, only confirms this principle. This principle is definitely embodied in the Genocide Convention, which first, specifically refers in Article IX to the responsibility of a State for genocide, a crime committed according to its substantive part by individuals, and second, reflects the absolute prohibition of genocide under general international law. The artificial notion of a State’s obligation under the Genocide Convention not to commit genocide does nothing to reinforce this air-tight prohibition.⁵⁰

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.

Article 3 states another basic proposition of the law of State responsibility: that the characterization of the act of a State as internationally wrongful is governed by international law, and that such a characterization is not affected by the fact that the act might be characterized as lawful by a State's domestic law. Article 3 is a particular application of the more general principle that, from the viewpoint of international law, the provisions of national law are a question of fact. Different facets of the same proposition, i.e. that the internal law of a State cannot affect the characterization of an act under international law and cannot provide a justification for the State's failure to comply with its obligations, are contained in Article 7 of the Articles, which states that an act is attributable to a State even if was taken by the actor in question in excess of authority or in contravention of instructions, and Article 32, which states that a responsible State cannot rely on its internal law as a justification for its failure to comply with the secondary obligations arising as a result of an internationally wrongful act.

In relation to the particular aspect of this general principle contained in Article 3 of the Articles, there has been a certain amount of judicial and arbitral practice supporting the rule as formulated by the ILC.

In its decision on annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*,⁵¹ the ad hoc Committee made reference to Article 3 of the Articles, as well as quoting extensively from the ILC's Commentaries in the context of its observations as to the inter-relationship between questions of breach of contract and questions of breach of the applicable bilateral treaty in the context of that case.

The case arose out of a concession agreement entered into by the claimant with the authorities of the Province of Tucumán, one of the sub-federal constituent entities of the Argentine Republic; that agreement contained an exclusive jurisdiction clause in favour of the local administrative courts in relation to any dispute relating to the interpretation or application of the Agreement. The claimant alleged various breaches of the fair and equitable treatment and full protection and security standards contained in the applicable bilateral investment treaty, both by conduct of the Province of Tucumán which was alleged to be in breach of the concession agreement and which was argued to be attributable to the respondent, as well as by actions of the federal authorities of Argentina itself.

The ad hoc Committee observed in this regard:

[a]s to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles [...]

⁵¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002.

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In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to Article 3 of the ILC Articles [...] ⁵²

The ad hoc Committee then set out lengthy extracts from the ILC's Commentaries on Article 3,⁵³ before later continuing

[o]n the other hand, where '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 between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.

In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.

Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16 (4) of the Concession Contract could have prevented its characterization as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty.⁵⁴

The Tribunal in *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* made reference to Article 3 of the Articles in the context of its decision on an application made by the claimant for the indication of provisional measure relating to contempt proceedings before the respondent's domestic courts.⁵⁵ The Supreme Court of Pakistan, by a judgment of 3 July 2002, had granted an injunction restraining the claimant from proceeding with the arbitration proceedings

⁵² Ibid., paras. 95–97.

⁵³ Ibid., para. 97, quoting Commentary to Article 3, paragraphs (4) and (7).

⁵⁴ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, paras. 101–103

⁵⁵ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Procedural Order No. 2 of 16 October 2002; *ICSID Review-FILJ*, vol. 18 (2003), p. 293; ICSID Reports, vol. 8, p. 388.

before ICSID in favour of domestic arbitration, reasoning that the ICSID Tribunal did not have jurisdiction; although an application had been made to hold the claimant in contempt for failure to comply with a similar injunction of the lower court by proceeding with its claim before ICSID, no action had been taken on it.

The Tribunal noted that the judgment containing the injunction addressed to the claimant was a final one, which the respondent was not able to remove or have set aside;⁵⁶ however, it also observed that 'although the Supreme Court Judgment of July 3, 2002 is final as a matter of the law of Pakistan, as a matter of international law, it does not in any way bind this Tribunal'.⁵⁷ On the other hand, the Tribunal affirmed that the claimant had a *prima facie* right to resort to ICSID arbitration under the ICSID Convention.⁵⁸ In these circumstances, the Tribunal observed, in relation to the provisional measure sought by the Claimant, that:

[...] it is important that the possibility of contempt proceedings in relation to the Supreme Court's 3 July 2002 Judgment not in any way impair the rights discussed above. The right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law.⁵⁹

In support of its statement that a State cannot 'plead its internal law in defence of an act that is inconsistent with its international obligations', the Tribunal made reference in a footnote to Article 3 of the Articles, as well as to Article 27 of the Vienna Convention on the Law of Treaties.⁶⁰

The reasoning of the *ad hoc* Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* set out above, including the references to Article 3 and the Commentary thereto, was quoted *in extenso* by the Tribunal in *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* in its later decision on jurisdiction.⁶¹ The reference arose in the context of the Tribunal's discussion of the interpretation to be given to a provision which was alleged to constitute an 'umbrella' clause, and in particular in support of the Tribunal's statement that:

[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.⁶²

In *SGS Société Générale de Surveillance SA v Republic of the Philippines*,⁶³ the Tribunal, in considering whether it had jurisdiction over alleged breaches of what was argued to be an 'umbrella' clause contained in the BIT applicable in that case, also made reference to the Commentary to Article 3 of the Articles, as well as to the decision of the *ad hoc* Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, and the decision of the Tribunal in *SGS v Pakistan* in relation to what was argued to be an analogous provision.

⁵⁶ *ICSID Review-FILJ*, vol. 18 (2003), p. 293, at p. 299.

⁵⁷ *Ibid.*, at p. 299.

⁵⁸ *Ibid.*, at p. 299–300.

⁵⁹ *Ibid.*, at p. 300.

⁶⁰ *Ibid.*, at p. 300.

⁶¹ See *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction, 6 August 2003, paras. 147–148.

⁶² *Ibid.*, para. 147.

⁶³ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, 29 January 2004.

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In doing so, it criticized the restrictive interpretation given by the Tribunal in *SGS v Pakistan* to the clause of the BIT applicable in that case which was alleged to constitute an ‘umbrella’ clause. In that regard, the Tribunal observed that although, as the Tribunal in *SGS v Pakistan* had noted in reaching its decision in that case, the ad hoc Committee in *Vivendi* had affirmed the principle that ‘a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law’, the ad hoc Committee had done so in a situation where the applicable BIT did not contain an ‘umbrella’ clause:

[...] the ad hoc Committee therefore did not need to consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law. Certainly it might do so, as the International Law Commission observed in its commentary to Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.⁶⁴

In an accompanying footnote, the Tribunal made reference to a passage from the ILC’s Commentary to Article 3.⁶⁵ The Tribunal went on to opine that, accordingly, the question of whether breach of a contract in the circumstances might amount to a breach of the treaty ‘is essentially one of interpretation, and does not seem to be determined by any presumption.’⁶⁶

In *Noble Ventures v Romania*,⁶⁷ again in the context of a discussion of whether an ‘umbrella clause’ contained in the BIT was breached by acts also alleged to constitute a breach of contract, the Tribunal made reference in passing to Article 3 as support for the position it took that a breach of contract does not *per se* give rise to international responsibility. As the Tribunal explained:

[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law. The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in inter alia Article Three of the International Law Commission’s Articles on State Responsibility adopted in 2001.⁶⁸

The Tribunal went on to observe that:

[...] inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other.⁶⁹

The Tribunal in *Técnicas Medioambientales Tecmed S.A. v United Mexican States*,⁷⁰ in the context of its examination of whether a resolution of the relevant authorities refusing to renew a permit for

⁶⁴ Ibid., para. 122.

⁶⁵ Ibid., note 54, referring to Commentary to Article 3, paragraph (7).

⁶⁶ Ibid., para. 122

⁶⁷ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

⁶⁸ Ibid., para. 53.

⁶⁹ Ibid.

⁷⁰ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

the operation of the landfill the subject of the claimants' investment could be characterised as expropriatory, affirmed that it was indisputable that:

[...] within the framework or from the viewpoint of the domestic laws of the State, it is only in accordance with domestic laws and before the courts of the State that the determination of whether the exercise of such power is legitimate may take place. And such determination includes that of the limits which, if infringed, would give rise to the obligation to compensate an owner for the violation of its property rights.⁷¹

However, the Tribunal then emphasized that the task of an arbitral tribunal applying an bilateral investment treaty was different, and that the characterization of a particular measure as legal under a State's internal law could not affect its characterization under the BIT:

[h]owever, the perspective of this Arbitral Tribunal is different. Its function is to examine whether the Resolution violates the Agreement in light of its provisions and of international law. The Arbitral Tribunal will not review the grounds or motives of the Resolution in order to determine whether it could be or was legally issued. However, it must consider such matters to determine if the [applicable bilateral investment treaty] was violated. That the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the [applicable bilateral investment treaty] or to international law.⁷²

In support of that proposition, the Tribunal cited a passage from the ILC's Commentary to Article 3 of the Articles:

[a]n Act of State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – even if under that law, the State was actually bound to act that way.⁷³

In *Continental Casualty Company v Argentine Republic*,⁷⁴ in the context of its discussion of whether it had jurisdiction to rule on the claimant's claims in respect of actions allegedly taken by the Respondent in relation to the claimant's subsidiary, the Tribunal referred to:

[...] the important statement of the ICJ in the *ELSI* case: 'Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in municipal law and what is unlawful in the municipal law may be fully innocent of violation of a treaty provision.'⁷⁵

In an accompanying footnote, the Tribunal noted that Article 3 of the Articles was 'to the same effect'.⁷⁶

In *Siemens A.G. v Argentine Republic*,⁷⁷ the Tribunal recorded that the claimant had relied on Article 3 in relation to the law applicable to the dispute:

⁷¹ Ibid., para. 119.

⁷² Ibid., para. 120.

⁷³ Ibid., para. 120, citing Commentary to Article 3, paragraph (1).

⁷⁴ *Continental Casualty Company v Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Jurisdiction, 22 February 2006.

⁷⁵ Ibid., para. 88, referring to *Elettronica Sicula SpA (ELSI) (Italy v United States of America)*, ICJ Reports 1989, p. 15, at p. 51, para. 73.

⁷⁶ *Continental Casualty Company v Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Jurisdiction, 22 February 2006, note 21.

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[...] Siemens also refers to the Draft Articles on Responsibility of States adopted by the International Law Commission [...], which state: '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.'⁷⁷

However, in its discussion of the question of the applicable law, the Tribunal did not refer to the Articles, or indeed to the claimant's argument in this regard.⁷⁹

Also of relevance in this regard is General Comment No. 31, adopted by the Human Rights Committee.⁸⁰ General Comments adopted by the Committee are not, strictly speaking, judicial statements, and, in form at least, constitute the Committee's considered view as to the interpretation of the provisions of the International Covenant on Civil and Political Rights. However, that interpretation necessarily takes place against the background of general international law to the extent that specific questions are not addressed by the Covenant. Of interest in relation to Article 3 of the Articles is the following passage, which can be seen as mirroring the rule under the general international law of State responsibility, as embodied in Article 3:

[t]he executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.⁸¹

⁷⁷ *Siemens A.G. v Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007.

⁷⁸ *Ibid.*, para. 70.

⁷⁹ *Ibid.*, paras. 76–80.

⁸⁰ Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

⁸¹ *Ibid.*, para. 4.

CHAPTER II

ATTRIBUTION OF CONDUCT TO A STATE

One of the most fertile areas of reference has been in relation to the attribution of conduct to the State for the purposes of international responsibility. The rules contained in Chapter II of Part One govern attribution to the State of conduct of persons or entities in a variety of specific circumstances.

Article 4 covers attribution of conduct of organs of a State; Article 5 provides for attribution of the conduct of persons or entities which, although not organs of a State pursuant to Article 4, nevertheless exercise elements of governmental authority, while Article 6 provides for the attribution of conduct of organs placed at the disposal of one State by another State when those organs in fact act in the exercise of elements of governmental authority of the State at the disposal of which they have been placed. Article 7 clarifies, in relation to the situations covered by Articles 4 to 6,⁸⁵ that where the conduct in question is that of an organ of a State or of a person or entity empowered to exercise elements of governmental authority, the fact that the organ, person or entity has exceeded his authority or contravened instructions is no obstacle to the attribution of the conduct in question to the State. Article 8 provides that, where the conduct in question is carried out by a person or group of persons who in fact act upon the instructions of, or under the direction or control of a State in carrying out that conduct, the conduct is attributable to the State in question. Article 9 covers attribution of conduct of a person or group of persons who in fact exercise elements of governmental authority in the absence or default of the official authorities in circumstances which call for the exercise of those elements of authority. Article 10 provides for the special situation of the attribution of acts of insurrectional or other movements which either become the government of the State or succeed in establishing a new State in part of the territory of a pre-existing State. Finally, Article 11 provides for attribution to the State of conduct which is acknowledged and adopted as its own.

Despite the relatively settled nature of the rules relating to attribution, since 2001, two principal areas have attracted particular attention. The first relates to the attribution of conduct of military or paramilitary forces in situations of armed conflict; in this area, the cases tend to involve significant factual disputes, although there have also been significant questions of the extent to which acts of such forces are attributable. The cases in the second area of debate, in the field of investment treaty protection, have tended to involve fewer disputes as to the facts, and have focused on the abstract legal question of the extent to which conduct of entities which do not formally part of the governmental structure of the State should be attributable to the State, so that the State bears responsibility for their conduct if those acts constitute a breach of the State's treaty obligations.

A particular feature of the cases which have dealt with issues of attribution has been the invocation of a number of the different bases of attribution in the alternative. Thus it has been argued that, even if conduct of armed groups is not attributable to the State because the actor in question did not constitute an organ of the State under Article 4, then the conduct is nevertheless attributable due to the fact that the actors in question acted on the instructions or under the direction or control of the State under Article 8. Similarly, in investment protection disputes it has been argued that, even if the actions of State entities were not attributable as being conduct of organs of the State under Article 4, then those actions would nevertheless be attributable on the basis that those entities had been exercising elements of governmental authority under Article 5, or on the basis that the entity in question had been acting under the direction and control of the State for the purposes of Article 8. For the purposes of the present study, the treatment of reliance on the Articles relating to attribution that follow proceeds on an article-by-article basis, despite the fact that this in a number of cases involves a certain amount of repetition.

⁸⁵ See Commentary to Article 7, para. (9).

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Quite apart from instances of reference to particular provisions of Chapter II of Part One in relation to the issue of attribution, a number of courts and tribunals have made general statements about attribution by reference to the Articles, or have referred generally to the provisions of the Articles relating to attribution. It is convenient to refer to those instances of reliance here.

In its decision on annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*,⁸⁶ the ad hoc Committee clearly proceeded on the basis that the acts of the Province of Tucumán, a sub-federal administrative division of Argentina, were attributable to it. The Tribunal in the Award the subject of the application for annulment⁸⁷ had proceeded on the basis that the actions of the Province of Tucumán were attributable to Argentina for the purposes of assessing whether there had been compliance with the applicable bilateral investment treaty, although it had concluded that it did not have jurisdiction to rule on those claims because of their close connection with alleged breaches of the concession contract, which itself contained an exclusive jurisdiction clause in favour of the administrative courts of the Province of Tucumán. As noted above in relation to Article 2 of the Articles, the ad hoc Committee referred to the Articles in commenting upon the terminology used by the Tribunal in its Award in relation to the notion of ‘attribution’. In that regard, the ad hoc Committee made express reference to a number of provisions of the Articles and the Commentaries thereto in relation to the question of attribution of the conduct of sub-federal entities:

[a]ll international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision.⁸⁸

Further, in the context of its discussion of the differences between the claims of breach of treaty and claims of breach of contract in the case, the ad hoc Committee observed that:

[...] in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities.⁸⁹

In *Noble Ventures v Romania*,⁹⁰ the Tribunal prefaced its discussion of whether the actions of two entities created by Romania in order to manage a privatization process were attributable to the respondent State by making a number of general comments. The Tribunal observed:

[a]s States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect. Regarding general international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001 [...]. While those Draft Articles are not binding, they are widely regarded as a codification of customary

⁸⁶ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002

⁸⁷ *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic*, (ICSID Case No. ARB/97/3), Award of 21 November 2000.

⁸⁸ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, footnote 17.

⁸⁹ *Ibid.*, para. 96, referring to Articles 2 (a), 4 and the Commission’s commentary to Article 4, paras. (8)–(10)

⁹⁰ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

international law. The 2001 ILC Draft provides a whole set of rules concerning attribution [...].⁹¹

That statement might be read as being ambiguous as to whether the Tribunal's observations as to the fact that the Articles are widely regarded as a codification of customary law were intended to apply to the entirety of the Articles. However, even adopting a more restrictive view of the Tribunal's comments, based on the context in which they were made, the Tribunal was clearly of the view that those provisions of the Articles relating to attribution were to be regarded as 'a codification of customary international law'.

Similar the Tribunal in *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*,⁹² stated:

[w]hen assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 [...] as a codification of customary international law.⁹³

⁹¹ Ibid, para. 69.

⁹² *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006.

⁹³ Ibid., para. 149. See also the identical passage in *Saipem SpA v People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 148.

ARTICLE 4

Conduct of organs of the State.

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 4 covers the question of attribution of acts carried out by organs of the State. As is made clear by the first paragraph of the Article, and as is further explained in the ILC's Commentaries on the provision, the definition of an organ for these purposes includes legislative, executive and judicial organs of the State, whatever level they hold in the organization of the state, and whether or not they are a part of central government or of a territorial unit of the State. Article 4(2) clarifies that the notion of organ includes any person or entity having that status in accordance with the internal law of the State.

The primary and axiomatic rule relating to attribution of conduct for the law of State responsibility is that conduct of the organs of a State is attributable to it. Given the status of that rule, and its undoubtedly customary nature, there are a large number of cases in which in effect there is no dispute that conduct of organs of the State are attributable to it; in these circumstances, the question of attribution is hardly averted to, and is to some extent taken for granted. Of the cases decided by the International Court of Justice since the adoption of the Articles, this has been the case, for instance, in relation to the attribution of the conduct of armed forces of a State,⁹⁴ and in relation to the attribution of the actions of domestic police and judicial authorities allegedly breaching the obligations to allow access to consular assistance under the Vienna Convention on Consular Relations.⁹⁵ Similarly, in investment protection disputes and human rights cases, there is often little discussion in relation to the attribution of acts of government Ministries or of domestic courts which indisputably constitute organs of the State, and in human rights cases, the question of whether the acts of State organs are attributable to the respondent State is often not even mentioned.

Even prior to the adoption of the Articles on second reading, the International Court of Justice in its Advisory Opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* had recognised the customary nature of the principle now embodied in Article 4 of the Articles. Referring to the 'well-established rule of international law' that 'the conduct of any organ of a State must be regarded as an act of that State', the Court went on to observe that the rule was of 'a customary character',⁹⁶ and that it was 'reflected' in one of the provisions of the ILC's draft which eventually became Article 4.⁹⁷

Despite the consolidated nature of the rule contained in Article 4, frequent references have been made to it.

⁹⁴ See e.g. the relevant actions of the United States of America in *Oil Platforms (Islamic Republic of Iran v United States of America)*, *Merits*, ICJ Reports 2003, p. 161.

⁹⁵ See e.g. *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Reports 2004, p. 12.

⁹⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, p. 62, at p. 87, para. 62.

⁹⁷ I.e., draft Article 6 of the draft Articles as adopted on first reading in 1996.

As noted above, a first group of cases has concerned questions of the attribution of military and paramilitary groups.

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,⁹⁸ an issue arose as to whether the actions of the Congo Liberation Movement (Mouvement de libération du Congo) ('MLC'), a rebel group operating within the territory of the Democratic Republic of the Congo, were attributable to Uganda. The DRC had argued that Uganda had not only supported the creation of the MLC but was 'closely involved in the recruitment, education, training, equipment and supplying of the MLC',⁹⁹ and had acted in close cooperation in attacks against the DRC armed forces. Uganda did not deny its provision of military and political assistance to the MLC, but denied any involvement or participation in its formation.¹⁰⁰

In relation to the potential attribution of acts of the MLC to Uganda on the basis that it was an organ of Uganda, the Court concluded, on the basis of the evidence before it,¹⁰¹ referring to Article 4 of the ILC's Articles, that:

[...] there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of 'an organ' of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001) [...] ¹⁰²

As discussed further below, the Court went on to find that the MLC had neither exercised elements of governmental authority on Uganda's behalf under Article 5 of the Articles, nor were there any probative elements on which it could be asserted that the actions of the MLC had been undertaken 'on the instructions of, or under the direction or control of' Uganda for the purposes of Article 8 of the ILC's Articles.¹⁰³

Later on in its judgment, the Court again made reference to the rule contained in Article 4, albeit without express to the Articles, in the context of the question of whether conduct of the Uganda Peoples' Defence Forces ('UPDF'), a part of the army of Uganda, were attributable to it. The Court concluded that there was sufficient basis on which to conclude that the UPDF troops had committed a wide range of violations of international law, including of international humanitarian law:

[h]aving examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.¹⁰⁴

The Court then turned to the question of whether 'the acts and omission of the UPDF and its officers and soldiers are attributable to Uganda'. The Court observed in that regard, referring to its

⁹⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁹⁹ *Ibid.*, para. 32.

¹⁰⁰ *Ibid.*, para. 42.

¹⁰¹ *Ibid.*, paras. 158–159.

¹⁰² *Ibid.*, para. 160.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, para. 211.

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Advisory Opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that:

[t]he 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' [...]. The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. 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.¹⁰⁵

The Court went on to reject an argument raised by Uganda to the effect that the troops in question had been acting contrary to instructions or had exceeded their authority, and that, as a consequence, the actions of those troops were not attributable to it; in this regard, the Court's statement recalls the rule contained in Article 7 of the Articles:

[i]t 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 I 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.¹⁰⁶

Similarly, in its judgment on the merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹⁰⁷ the Court was faced with the questions of whether the conduct of members of the Bosnian Serb troops forming the army of the Republika Srpska (the VRS), as well as the actions of various paramilitary Serb groups, in relation to the massacre at Srebrenica and other atrocities committed within the territory of Bosnia and Herzegovina were attributable to the Federal Republic of Yugoslavia (as it then was). The Court's approach in this regard deserves examination in some detail.

The Court dealt first with the question of whether there had been conduct which, if attributable to the FRY, would have constituted a violation of its obligations under the Genocide Convention. In this context, the Court made a detailed examination of each of the separate incidents relied upon by Bosnia and Herzegovina. In relation to the allegations of large-scale killings in specific areas and detention camps during the conflict in Bosnia and Herzegovina, the Court found, on the basis of the evidence before it, that such events had been established; however, although many of the victims had been members of a protected group for the purposes of the Genocide Convention, therefore suggesting that they might have been specifically targeted,¹⁰⁸ the Court held that it was not established that those killings had been committed with the necessary specific intent to destroy the protected group in whole or in part. Accordingly, the Court concluded that the elements of the crime of genocide had not been established in relation to those events.¹⁰⁹ A similar conclusion was reached in relation to specific acts constituting the material element of the crimes prohibited by

¹⁰⁵ Ibid., para. 213, quoting *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, p. 62, at p. 87, para. 62.

¹⁰⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168, para. 214.

¹⁰⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

¹⁰⁸ Ibid., para. 276.

¹⁰⁹ Ibid., para. 277.

Article II(b) of causing serious bodily or mental harm to members of the protected group.¹¹⁰ The Court further found that the necessary specific intent could not be inferred from the overall pattern of events perpetrated throughout the conflict.¹¹¹

However, the Court reached a different conclusion in relation to the massacre at Srebrenica. Having found that actions in violation of Article II(a) and (b) of the Genocide Convention had taken place in and around Srebrenica,¹¹² the Court further found, on the basis of decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY), that the necessary specific intent to destroy a protected group, in whole or in part, had been present at the relevant time, and that therefore 'acts of genocide had been committed by members of the VRS in and around Srebrenica from about 13 July 1995'.¹¹³

Earlier in its judgment, the Court had set out the arguments of the Applicant as to attribution of the actions of the VRS and paramilitary groups. The Applicant had argued that there had been close ties of a political and financial nature between the Government of the Respondent and the authorities of the Republika Srpska, and also as regards the administration and control of the VRS. In that regard, the applicant alleged that Bosnian Serb members of the Yugoslav army had joined the VRS, and had been subsequently 'administered' by the offices of the Yugoslav army in Belgrade.¹¹⁴ The applicant further argued that the VRS had been armed and equipped by the Respondent insofar as when the Yugoslav army withdrew from Bosnia in May 1992, all of its military equipment was left behind, and was thereafter taken over by the VRS, and that the Respondent had subsequently 'actively supplied the VRS with arms and equipment' throughout the conflict.¹¹⁵ Finally, the Applicant argued that, in the financial sphere, there had been close cooperation between the financial entities of the Respondent and those of the Republika Srpska and the Republika Srpska Krajina.¹¹⁶ In that regard, the Court found that it was established that:

[...] the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.¹¹⁷

In light of its conclusion that the only acts constituting the material element of genocide committed with the requisite specific intent had taken place at Srebrenica, the Court went on to address the question of whether the actions of the actors involved, namely troops of the VRS and certain paramilitary units, could be attributed to the Respondent. The Court framed the issue in the following way:

[f]irst, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide.¹¹⁸

¹¹⁰ Ibid., paras. 298–319, in particular para. 319.

¹¹¹ Ibid., paras. 370–376.

¹¹² Ibid., para. 291.

¹¹³ Ibid., para. 297.

¹¹⁴ Ibid., para. 238.

¹¹⁵ Ibid., para. 239.

¹¹⁶ Ibid., para. 240.

¹¹⁷ Ibid., para. 241.

¹¹⁸ Ibid., para. 379.

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Having discussed the relationship between those issues and the question of whether the Respondent had complied with its obligation under Article I of the Genocide Convention to prevent and punish genocide, the Court addressed the first question of whether the acts constituting genocide committed at Srebrenica were attributable to the Respondent. The Court observed, in language clearly recalling the formulation of the relevant rules of attribution contained in the Articles on State Responsibility, that:

[f]irst, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.¹¹⁹

In relation to that first issue, namely whether the actions of the armed forces involved were attributable to the Respondent on the basis that those forces constituted organs of the respondent, the Court observed that the question

[...] relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility.¹²⁰

The Court then set out Article 4 in its entirety.

Applying that rule to the facts, the Court disposed briefly of the allegation that the ‘persons or entities’ which had committed the massacres at Srebrenica constituted organs of the Respondent under its internal law at the relevant time. The Court observed that:

[t]his rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by ‘persons or entities’ having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres.¹²¹

Although accepting that there was evidence of direct or indirect participation in operations by the Yugoslav army in Bosnia during the relevant time, the Court was of the view that there was no evidence of any such participation specifically in relation to the massacres at Srebrenica.¹²² The Court further held that ‘neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.’¹²³

As noted above, Bosnia and Herzegovina argued that all officers of the VRS had remained under the administration of the FRY, and that their salaries had been paid by the FRY up until 2002, and that, accordingly, they remained *de jure* organs of the applicant. In support of that argument, it

¹¹⁹ Ibid., para. 384.

¹²⁰ Ibid., para. 385.

¹²¹ Ibid., para. 386.

¹²² Ibid.

¹²³ Ibid.

was alleged that the promotion of General Mladić, the leader of the VRS, had been handled in Belgrade.¹²⁴

In this regard, the Court found that it had not been shown that General Mladić or any of the other officers who were administered by the offices of the FRY were, according to the law of the respondent, *de jure* organs of the respondent, and it had not even been shown that General Mladić was one of the officers who had been so administered.¹²⁵

Although finding that considerable support, including financial support, had been provided by the FRY to the Republika Srpska, involving the payment, inter alia, of salaries of officers, the Court held that this was not sufficient to automatically make those soldiers organs of the FRY.¹²⁶ The Court clarified, that:

[t]he expression ‘State organ’, as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State.¹²⁷

In this regard, the Court made reference to a passage from the ILC’s Commentary on Article 4, which provides, in relevant part:

[...] Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law – that the conduct of an organ of the State is attributable to that State. The reference to a ‘State organ’ covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.¹²⁸

The Court then went on to observe, in terms recalling the formulation of Article 5 of the Articles, that:

[t]he functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being ‘administered’ from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.¹²⁹

As to whether the actions of the paramilitary group known as the ‘Scorpions’ were attributable to the Respondent on the basis that that group constituted an organ of the Respondent, there was a substantial dispute between the parties as to whether that group had been incorporated into the FRY’s armed forces. Although there was some evidence before the Court, in the form of intercepts of communications from officers of the Republika Srpska (the authenticity of which was disputed), pointing to such a conclusion, the Court felt that it was unable to conclude on that basis that the ‘Scorpions’ had constituted an organ at the relevant time.¹³⁰ The Court added, in language echoing that of Article 6 of the ILC’s Articles, dealing with the attribution of actions of organs of a

¹²⁴ Ibid., para. 387.

¹²⁵ Ibid., para. 388.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Commentary to Article 4, paragraph (1).

¹²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, para. 388.

¹³⁰ Ibid., para. 389.

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State placed at the disposal of another State, albeit without express reference to that provision, that:

[...] in any event, the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.¹³¹

The Court discerned a further basis on which conduct could be attributed to the State where the conduct in question was carried out by an actor which did not constitute a *de jure* organ of the State in question, and did not act under its direction and control for the purposes of Article 8. This further basis of attribution was characterised by the Court as attribution of actions of ‘de facto organs’ of a State.

In this regard, Bosnia and Herzegovina had argued that irrespective of whether or not the Republika Srpska, the VRS, and the various paramilitary groups in question had in fact been *de jure* organs of the FR Yugoslavia, they should be regarded as having been ‘de facto organs’ of the FR Yugoslavia. As the Court summarised the position of the Applicant, the Applicant’s argument in this regard

[...] goes beyond mere contemplation of the status, under the Respondent’s internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias [...] must be deemed, notwithstanding their apparent status, to have been ‘de facto organs’ of the FR Yugoslavia, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FR Yugoslavia, just as if they had been organs of that State under its internal law; reality must prevail over appearances.¹³²

The Court first dealt with the question whether it was possible, as a matter of principle, ‘to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for the purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act’.¹³³

The Court affirmed that such a basis of attribution did exist, observing that:

[...] persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument. 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.¹³⁴

However, as the Court went on to emphasise, the circumstances in which attribution of the acts of individuals or entities which are not legally organs of the State is permissible:

¹³¹ Ibid.

¹³² Ibid., para. 390.

¹³³ Ibid., para. 391.

¹³⁴ Ibid., para. 392.

[...] must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment [in *Military and Paramilitary Activities*] expressly described as 'complete dependence'.¹³⁵

The basis of the Court's conclusion in this regard was a number of passages from the Court's decision in *Military and Paramilitary Activities in and against Nicaragua*,¹³⁶ where, in the context of discussion of whether the conduct of the *contras* could be attributed to the United States, the Court had observed that:

[w]hat 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 the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.¹³⁷

The Court in *Military and Paramilitary Activities* had held that, on the evidence, 'despite the heavy subsidies' provided by the US to the *contras*

[...] there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.¹³⁸

That finding was based, inter alia, on a US Intelligence Committee assessment, which had concluded that the only control which could have been exercised by the US was a cessation of aid.¹³⁹ The Court in *Military and Paramilitary Activities* had also relied on the fact that, in addition, despite the cessation of aid by the United States after 1 October 1984, activity by the *contras* had continued. The Court concluded:

[i]n sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the *contra* force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the *contras* depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is *a fortiori* unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States.¹⁴⁰

In the light of that previous jurisprudence, the Court in *Application of the Genocide Convention* thus formulated the test for attribution on that basis as being whether:

[a]t the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they

¹³⁵ Ibid., para. 393.

¹³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p. 14.

¹³⁷ Ibid., at p. 62, para. 109.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid., at pp. 62–63, para. 110.

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can be equated with organs of the Respondent for the purposes of its international responsibility.¹⁴¹

In that regard, the Court had no hesitation in answering in the negative. In relation to the Republika Srpska, the Court observed:

[a]t the relevant time, July 1995, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years [...], and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities' [...], did this signify a total dependence of the Republika Srpska upon the Respondent.¹⁴²

As to whether the conduct of the Scorpions could be equated with the FRY for the purposes of attribution, having made reference to the oral evidence, and proceedings pending before the ICTY, which were however only at the stage of indictment, the Court concluded that it had not been presented with sufficient evidence in order to conclude that this was the case.¹⁴³

In conclusion, the Court summarised its findings as follows:

[...] the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.¹⁴⁴

As discussed below in the context of Article 8, the Court also found that it had not been established that the conduct of the VRS or the various paramilitary groups was attributable to the FRY on the basis that they were acting on the instructions, or under the direction and control of the FRY in committing the atrocities at Srebrenica. As a result, the Court concluded that the Respondent could not be held responsible for those acts.

In relation to the Court's identification of the status of 'de facto organ' as a potential basis for attribution, it should be noted that the question of the possibility of attribution to the State of conduct of a persons, group or entities on this basis is not dealt with expressly by the ILC's Articles, nor is it discussed in the ILC's Commentaries to Chapter II of Part One. On the other hand, the proposition contained in Article 4(2) that the notion of organ of a State *includes* any person or entity which has that status as a matter of its internal law on its face does not preclude the attribution of acts of de facto organs,¹⁴⁵ and leaves open the possibility that other entities may

¹⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 393.

¹⁴² *Ibid.*, at para. 394, quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p. 14, at p. 63, para. 111.

¹⁴³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 395.

¹⁴⁴ *Ibid.*, para. 395.

¹⁴⁵ It bears noting in this regard that one of the precursors to Article 4 in the draft Articles adopted on first reading in 1996 (Article 5) had a slightly narrower formulation, providing: 'For the purposes of the present articles, conduct of any

be assimilated to organs of the State even if they do not have that status under the State's internal law.¹⁴⁶ Rather, by contrast to the general position under international law, pursuant to which a State may not invoke its internal law to affect the characterization as a matter of international law, the rule contained in Article 4(2) operates in this specific context in the opposite manner, so as to prevent a State denying that an entity or person that is classified as an organ of the State under its domestic law does not constitute an organ for the purposes of the international law of responsibility.

Article 4 has also been widely referred to in the context of investment protections disputes, the second broad category referred to above.

The dispute in *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*¹⁴⁷ concerned a contract for the widening and deepening of certain sections of the Suez Canal. The claimants formed a joint venture vehicle which entered into a contract for the works with the Suez Canal Authority ('SCA'), an Egyptian State entity, after a tendering procedure. The claimants alleged breaches by Egypt of the substantive standards of protection contained in applicable bilateral investment treaties in relation to various actions of the SCA, in particular in withholding information and as a result of alleged misrepresentations in the course of the negotiations leading to the contract.

At the jurisdictional phase, the Tribunal was faced with various arguments made by Egypt that the Tribunal lacked jurisdiction over the claimants' claims. Among these was an argument that the SCA had separate legal personality, and that, accordingly, given that the dispute arose out of the contract entered into by the SCA, there was no dispute with a contracting party for the purposes of Article 25 of the ICSID Convention.¹⁴⁸

In response to this argument, the Tribunal observed that:

[a]s the Claimants correctly pointed out, the issue of whether a State is responsible for the acts of a State entity is to be resolved in accordance with international law, and in particular with the principles codified in the Articles on State Responsibility for internationally wrongful acts.¹⁴⁹

Given that the decision was concerned only with the question of jurisdiction of the Tribunal, the Tribunal abstained from deciding the question whether the acts of the SCA were attributable to the respondent and the further question of whether those acts resulted in a breach of the treaty.¹⁵⁰

However, the Tribunal in *Jan de Nul* appears to have been dissatisfied with the formulation of the arguments made before it by Egypt on the question of whether or not the acts of SCA could be

State organ having that status under the internal law of the that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question'.

¹⁴⁶ Cf. in this regard, the discussion by Judge ad hoc Mahiou (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Dissenting Opinion of Judge ad hoc Mahiou), at para. 103, referring to Article 4(2) of the Articles, and quoting the Commentary to Article 4, paragraph (11).

¹⁴⁷ *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006.

¹⁴⁸ Ibid., para. 83.

¹⁴⁹ Ibid., para. 84.

¹⁵⁰ The Tribunal noted that it would have been open to it to decide that issue if it had been 'manifest' that the entity in question had no link with the State: Ibid., para. 85, referring to *Consortium Groupement L.E.S.I. – DIPENTA v République Algérienne Démocratique et Populaire*, Award of 27 December 2004, at para. 19. The Tribunal also (para. 86) referred to and distinguished the decision in *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, 42 ILM, 2003, in which the Tribunal had expressed a view at the jurisdictional stage on whether a particular body was a State entity, on the basis that the question had been the subject of substantial argument and in order 'to satisfy the legitimate expectations of the Parties'. The Tribunal in *Jan de Nul* declined to take the same approach on the basis that in the case before it the parties had only briefly touched upon the issue of attribution of acts of SCA to the respondent.

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attributed to it,¹⁵¹ and on that basis reserved that question for the merits, while giving the parties an indication as to the principles which it thought were applicable; in this regard the Tribunal referred in particular to the rules of attribution contained in Articles 4 and 5 of the ILC's Articles. In doing so, the Tribunal expressly recognized the customary nature of the rules contained in those provisions:

[w]hen assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. In particular, the Tribunal will consider the following provisions:

- Art. 4 of the ILC Articles which codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so-called *de jure* organs which are empowered to act for the State within the limits of their competence. [...]¹⁵²

It may be noted that the formulation of the Tribunal of the rule of attribution of conduct of organs goes beyond that contained in Article 4 of the Articles, insofar as the Tribunal referred to the attribution of acts of 'so-called *de jure* organs which are empowered to act for the State *within the limits of their competence*.'¹⁵³ To the extent that the Tribunal appears to suggest that *ultra vires* acts of *de jure* organs are not attributable to the State, that passage is inconsistent with Article 7 of the Articles, which provides that an act of an organ of a State acting in that capacity is to be considered an act of the State for the purposes of the law of State responsibility 'even if it exceeds its authority or contravenes instructions'.¹⁵⁴ The Tribunal's formulation is all the more surprising insofar as, as discussed below, the Tribunal in its formulation of the rule contained in Article 5 of the Articles incorporated the notion deriving from Article 7 of the irrelevance of the *ultra vires* nature of the action for the purposes of attribution.

Saipem SpA v People's Republic of Bangladesh,¹⁵⁵ was a dispute arising out of the alleged disruption by Petrobangla (a State entity created by statute responsible for exploitation of hydrocarbon resources in Bangladesh) of an ICC arbitration, the alleged interference of the Bangladeshi courts with that arbitration, and the de facto annulment of the ICC Award; the ICC Award was rendered in relation to a dispute under a contract entered into by Petrobangla and the Claimant to construct a gas pipeline. The Tribunal made reference to Articles 4, 5 and 8 of the Articles in assessing whether it had prima facie jurisdiction over the dispute.

Bangladesh had accepted that its courts were 'part of the State', and thus their actions were attributable to it; in this regard, the Tribunal observed that 'this cannot be seriously challenged in

¹⁵¹ See in particular *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006, para. 83, note 17, noting that the principal argument in relation to the independence of the SCA had been made in relation to a different issue.

¹⁵² Ibid., para. 89.

¹⁵³ See also the formulation of the rule embodied in Article 4 of the Tribunal in *Saipem SpA v People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 148, discussed below. Cf. the formulation in draft Article 5 of the draft Articles adopted on first reading in 1996: 'For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question'.

¹⁵⁴ Cf. also Article 3 of the Articles, providing that the characterization of an act of a State as internationally wrongful is not affected by the characterization of that act as lawful by internal law, and the Commentary to Article 7, para. (2).

¹⁵⁵ *Saipem SpA v People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007.

light of previous ICSID cases'.¹⁵⁶ However, Bangladesh had argued that the actions of Petrobangla were not attributable to it on various grounds. In this regard, the Tribunal observed that

[i]t is not for the Tribunal at the jurisdictional stage to examine whether the acts complained of give rise to the State's responsibility, except if it were manifest that the entity involved had no link whatsoever with the State. This is plainly not the case in the present dispute.

In fact, at first sight at least, Petrobangla appears to be part of the State under Bangladeshi law. Indeed, upon a specific question from the Tribunal at the hearing, [one of the respondent's witnesses] confirmed that 'Petrobangla is a statutory public authority' within the meaning of the Constitution of Bangladesh and is thus 'included in the definition of the state, the same as Parliament' [...].

In this context and still at first sight, the Tribunal fails to see the relevance of Bangladesh's emphasis on the fact that Petrobangla, as a part of the State, 'has its own legal personality' [...] distinct and allegedly independent from the Government of Bangladesh [...]. In any event, these circumstances do not imply that Petrobangla has no link whatsoever with the State.

Similarly, the allegation that Petrobangla's actions were 'not acts of the State in a sovereign capacity' [...] and that Petrobangla acted in front of the courts of Bangladesh 'as a contracting party which feared bias of the arbitrators they were facing at the time' [...] does not make a difference at this jurisdictional stage.

When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 [...] as a codification of customary international law. The Tribunal will in particular consider the following provisions:

- Art. 4 of the ILC Articles which codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so-called *de jure* organs which are empowered to act for the State within the limits of their competence. [...]¹⁵⁷

The Tribunal also made reference to Articles 5 and 8 of the Articles, before continuing:

[a]t this jurisdictional stage, there is no indication that either the courts of Bangladesh or Petrobangla could manifestly not qualify as state organs at least *de facto*.¹⁵⁸

Reference was also made to Article 4 by the Tribunal in *Helnan International Hotels A/S v Republic of Egypt*.¹⁵⁹ The dispute concerned a contract for the management of certain hotels entered into by a public sector company (EHC) with the claimant. Following a reform in 1991, public sector companies were distributed under a number of State-owned holding companies supervised by the Minister for the Public Sector. As part of this process, the Egyptian Company for Hotels and Tourism ('EGOTH') had been created, and it became the successor to EHC under the contract

¹⁵⁶ Ibid., para. 143.

¹⁵⁷ Ibid., paras. 144–148.

¹⁵⁸ Ibid., para. 149.

¹⁵⁹ *Helnan International Hotels A/S v Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction of 17 October 2006.

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with the claimant. The contract was terminated in 2004 following a arbitration instituted by EGOTH in accordance with the terms of the contract, and the hotels were ordered to be handed over to EGOTH.

The claimant alleged that the termination of the contract constituted a breach by Egypt of its obligations under the applicable bilateral investment treaty. In response, Egypt argued that none of EGOTH's contracts or acts were attributable to Egypt, relying on the separate legal personality of EGOTH under Egyptian law, and the fact that, even though EGOTH was owned by the Egyptian government, its administration was independent. As a consequence, it was argued that the Claimant's claims were really against EGOTH, and that the Tribunal did not have jurisdiction over the dispute. By contrast, the Claimant relied upon the Articles (in particular Articles 4 and 5) to argue that, despite its separate legal personality, EGOTH was '*de jure* and *de facto* an emanation of the Egyptian State', and that consequently Egypt could be held responsible for its actions.¹⁶⁰

The Tribunal observed that it was not necessary for the purposes of assessing its jurisdiction to decide on the status of EGOTH, having already found the existence of a *prima facie* dispute arising directly out of the Claimant's investment.¹⁶¹ Nevertheless, in light of the fact that the Parties had fully argued the point, it proceeded to rule on the issue at that stage.¹⁶²

The Tribunal opined that the claimant had 'convincingly demonstrated that EGOTH [...] is under the close control of the State',¹⁶³ pointing to various factors, including EGOTH's statutory purpose, the fact that its memorandum and articles of association were under Egyptian law reviewed by the State Council and that its general assembly was headed by the chairman of its holding company, itself a company owned 100% by Egypt, the administrative and executive powers exercised by the government over the holding company, the fact that the funds of EGOTH were public funds, and that the officers of EGOTH were subject to imprisonment if they did not distribute the State's share of the profits.

However, as the Tribunal noted, making reference to the Commentary to Article 5 of the Articles:

[...] all these gathered clues are not sufficient to conclude that EGOTH's conduct is attributable to Egypt. [...]

'the fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specific elements of governmental authority.'¹⁶⁴

As discussed below in relation to Article 5, the Tribunal concluded that the conduct of EGOTH was nevertheless attributable to Egypt,¹⁶⁵ thus implicitly rejecting the claimant's argument that EGOTH was to be treated as an organ of Egypt under Article 4.

¹⁶⁰ Ibid., para. 85–86.

¹⁶¹ The Tribunal also dismissed Egypt's objection *ratione temporis*, holding that the dispute was within the temporal scope of the Tribunal: *ibid.*, paras. 48–57.

¹⁶² Ibid., para. 91.

¹⁶³ Ibid., para. 92.

¹⁶⁴ Ibid.; the passage quoted is from Commentary to Article 5, para (3)

¹⁶⁵ *Helnan International Hotels A/S v Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction of 17 October 2006, para. 93.

In the context of its Partial Award in *Eureko BV v Republic of Poland*,¹⁶⁶ the Tribunal was called upon to decide whether conduct of the Minister of the State Treasury in relation to a share purchase agreement and subsequent agreements entered into by the Polish State Treasury and the Claimant in respect of the privatization of a State-owned insurance company (PZU) were attributable to the Respondent.

Poland had argued that in entering into the share purchase agreement, the State Treasury was, as a matter of Polish law,¹⁶⁷ to be treated as acting as a ‘private commercial actor’. As a result, it was argued, the entry into the share purchase agreement was not the result of the exercise of governmental powers, and therefore was not attributable to Poland.¹⁶⁸

The Tribunal rejected the argument, noting that it ‘flies in the face of well recognized rules and principles of international law.’¹⁶⁹ The Tribunal, having noted that it had been constituted under the applicable bilateral investment treaty and that it was required to decide the dispute on the basis of the BIT and ‘universally acknowledged rules and principles of international law’,¹⁷⁰ observed that:

[i]n the perspective of international law, it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State.¹⁷¹

The Tribunal then referred to Article 4 of the Articles, which—it observed —was ‘crystal clear’,¹⁷² and held that:

[...] there can be no doubt that the Minister of the State Treasury [in entering into the SPA and its Addendums] was acting pursuant to clear authority conferred on him by decision of the Council of Ministers of the Government of Poland in conformity with the officially approved privatization policy of that Government. As such the Minister of the State Treasury engaged the responsibility of the Republic of Poland. Moreover the record before the Tribunal is spangled with decisions of the Council of Ministers in respect of the PZU privatization which authorize the State Treasury Minister or Ministry to take actions, some of which the Tribunal concludes later in its Award were in breach of Poland’s obligations under the Treaty.¹⁷³

In support of that conclusion, the Tribunal quoted a passage from the Commentary to Article 4, in which the Commission observed that ‘[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as ‘acta jure gestionis’’,¹⁷⁴ and a further passage from the Commission’s Introductory Commentary to Chapter II of Part One, in which the Commission stated that a State is responsible for the acts of ‘[...] all the organs,

¹⁶⁶ *Eureko BV v Republic of Poland*, Partial Award of 19 August 2005.

¹⁶⁷ As a matter of Polish law, the State Treasury is apparently the residual repository of the State’s right of ownership of all State property not belonging to other legal persons forming part of the State: see *ibid.*, paras 119–120. Although apparently not regarded as having separate legal personality, the State Treasury is referred to as the ‘State’ when taking sovereign actions, but as the State Treasury’ when exercising the State’s rights of property or ownership: cf. the expert evidence quoted *ibid.*, at para. 133.

¹⁶⁸ *Ibid.*, para. 123; the question relating to the attributability of actions of the State Treasury to Poland was raised by the Tribunal, inviting comments on the question in the light of the Articles and the relevant provisions of international law: *ibid.*, para. 122.

¹⁶⁹ *Ibid.*, para. 125.

¹⁷⁰ *Ibid.*, para. 126, referring to Article 12(6) of the applicable BIT.

¹⁷¹ *Ibid.*, para. 127.

¹⁷² *Ibid.*, para. 128.

¹⁷³ *Ibid.*, para. 129.

¹⁷⁴ *Ibid.*, para. 130, citing Commentary to Article 4, paragraph (6).

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instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law'.¹⁷⁵

The Tribunal then observed that the Commission's Commentaries emphasise that:

[...] the principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is in fact acting on the instructions of, or under the direction or control of, that State.¹⁷⁶

In that regard, the Tribunal referred to a passage in the Commentary to Article 5, in which the Commission observed that Article 5 is intended:

[...] to take account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.¹⁷⁷

As a consequence, the Tribunal concluded that, 'whatever may be the status of the State Treasury in Polish law', from the perspective of international law:

[...] the Republic of Poland is responsible to Eureka for the actions of the State Treasury. These actions, if they amount to an internationally wrongful act, are clearly attributable to the Respondent and the Tribunal so finds.¹⁷⁸

In *Generation Ukraine, Inc. v Ukraine*,¹⁷⁹ Ukraine challenged the Tribunal's jurisdiction *ratione personae*, arguing that the Kyiv City State Administration, and not Ukraine itself, was the proper party to the dispute on the basis that the dispute related to the acts or omissions of the Kyiv City State Administration; in this regard it argued that 'being the embodiment of the state executive power at the local level, the [Kyiv City State Administration] does not act on behalf of Ukraine as a State at the international arena'.¹⁸⁰

The Tribunal rejected Ukraine's objection to its jurisdiction, in the process referring to Article 4 of the Articles:

The Respondent has failed to differentiate between disputes arising under domestic law and dispute arising under the BIT. Insofar as this statement relates to a cause of action based on the BIT, it discloses a confusion about the juridical nature of such a cause of action. By invoking Article III of the BIT, the Claimant is seeking to invoke the international responsibility of Ukraine on the basis that various acts or omissions of officials of the Kyiv City State Administration are attributable to Ukraine in accordance with the rules of international law and that such acts or omissions amount to an expropriation. The relevant international rule of attribution is summarised in Article 4 of the ILC's Articles on State Responsibility [...]:

There is no doubt that the conduct of a municipal authority such as the Kyiv City State Administration, which is listed as an organ of State power by the Ukrainian Constitution, is

¹⁷⁵ *Eureka BV v Republic of Poland*, Partial Award of 19 August 2005, para. 131, citing Introductory Commentary to Part One, Chapter II, paragraph (7).

¹⁷⁶ *Eureka BV v Republic of Poland*, Partial Award of 19 August 2005, para. 132.

¹⁷⁷ *Ibid.*, citing Commentary to Article 5, paragraph (1).

¹⁷⁸ *Eureka BV v Republic of Poland*, Partial Award of 19 August 2005, para. 134.

¹⁷⁹ *Generation Ukraine, Inc. v Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003.,

¹⁸⁰ *Ibid.*, para. 10.1

capable of being recognised as an act of the State of Ukraine under international law. Judicial authority for this proposition may be found in the decision of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia (Merits)* [...]

The Respondent is correct to affirm that ‘the [Kyiv City State Administration] does not act on behalf of Ukraine as a State at the international arena’. This is precisely the reason that Ukraine rather than the Kyiv City State Administration is the proper party to these international arbitration proceedings, where the international obligations of the former are alleged to have been breached by the conduct of the latter.

It would be an entirely different matter if this Tribunal were to be seized of a cause of action based on an alleged breach of a contract between the Claimant and the Kyiv City State Administration. In such a case, the Kyiv City State Administration itself would be the proper party to these proceedings. It is in this situation that Article 25(3) of the ICSID Convention, cited by the Respondent in the context of this jurisdictional objection *ratione personae*, has a role to play. Article 25(3) relates to the consent of the respondent State to the participation of a ‘constituent subdivision or agency’ of that State in ICSID proceedings. This is a necessary prerequisite for investment disputes where the investor alleges a breach of an obligation owed by the ‘constituent subdivision or agency’ in its own capacity. Only Ukraine is privy to the obligations under the BIT, not the Kyiv City State Administration.

This distinction between the basis of liability in treaty and contractual claims was examined at length by the ad hoc Committee in *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* [...]

There is no difficulty in applying the international rules of attribution in this case. The proper focus is instead on whether the Claimant can establish that the conduct of the Kyiv City State Administration, or other relevant Ukrainian State organs, amounts to a breach of an international obligation set out in the BIT.¹⁸¹

In the NAFTA case of *Técnicas Medioambientales Tecmed S.A. v United Mexican States*,¹⁸² the Tribunal was faced with the question whether various actions of the Hazardous Materials, Waste and Activities Division of the National Ecology Institute of Mexico (‘INE’) were attributable to the Respondent. INE was an agency of the Federal Government of the United Mexican States within the Ministry of the Environment, Natural Resources and Fisheries, and was in charge of Mexico’s national policy on ecology and environmental protection, and was also the regulatory body on environmental issues.¹⁸³ Having initially granted an authorization to operate the landfill site constituting the claimant’s investment, INE subsequently rejected an application for renewal of the operating licence. That refusal was alleged by the claimant to constitute a violation of various provisions of the applicable bilateral investment treaty.

Given the status of INE, the Tribunal had no hesitation in concluding that its actions ‘are attributable to the Respondent under international law’.¹⁸⁴ In support of that conclusion, a reference was provided in a footnote pointing to Article 4 of the Articles and the Commission’s Commentary thereto.¹⁸⁵

¹⁸¹ Ibid., paras. 10.2–10.7

¹⁸² *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

¹⁸³ Ibid., para. 36.

¹⁸⁴ Ibid., para. 151.

¹⁸⁵ Ibid., note 187.

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In *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*,¹⁸⁶ the Tribunal announced at the beginning of its Award that it would:

[...] decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN (hereinafter referred to as 'the ILC') Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries [...]¹⁸⁷

The dispute concerned contracts entered into by the claimant's subsidiaries with the Instituto Ecuatoriano de Electrificación ('INECEL'). INECEL had defaulted on payments due under the contracts for the provision of electrical power, and had subsequently been put into liquidation. The claimants argued that INECEL was an organ of Ecuador, 'directed and controlled by Ecuador through its government officials', and that 'the object and functions of INECEL include those reserved generally to State regulatory bodies'.¹⁸⁸ They emphasised, inter alia, that upon the liquidation of INECEL, the Attorney General became 'the State's representative with respect to all its rights and obligations', as well as the fact that the INECEL enjoyed special prerogatives in signing contracts in its capacity as a State entity.¹⁸⁹

Ecuador initially responded that the applicable BIT could not apply to the contract because the contract had been signed with INECEL and not Ecuador, that INECEL was 'an autonomous entity that is legally independent of the State',¹⁹⁰ and that a distinction had to be drawn between sovereign obligation assumed by it, and commercial obligations assumed by INECEL under the contract.¹⁹¹ Ecuador later accepted that 'INECEL was a public-sector agency and that official representatives or delegates constituted a majority of its board',¹⁹² and that 'INECEL was empowered to exercise certain public powers'.¹⁹³ Ecuador nevertheless maintained that, due to its 'separate legal personality, its own capital, and autonomous management, INECEL must not be confused with the State'.¹⁹⁴

In dealing with these arguments, the Tribunal made reference to the Articles, which it treated as representing customary international law in this regard:

INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State. In this case, the customary rules codified by the ILC in their Articles on Responsibility of States for Internationally Wrongful Acts are applicable. Therefore, any acts or omissions of INECEL in breach of the BIT or of other applicable rules of general international law are attributable to Ecuador, and engage its international responsibility.¹⁹⁵

Although the Tribunal's conclusion was explicitly that conduct of INECEL was attributable to Ecuador on the basis that INECEL was to be regarded as an organ, the note accompanying that passage made reference to Article 5 of the Articles.¹⁹⁶ This would appear to be an error.

¹⁸⁶ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007.

¹⁸⁷ Ibid., para. 42.

¹⁸⁸ Ibid., para. 219.

¹⁸⁹ Ibid., paras. 220–221.

¹⁹⁰ Ibid., para. 222.

¹⁹¹ Ibid., para. 223.

¹⁹² Ibid., para. 224.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., para. 225.

¹⁹⁶ Ibid., note 24.

A particular aspect of the rules relating to attribution of acts of organs embodied in Article 4, namely that of the attributability of acts of all organs of the State, whatever their level in the hierarchy or organizational structure of the State, as reflected in Article 4(2), has resulted in a number of references to the Articles.

In its decision in the NAFTA case of *Mondev International Limited v United States of America*,¹⁹⁷ the Tribunal took note of the fact that the United States did not dispute that actions of municipal authorities and decisions of sub-federal courts were attributable to it for the purposes of NAFTA, although it denied that any actions taken prior to the entry into force of NAFTA on 1 January 1994 could constitute a breach of the standards of protection contained in Chapter 11 of NAFTA. In that regard, the Tribunal made reference in a footnote to Article 105 NAFTA, as well as making reference to Article 4 of the Articles.¹⁹⁸

Similarly, in *Grand River Enterprises Six Nations Ltd v United States of America*, the Tribunal, in its decision on objections to jurisdiction took note of the fact that the United States ‘acknowledge[d] that that it is internationally responsible under NAFTA’ for the actions taken by its various states.¹⁹⁹ In a footnote to the passage, the Tribunal referred to Article 4(1) of the Articles, as well as the passage of the ILC’s Commentary thereon in which the Commission states ‘[i]t does not matter [...] whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations.’²⁰⁰

In its decision on annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*,²⁰¹ the ad hoc Committee made express reference to Article 4 and the Commentaries thereto in relation to the question of attribution of the conduct of sub-federal entities:

[a]ll international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. See [ILC Articles] Articles 2 (a), 4 and the Commission’s commentary to Article 4, paras. (8)–(10).²⁰²

Further, later on its decision in the context of its discussion of the difference between the claims of breach of treaty and claims of breach of contract in the case, the Tribunal observed that:

[...] in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities.²⁰³

Although that observation was made without express reference to Article 4 of the Articles, it clearly recalls the earlier statement of principle by the ad hoc Committee (in relation to which the Committee had referred to Article 4 and its Commentary), that Argentina was responsible for the acts of its governmental authorities, whether central, provincial or otherwise.

¹⁹⁷ *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No. ARB(AF)/99/2), Award of 11 October 2002.

¹⁹⁸ *Ibid.*, para. 67 and note 12.

¹⁹⁹ *Grand River Enterprises Six Nations Ltd et. al v United States of America*, Decision on Objections to Jurisdiction, 20 July 2006.

²⁰⁰ *Ibid.*, note 1, quoting Commentary to Article 4, paragraph (9).

²⁰¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, Decision on Annulment of 3 July 2002.

²⁰² *Ibid.*, footnote 17.

²⁰³ *Ibid.*, para. 96.

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Further, later on in its decision, having referred to a passage from the Award the subject of the application for annulment, the Tribunal observed that it:

[...] appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, *a priori*, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.²⁰⁴

In that regard, the ad hoc Committee again referred to the Commentary to Articles 4 and 12.²⁰⁵

That last passage, including the reference to the Commentaries to Articles 4 and 12, was itself noted by the Tribunal convened to hear the resubmitted case (*Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ('Vivendi II')).²⁰⁶ Upon the hearing of the resubmitted case, it was not in dispute that acts of the Province, or of organs of central government, were attributable to Argentina; however, there was a dispute as to the extent to which the actions of individual provincial legislators and an Ombudsman were attributable to Argentina for the purposes of assessing compliance with the applicable BIT.

The Tribunal summarised the argument in this regard as follows: Argentina, although not disputing 'that the ILC Articles represent, in part, an authoritative summary of international law on the issue of attribution of responsibility to a state',²⁰⁷ had taken the position that 'the general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *ie*, as agent of the state.'²⁰⁸ In that regard, it was argued that, in relation to each person or body whose actions were said to be attributable to Argentina and for which Argentina was alleged to bear responsibility, it was necessary to ask whether the person or body in question was an organ of government, and if not, whether it was acting 'under the direction, instigation or control of an organ of government, *ie*, as an agent of the state'.²⁰⁹

In relation to the actions of the provincial legislators, in particular those belonging to the opposition, it was argued that they lacked the necessary governmental authority in making the statements relied upon.²¹⁰ In relation to the Ombudsman, it was argued that it was neither a State organ, nor an agent of the State. In this regard, Argentina relied on 'the domestic characterization of the functions of the Ombudsman [...] as a body opposed to government',²¹¹ and, in an apparent reference to the Introductory Commentary to Chapter II of Part One, to the 'prime importance' of the domestic characterization of a body under the Articles.²¹²

In response to that argument, the claimants argued that the actions of the provincial legislators and the Ombudsman were attributable to Argentina. In particular, having noted that Argentina did not 'deny responsibility for actions (which may [be] found to constitute treaty breaches) of the

²⁰⁴ Ibid., para. 110.

²⁰⁵ Ibid., note 78, referring to Commentary to Article 4, paragraph (6), and Commentary to Article 12, paragraphs (9) and (10).

²⁰⁶ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ('Vivendi II') (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 2.2.2 and note 17. The Tribunal also referred to paras. 102, 103 and 105 of the decision of the ad hoc Committee.

²⁰⁷ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ('Vivendi II') (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 6.8.2.

²⁰⁸ Ibid.

²⁰⁹ Ibid., para. 6.8.3.

²¹⁰ Ibid., paras. 6.8.4–6.8.6.

²¹¹ Ibid., para. 6.8.7–6.8.9.

²¹² Ibid., para. 6.8.8; cf. Introductory Commentary to Part One, Chapter II, paragraph (6): 'In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance.'

Legislature (as a body), the Executive and provincial organs [...], the Attorney General or the Court of Accounts',²¹³ they argued, relying on Articles 4 and 5 of the Articles, that actions of the provincial legislators and the Ombudsman were attributable to Argentina on the basis that:

(i) the provincial legislators of Tucumán, exercising as they do 'legislative' functions at 'a territorial unit of the State', individually and collectively are 'State organs' whose conduct shall be considered an act of the state under international law, and

(ii) the Ombudsman, having regard to his governmental functions, relationship with the Legislature and sweeping authority, also has the status of a 'State organ' for whose conduct the state is responsible. And even if the Tribunal were to conclude that the Ombudsman is not a state organ, it is certainly an entity 'empowered by the law' of Argentina 'to exercise elements of governmental authority' within the meaning of Article 5 for which the state must take responsibility.²¹⁴

In the event, the Tribunal did not feel required to definitively rule on that issue, although it nevertheless indicated the conclusion it would have reached. Having noted that the parties had 'spent much time on the responsibility, or lack thereof, of the Argentine Republic for the acts of individual opposition party legislators and of the Ombudsman', and that Argentine 'did not contest its responsibility for the acts of the Legislature in the exercise of its governmental authority, the Executive, the Attorney-General or the Regulator' but only 'denies responsibility for the acts of individual legislators, particularly opposition politicians and the Ombudsman',²¹⁵ the Tribunal observed:

[w]e do not need to decide these questions given our conclusion that multiple acts of members of the Executive, government ministers, the Regulator (which was politically guided by the Executive) and the Legislature violated the Article 3 standard. Had it been necessary, we would have been inclined to find that many of the acts of the Ombudsman that were complained of involved the exercise of governmental authority and would thus have been attributable to Argentina in the event they too constituted a breach of Article 3.²¹⁶

An arbitral tribunal operating under the aegis of MERCOSUR made reference to Article 4 in its decision on *Import Prohibition of Remolded Tires from Uruguay*.²¹⁷ The reference occurred in the context of the Tribunal's discussion of an argument by Brazil that various acts relied upon by Uruguay were acts of administrative organs from various different sectors having no competence in relation to Brazil's foreign trade policy. Uruguay relied on those acts as supporting its interpretation of the principal measure constituting the import prohibition which it alleged breached Brazil's obligations under the MERCOSUR treaty. The Tribunal observed:

[i]t should be recalled that the draft Articles of the International Law Commission, that codify customary law, state that, under international law, the conduct of any State organ shall be considered an act of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in

²¹³ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ('Vivendi II') (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 5.4.1

²¹⁴ *Ibid.*, para. 5.4.2

²¹⁵ *Ibid.*, para. 7.4.44.

²¹⁶ *Ibid.*

²¹⁷ MERCOSUR, *Import Prohibition of Remolded Tires from Uruguay*, Award of 9 January 2002, (unofficial translation by the Secretariat in 'Responsibility of States for internationally wrongful acts; Compilation of decisions of international courts, tribunals and other bodies; Report of the Secretary-General' UN doc. A/62/62, 1 February 2002, at p. 19, para. 28).

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the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State (see article 4 of the [Articles]).²¹⁸

The Tribunal accordingly concluded that all of the acts of those administrative bodies were attributable to Brazil, and in total constituted an internal practice which confirmed the interpretation given to the Portaria (decree) of which Uruguay principally complained.

In *Azurix v Argentine Republic*,²¹⁹ the claimant argued that Argentina was responsible for the actions of the Province of Buenos Aires, one of Argentina's sub-federal constituent entities. The applicable BIT expressly provided that it applied to the political sub-divisions of the Parties, and the claimant also invoked the rules of customary international law, referring in this regard 'as best evidence' to Articles 4 and 7 of the Articles, as well as the decision of the ad hoc Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*.²²⁰

Argentina, for its part, did not dispute that the BIT was applicable to the Province of Buenos Aires, nor did it dispute its responsibility for acts of provincial authorities under customary international law; however, it argued that the acts complained of all constituted breaches of a contract concluded by the claimant with the Province of Buenos Aires, and that, accordingly, the acts of the Province were not attributable to Argentina.²²¹ The Respondent also referred to the decision of the ad hoc Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* discussed above in support of its position.²²²

The Tribunal, in addressing these arguments, observed at the outset of its discussion that:

[t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The [Articles], as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration. Moreover, Article XIII of the BIT states clearly: 'This Treaty shall apply to the political subdivisions of the Parties.' This is not in dispute between the parties. The issue is whether the acts upon which Azurix has based its claim can be attributed to the Respondent. The Respondent contends that such attribution is not feasible because all the acts are contractual breaches by the Province. This is a different matter to which the Tribunal will now turn.²²³

The Tribunal then went on to observe that its decision on jurisdiction had been based on a prima facie showing by the claimant that acts attributable to Argentina breached the BIT. Having noted that there was no contractual relationship between the claimant and Argentina, given that the concession agreement had been concluded between the Province of Buenos Aires and the claimant's subsidiary, and further, that none of the alleged breaches of the BIT constituted breaches of contractual obligations owed to the claimant itself, given that those obligations had been undertaken in relation to the claimant's subsidiary, the Tribunal concluded that the factual precondition for application of the umbrella clause contained in the BIT – the entering into an obligation with the claimant – was not fulfilled.²²⁴

The Tribunal then emphasised that its task in evaluating the facts and allegations of the parties was 'to determine whether the alleged actions or omissions of the Respondent and the Province, as its political subdivision, amount to a breach of the BIT itself.'²²⁵

²¹⁸ MERCOSUR, *Import Prohibition of Remolded Tires from Uruguay*, Award of 9 January 2002, p. 39.

²¹⁹ *Azurix Corp. v Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006.

²²⁰ *Ibid.*, paras. 46 and 47.

²²¹ *Ibid.*, para. 49.

²²² *Ibid.*

²²³ *Ibid.*, para. 52.

²²⁴ *Ibid.*

²²⁵ *Ibid.*, para. 53.

In relation to Argentina's argument that the claimant could not invoke breaches of contract as giving rise to international responsibility for breach of the Treaty, the Tribunal observed that it had:

[...] no doubt that the same events may give rise to claims under a contract or a treaty, 'even if these two claims would coincide they would remain analytically distinct, and necessarily require different enquiries'.²²⁶

Referring to the decision of the ad hoc Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, the Tribunal concluded that it was:

[...] faced with a claim that it is not 'simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina', but with a claim that 'these acts taken together, or some of them, amounted to a breach' of the BIT. This is the nature of the claim in respect of which the Tribunal held that it had jurisdiction and which the Tribunal is obliged to consider and decide.²²⁷

The Tribunal thus rejected Argentina's argument that the conduct of the Province relied upon by the claimant could not be attributed to it merely because it concerned breaches of the contract concluded with the Province by the claimant's subsidiary.

In *Noble Ventures v Romania*,²²⁸ the Tribunal referred to the Articles in the context of its general observations as to attribution, commenting that the Articles, although not binding, 'are widely regarded as a codification of customary international law'.²²⁹ Whether or not the Tribunal's comments in this regard were intended to refer to the entirety of the Articles, from the context, it is at least clear that the Tribunal so regarded the provisions relating to attribution, and in particular Articles 4 and 5.

The Tribunal was concerned with the question of whether the acts of two entities (SOF and APAPS), created for the purposes of a process of privatization, were attributable to the Romania for the purposes of the applicable BIT. Following its general observations on the question of attribution of conduct, and the need to have reference to the general international law of State responsibility in that regard, referred to above, the Tribunal then went on to consider whether the acts of two entities were attributable to the Respondent, on the basis of the potentially applicable provisions of the ILC's Articles. In relation to Article 4, the Tribunal observed:

[...] Art. 4 2001 ILC Draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as *de jure* organs.²³⁰

²²⁶ Ibid., para. 54, citing *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005, para. 258.

²²⁷ *Azurix Corp. v Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 54, citing *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para. 112.

²²⁸ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

²²⁹ Ibid., para. 69.

²³⁰ Ibid. In relation to the Tribunal's formulation that the rule concerns attribution of conduct 'which have been expressly entitled to act for the State within the limits of their competence', see the comments above in relation to the similar formulation used by the Tribunal in *Jan de Nul*.

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The Tribunal clearly regarded Article 4 as encapsulating customary international law in relation to the attribution of conduct of State organs, although it found on the facts that the SOF and APAPS did not constitute *de jure* organs, and that their conduct was therefore not attributable to Romania on that basis. However, as discussed below in the context of Article 5, the Tribunal went on to conclude that the actions of the two entities were nonetheless attributable to Romania on the basis that they were exercising elements of governmental authority in their dealings with the Claimant.²³¹ As a result, the Tribunal concluded that ‘the acts of SOF and APAPS which were of relevance in the present case’ were attributable to Romania ‘for the purposes of assessment under the BIT’.²³²

The Tribunal also made further reference to the Articles, and implicitly to the Commentary to Article 4, in addressing an argument made by the Respondent that a distinction was to be drawn between the attribution of governmental and commercial conduct, the latter not being attributable.²³³ The Tribunal doubted the relevance of the distinction, observing:

[t]he distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so call *acta iure imperii*, should be attributable. The ILC draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its draft articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.²³⁴

The Tribunal’s reference to the fact that the Commission’s draft ‘does not maintain or support such a distinction’ would appear to be an implicit reference to a passage from the Commentary to Article 4, in which the Commission observed that

[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or ‘*acta iure gestionis*’.²³⁵

Further, the Tribunal’s observations that the nature *iure gestionis* or *iure imperii* of any given act of a State agency was not as such relevant to the question of attribution of those acts to a State, and that whether or not such actions would constitute a breach by the State of its international obligations was a separate question, echo the continuation of that passage from the Commentary to Article 4, in which the Commission observed that:

[o]f course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.²³⁶

²³¹ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005, para. 80.

²³² *Ibid.*, para. 83.

²³³ *Ibid.*, para. 82.

²³⁴ *Ibid.*

²³⁵ Commentary to Article 4, paragraph (6).

²³⁶ *Ibid.*

Having concluded that the conduct of SOF and APAPS were attributable to Romania on the basis of Article 5, the Tribunal stated that it was:

[...] willing to assume that the Respondent is correct in contending that the principle of international law that *pacta sunt servanda* does not entail the consequence that a breach by a State of a contract that the State has entered into with an investor is in itself necessarily a breach of international law and this is so even if the restrictive rules regarding representation of the State [...] are satisfied, so that indisputably the State is itself the contracting party and has committed a breach of the contract.²³⁷

However, the Tribunal emphasised that:

[...] that does not mean that breaches of contract cannot, under certain conditions, give rise to liability on the part of a State. On the contrary, where the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause [...], breaches of a contract into which the State has entered are capable of constituting a breach of international law *by virtue of the breach of the umbrella clause*.²³⁸

A particularly interesting example of reference to Article 4 is to be found in the decision of the Tribunal in the NAFTA case of *United Parcel Services, Inc. v Canada*. The case concerned actions alleged to be in breach of the substantive protections contained in Chapter 11 NAFTA as a result of the actions of Canada Post, a State entity having responsibility for the postal system within Canada, and having the monopoly on the collection, transmission and delivery of first class post. As noted by the Tribunal:

[t]hree of UPS' claims [...] are based in whole or in part on the proposition that the actions of Canada Post which are alleged to be in breach of articles 1102 and 1105 are attributable to Canada.²³⁹

UPS relied on Articles 4 and 5 of the Articles to argue that the actions of Canada Post were to be attributed to Canada. UPS' position was that 'whether Canada Post's conduct falls under article 4 or under article 5, says UPS, there is clear and undeniable state responsibility attributable to Canada'..²⁴⁰ As the Tribunal noted:

[i]n support of its argument, UPS draws on relevant provision of the [Articles] as accepted propositions of customary international law, a status recently recognized (at least in relation to article 4) by the International Court of Justice in the *Genocide Convention* case [...].²⁴¹

The Tribunal then proceeded to set out the text of Article 4, as well as various passages from the Commentary thereto relied upon by UPS,²⁴² as well as noting UPS' reliance on Article 5 of the Articles, and referring to a passage from the Commentary thereto.²⁴³

²³⁷ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005, para. 85.

²³⁸ *Ibid.* (emphasis in original).

²³⁹ *United Parcel Services, Inc. v Canada*, Award of 11 June 2007, para. 45.

²⁴⁰ *Ibid.*, para. 49.

²⁴¹ *Ibid.*, para. 47, referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 385.

²⁴² *United Parcel Services, Inc. v Canada*, Award of 11 June 2007, para. 47, quoting Commentary to Article 4, paragraphs (1), (5), (6) and (12).

²⁴³ *United Parcel Services, Inc. v Canada*, Award of 11 June 2007, para. 48, quoting Commentary to Article 5, paragraph (5).

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In support of its argument that the actions of Canada Post were to be attributed to Canada, UPS relied on the terms of the relevant legislation ‘by which Canada Post was created in place of a regular department of the State’, in particular the provisions specifying that Canada Post was ‘an institution of the Government of Canada’, and ‘an agent of Her Majesty in right of Canada’, as well as relying on the regulation-making powers conferred on Canada Post in relation to its letter mail monopoly, and its right to place street mail collection boxes and to have access to mail delivery boxes. In the light of those factors UPS argued that Canada Post was to be regarded as an organ of the State on the basis of Article 4.²⁴⁴ UPS also referred to judicial and executive statements, according to which Canada Post was ‘part of the government’ or ‘part of its decision-making machinery’.²⁴⁵ Further reliance was placed on a decision of a WTO Panel, which had rejected Canada’s argument that, because Canada Post was a Crown corporation with separate legal personality, regulations made in setting mail rates were outside Canada’s control and did not qualify as ‘regulations’ or ‘requirements’ of Canada for the purposes of Article III:4 GATT.²⁴⁶ The WTO Panel had reached that conclusion on the basis that Canada Post operated under government instructions, and the government had power to direct Canada Post to change the applicable rates if it considered that the rates adopted by it were inappropriate.²⁴⁷

Canada for its part did not dispute that the ILC’s formulation of the rules of attribution contained in Articles 4 and 5 of the Articles reflected the relevant rules of customary international law, nor the characterizations of Canada Post as a matter of domestic law. Rather, it argued that they, as well as the WTO ruling, were irrelevant, and were displaced by the specific terms of NAFTA.²⁴⁸ In that regard, Canada argued that the Articles had a ‘residual character’, and relied on the *lex specialis* principle embodied in Article 55 of the Articles, arguing that NAFTA contained:

[...] special provisions relating to attribution, to the content of the obligation and to methods of implementation (through the investor which initiated arbitration) which would displace any possible operation of the residual proposition of law reflected in article 4 about the attribution of acts of a ‘State organ’ [...]²⁴⁹

In the alternative, Canada submitted that Article 5, rather than Article 4, would be applicable, on the basis that Canada Post was not an organ of the State; however in that regard it argued that Canada Post had not been empowered by the law of Canada to exercise ‘elements of governmental authority’.²⁵⁰

In addressing these arguments, the Tribunal noted that, in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

[...] we are to find the ordinary meaning of the terms of [NAFTA] in their context and in the light of its object and purpose. Articles 1102–1105, read alone, could well be understood as applying to Canada Post. For the reasons given by UPS, Canada Post may be seen as part of the Canadian government system, broadly conceived. In terms of Canada’s very strong submissions, which appear to accord fully with the facts and the history, Canada Post has an essential role in the economic, social and cultural life of Canada. Moreover, like national postal administrations around the world, it meets the obligations of Canada, owed to all other members of the Universal Postal Union, to ensure that international mail is delivered within Canada.²⁵¹

²⁴⁴ *United Parcel Services, Inc. v Canada*, Award of 11 June 2007, para. 50.

²⁴⁵ *Ibid.*, para. 51.

²⁴⁶ *Ibid.*, para. 52, referring to *Canada – Certain Measures Concerning Periodicals*, Panel Report of 14 March 1997, WTO doc. WT/DS31/R.

²⁴⁷ *United Parcel Services, Inc. v Canada*, Award of 11 June 2007, para. 53.

²⁴⁸ *Ibid.*, para. 54.

²⁴⁹ *Ibid.*, para. 55.

²⁵⁰ *Ibid.*, para. 56.

²⁵¹ *Ibid.*, para. 57.

Despite the strong evidence which pointed towards the conclusion that conduct of Canada Post should be treated as attributable to Canada under Article 4 as being the conduct of an organ, as discussed below in the context of Article 55, the Tribunal however concluded that Article 4 did not govern the question of attribution to Canada of the actions of Canada Post:

Articles 1102–1105 are not however to be read alone. They are to be read with chapter 15 and, so far as this Tribunal is concerned, with the jurisdictional provisions of Articles 1116 and 1117. The immediately relevant provisions of chapter 15 are the two specific provisions which UPS contends Canada is breaching. They are articles 1502(3)(a) and 1503(2) [...]

Several features of these provisions read as a whole lead the Tribunal to the conclusion that the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances. The special rules of law stated in chapters 11 and 15, in terms of the principle reflected in article 55 of the ILC text, ‘govern’ the situation and preclude the application of that law [...].²⁵²

Having analyzed the relevant provisions of NAFTA which pointed to that conclusion, the Tribunal stated:

[t]he careful construction of distinctions between the State and the identified entities and the precise placing of limits on investor arbitration when it is the actions of the monopoly or the enterprise which are principally being questioned would be put at naught on the facts of this case were the submissions of UPS to be accepted. It is well established that the process of interpretation should not render futile provisions of a treaty to which the parties have agreed unless the text, context or purposes clearly so demand.²⁵³

The Tribunal further dismissed reliance on the decision of the WTO panel as irrelevant, as it had been made in a different context:

[t]he foregoing analysis of [NAFTA] also shows why the WTO panel report in the *Canada Periodicals* case [...] is not in point. The provisions of the GATT considered in that case do not distinguish, as chapters 11 and 15 of NAFTA plainly and carefully do, between organs of State of a standard type [...] and various other forms of State enterprises.²⁵⁴

Accordingly, the Tribunal concluded that:

[...] actions of Canada Post are not in general actions of Canada which can be attributed to Canada as a ‘Party’ within the meaning of articles 1102 to 1105 or for that matter in articles 1502(3)(a) and 1503(2). Chapter 15 provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case.²⁵⁵

As discussed below in relation to Article 5, the Tribunal also concluded that, with one exception, for the same reasons Article 5 of the Articles did not govern questions of attribution of the actions of Canada Post.

²⁵² Ibid., paras. 58–59.

²⁵³ Ibid., para. 60.

²⁵⁴ Ibid., para. 61.

²⁵⁵ Ibid., para. 62.

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*Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova*²⁵⁶ was a claim brought under a BIT.²⁵⁷ The Respondent did not appear and was not represented in the arbitration. In verifying that the Republic of Moldova was the appropriate Respondent, the Tribunal noted that the claimant had entered into a privatization contract with the Department of Privatization of the Republic of Moldova, and that body was authorized to assess compensation in relation to the claimants' property which had been taken and in relation to which there was a dispute as to the adequacy of the compensation. The Tribunal then observed, with reference to Article 4 of the Articles, that the Department of Privatization was:

[...] a central Governmental body of the Republic of Moldova, delegated by Governmental regulations to carry out state functions, and the effects of its conduct may be attributed to the State. It is generally recognised, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions (See Article 4 of the ILC Articles on State Responsibility [...]). The State of the Republic of Moldova is therefore the correct Respondent.²⁵⁸

In its decision in *Waste Management, Inc. v United Mexican States* ('*Waste Management II*'),²⁵⁹ the second Tribunal convened to hear the case noted that:

[t]he Respondent did not deny that for the purposes of Chapter 11 of NAFTA the conduct of the City of Acapulco and the State of Guerrero was attributable to it. More difficult issues arise with respect to the conduct of Banobras, which is a development bank partly-owned and substantially controlled by Mexican government agencies. [...]²⁶⁰

In this regard, the Tribunal referred to various of the possible bases of attribution embodied in the provision contained in Chapter II of Part One on the basis of which the conduct of Banobras might be attributable to the Mexican State; in this regard, it made explicit reference to Article 4 of the Articles:

[...] it is doubtful whether Banobras is an organ of the Mexican State within the meaning of Article 4 of the [Articles]. Shares in Banobras were divided between the public and private sector, with the former holding a minimum of 66%. The mere fact that a separate entity is majority-owned or substantially controlled by the state does not make it *ipso facto* an organ of the state.²⁶¹

As discussed further below, the Tribunal went on to express doubts as to whether the conduct of Banobras was attributable to Mexico in the alternative on the basis of either Article 5 or Article 8 of the Articles.²⁶² However, in the end, the Tribunal did not feel it necessary to decide the question of attribution of conduct of Banobras, stating that '[f]or the purposes of the present Award, however, it will be assumed that one way or another the conduct of Banobras was attributable to Mexico for NAFTA purposes.'²⁶³

²⁵⁶ *Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova*, Award, 22 September 2005.

²⁵⁷ Cf. *ibid.*, sections 1.3 and 2.2.1.

²⁵⁸ *Ibid.*, section 2.2.2

²⁵⁹ *Waste Management, Inc. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/3) ('*Waste Management II*'), Award of 30 April 2004.

²⁶⁰ *Ibid.*, para. 75.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*; the Tribunal went on to hold that even if the conduct of Banobras was attributable, it did not constitute a breach: see paras. 103 and 139.

In its decision on jurisdiction in *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic*,²⁶⁴ the arbitral tribunal was faced with an argument by Argentina that taxes assessed by sub-federal provinces were not attributable to it:

[t]he Argentine Republic has expressed the view that because the taxes have been assessed by the Argentine Provinces, and irrespective of whether this is a lawful or unlawful action or whether it violates the federal arrangements in force, the responsibility and liability of the Argentine Republic cannot be engaged. The Tribunal is mindful in this respect that under international law the State incurs international responsibility and liability for unlawful acts of its various agencies and subdivisions. The same holds true under Article XIII of the Bilateral Investment Treaty when providing that this ‘...Treaty shall apply to the political subdivisions of the Parties’.²⁶⁵

In a footnote, the Tribunal referred to Article 4 and the accompanying Commentary.²⁶⁶

Further references to Article 4 may be found in a number of opinions of the Advocates General in cases before the European Court of Justice (ECJ) concerning questions of State liability for breach of European Community law. In this regard, although the ECJ has so far abstained from referring expressly to the Articles, the Advocates General have on a number of occasions relied upon the Articles, including Article 4.

In its decision in *Köbler v Austria*,²⁶⁷ a case concerning the question of whether State liability for breach of Community law could result from a decision of the highest court in the legal system of one of the Member States, the ECJ referred to the rule under international law of attribution to the State of the actions of all State organs, whatever their function.

The ECJ started its discussion by reaffirming a number of propositions from previous decisions on the subject of State liability, reiterating that ‘the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty’²⁶⁸ and that the principle ‘applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach’²⁶⁹. The Court then observed:

[i]n international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals.²⁷⁰

In this regard, it is significant that Advocate General Léger, in his Opinion in *Köbler*, squarely placed the issue of liability as the result of judicial decisions in the context of broader international law, referring to the ‘useful comparison with State responsibility in international law’.²⁷¹ Reasoning that State liability under Community law embodied the principle of international law of ‘State

²⁶⁴ *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004.

²⁶⁵ *Ibid.*, para. 32 (footnote omitted).

²⁶⁶ *Ibid.*, note 5, referring to Commentary to Article 4, paragraphs (1) to (13).

²⁶⁷ Case 224/01 *Köbler v Austria* [2003] ECR I-10239.

²⁶⁸ *Ibid.*, para. 30.

²⁶⁹ *Ibid.*, para. 31.

²⁷⁰ *Ibid.*, para. 32.

²⁷¹ Case 224/2001 *Köbler v Austria*, Opinion of Advocate General Léger, 8 April 2003, para. 42.

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unity’,²⁷² he derived two conclusions: the first was that ‘an unlawful act is necessarily attributed to the State, and not to the State organ which committed it. Only the State is a person recognised as having rights and duties in international law, to the exclusion of its organs.’²⁷³ He continued

[i]n the second place, the rule of State unity means that the State is liable for the loss or damage which it causes by any act or omission contrary to its international obligations, whichever State authority is responsible for it. That principle is clearly set out in Article 4(1) of the draft articles on the responsibility of States, which were drawn up by the International Law Commission [...].²⁷⁴

Questions of attribution of conduct to the State also arose in *A.G.M.-COS.MET Srl v Suomen valtio and Lehtinen*, another case concerning issues of State liability for breach of Community law.²⁷⁵ The case concerned the potential liability of Finland as a result of public statements made by an official employed by a State body, the statements being alleged to constitute an obstacle to the free movement of goods. The claim was brought before the Finnish courts, which referred a number of preliminary questions to the European Court. One of those questions related to the issue of whether the acts of the official in question could be attributed to Finland for the purposes of State liability under Community law, it being asserted in defence that the official had not been acting in an official capacity at the time the statements were made.

In his Opinion on the case, Advocate General Kokott made reference to the general law of State responsibility, as reflected in the Articles. He observed, referring in a footnote to the Articles, including Articles 4, 7 and 8, and the accompanying Commentary, that:

[international law] provides that acts are attributed only if and to the extent that State authority is ostensibly being exercised. The other cases in which conduct is attributed to the State are also similar in public international law and European law: acts of State organs, acts in accordance with directions, and State tolerance, or failure to fulfil a duty to intervene.²⁷⁶

In its judgment, the Court, sitting as a Grand Chamber, observed that:

[...] the referring court’s first question should be reformulated so that the court essentially asks whether it is possible to classify the opinions expressed publicly by Mr Lehtinen as obstacles to the free movement of goods for the purposes of Article 4(1) of the Directive, attributable to the Finnish State.

Whether the statements of an official are attributable to the State depends in particular on how those statements may have been perceived by the persons to whom they were addressed.

The decisive factor for attributing the statements of an official to the State is whether the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office.

In this respect, it is for the national court to assess in particular whether:

²⁷² Cf. Commentary to Article 4, paragraph (5): ‘The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility’.

²⁷³ Case 224/2001 *Köbler v Austria*, Opinion of Advocate General Léger, 8 April 2003, para. 46.

²⁷⁴ *Ibid.*, at para. 47 (footnotes omitted). The Advocate General also referred to Article 42 in a footnote: *ibid.*, note

44.

²⁷⁵ Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Lehtinen*, judgment of 17 April 2007.

²⁷⁶ Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Lehtinen*, Opinion of Advocate General Kokott, 17 November 2005, para. 84, and notes 29–32, referring to Articles 4, 7 and 8 and the Commentaries thereto.

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- the official has authority generally within the sector in question;
- the official sends out his statements in writing under the official letterhead of the competent department;
- the official gives television interviews on his department's premises;
- the official does not indicate that his statements are personal or that they differ from the official position of the competent department; and
- the competent State departments do not take the necessary steps as soon as possible to dispel the impression on the part of the persons to whom the official's statements are addressed that they are official positions taken by the State.²⁷⁷

In the operative paragraph of its judgment, providing the formal response to question referred by the Finnish court, the European Court of Justice stated:

[s]tatements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State, not personal opinions of the official, are attributable to the State. The decisive factor for the statements of an official to be attributed to the State is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office.²⁷⁸

It may be noted that the Articles and the Commentaries do not deal specifically with the question of attribution of verbal statements made by State officials, nor the circumstances in which such statements are to be deemed to be attributable to the State.

Although not strictly speaking a judicial pronouncement, reference should also be made to General Comment No. 31 adopted by the Human Rights Committee.²⁷⁹ The Committee made a number of observations in relation to the regime under the International Covenant on Civil and Political Rights which, although not referring explicitly to the Articles confirm, and in part appear to be inspired by, the approach adopted by the ILC in Article 4. It should be emphasized that, as noted above, General Comment No. 31 is an expression of the views of the Committee on the interpretation of the provisions of the Covenant; however, that interpretation necessarily takes place against the wider background of general international law, including the rules on State responsibility. The Human Rights Committee observed:

[t]he obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties [...]. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according

²⁷⁷ Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Lehtinen*, judgment of 17 April 2007. paras. 55–58.

²⁷⁸ Ibid.

²⁷⁹ Human Rights Committee 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004

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to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.²⁸⁰

Reference was also made to, *inter alia*, Article 4 in the judgments of the members of the United Kingdom House of Lords in *Jones v Ministry of Interior; Mitchell and others v Al-Dali and others and Ministry of Interior*,²⁸¹ a decision relating to whether or not the Saudi government and various officials were immune from suit before the English courts under the State Immunity Act 1978 in relation to alleged acts of torture which had taken place in Saudi Arabia. Lords Bingham and Hoffmann gave the only two substantive judgments, with both of which the other three members of the House all agreed; both referred to Articles 4 and 7 of the Articles in addressing the question of immunity.

Lord Bingham observed that the rule under s. 1(1) of the State Immunity Act 1978 was one of immunity, unless the proceedings against the state fall within one of the specified exceptions.²⁸² He went on to observe:

[w]hile the 1978 Act explains what is comprised within the expression 'State', and both it and the 1972 European Convention govern the immunity of separate entities exercising sovereign powers, neither expressly provides for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state ('servants or agents') in respect of acts done by them as such in the foreign state. There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents.²⁸³

Having observed that '[i]n some borderline cases there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct', Lord Bingham noted that the present cases were not borderline, in that the individual defendants were public officials, and there was 'no suggestion that the defendants' conduct was not in discharge or purported discharge of their public duties'.²⁸⁴ He then stated:

[i]nternational law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.²⁸⁵

He then referred to Articles 4 and 7 of the Articles and the accompanying Commentaries,²⁸⁶ and noted that the approach embodied in those Articles had been endorsed by the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.²⁸⁷ He concluded in this regard:

²⁸⁰ Ibid., para. 4.

²⁸¹ *Jones v Ministry of Interior; Mitchell and others v Al-Dali and others and Ministry of Interior*, [2006] UKHL 26; [2007] 1 AC 270.

²⁸² [2007] 1 AC 270 at 280, para. 9.

²⁸³ [2007] 1 AC 270 at 280–281, para. 10.

²⁸⁴ [2007] 1 AC 270 at 281, para. 11.

²⁸⁵ [2007] 1 AC 270 at 281, para. 12.

²⁸⁶ [2007] 1 AC 270 at 281–282, para. 12, referring to Commentary to Article 4, paragraph (13), and Commentary to Article 7, paragraph (8).

²⁸⁷ [2007] 1 AC 270 at 282, para. 12; the reference is to *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168, paras. 213–214.

[p]ausing at this point in the analysis, I think that certain conclusions (taking the pleadings at face value) are inescapable: (1) that all the individual defendants were at the material times acting or purporting to act as servants or agents of the Kingdom; (2) that their acts were accordingly attributable to the Kingdom; (3) that no distinction is to be made between the claim against the Kingdom and the claim against the personal defendants; and (4) that none of these claims falls within any of the exceptions specified in the 1978 Act.²⁸⁸

He then went on to dismiss the argument that there existed an exception to immunity in the case of violations of *jus cogens* norms, such as the prohibition of torture.

Lord Hoffman also made reference to the Articles, albeit from a slightly different perspective, in addressing the conclusion of the Court of Appeal that the individual defendants were not entitled to immunity because acts of torture were so illegal that they could not be considered governmental acts or exercises of state authority entitled to the protection of state immunity *ratione materiae*. He observed:

[i]t has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal. The cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law.²⁸⁹

Having referred to *Mallén v United States of America*,²⁹⁰ Lord Hoffmann also referred to Article 4 of the Articles, passages from the accompanying Commentary and Article 7 in support of that conclusion.²⁹¹ He then observed:

[i]t seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.²⁹²

Reference to Article 4 has also arisen in the context of consideration of other issues, which, on analysis, do not strictly concern the question of attribution of conduct constituting an internationally wrongful act of organs of the State. In this regard, it should be noted that although Article 4 (in common with the other articles in Chapter II of Part One) is phrased generally in terms of whether 'conduct' is attributable to the State, with no express limitation as to for what purpose attribution is necessary, the rules of attribution contained in Chapter II of Part One are concerned solely with questions of attribution of conduct for the purposes of State responsibility, and do not purport to lay down the conditions under which conduct may be attributed to the State for other purposes. The Introductory Commentary to Chapter II of Part One makes clear that:

[t]he purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility [...]²⁹³

²⁸⁸ [2007] 1 AC 270 at 283, para. 13.

²⁸⁹ [2007] 1 AC 270 at 300, para. 74

²⁹⁰ (1927) 4 RIAA 173; [2007] 1 AC 270 at 300–301, para. 75

²⁹¹ [2007] 1 AC 270 at 301, paras. 76–77, quoting Commentary to Article 4, paragraph (13).

²⁹² [2007] 1 AC 270 at 301, para. 78

²⁹³ Introductory Commentary Part One, Chapter II, paragraph (7).

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Different standards of attribution may apply in other situations and for other purposes, for instance the rules of representation governing when a State is to be taken to have undertaken obligations in international law; as stressed by the Tribunal in *Noble Ventures v Romania*, the standard for these purposes is not necessarily the same as that applicable to attribution of conduct for the purposes of State responsibility.²⁹⁴ On the other hand, it is of course possible that the standard of attribution for such other purposes may be the same as that for the purposes of attribution of internationally wrongful acts in relation to State responsibility. However, on a correct analysis, such a conclusion is justified merely by the fact that that is the content of the applicable rule of attribution in question, not because the customary international law rules of State responsibility relating to attribution, as embodied in the Articles, so provide.

One such example of reliance on Article 4 in relation to a question of attribution to the State of conduct which was not alleged to constitute an internationally wrongful act is represented by the decision on jurisdiction in *Tokios Tokelés v Ukraine*.²⁹⁵ The Tribunal was called upon to decide whether the claimant and respondent had engaged in negotiations required under the applicable BIT as a precondition to submission of the dispute to arbitration under the jurisdictional clause of the applicable BIT. The respondent argued that the negotiations which had taken place had been between the Claimant's local subsidiary and the Kyiv municipal authorities were not sufficient for this purpose.

The Tribunal found that there had been negotiations between the claimant and the central authorities of the Respondent sufficient for the purposes of the relevant provisions of the BIT, as well as 'extensive negotiations' between representatives of the claimant and the municipal authorities. In light of the former finding, the Tribunal held that it was not necessary to decide the question of whether negotiations with the municipal authorities were relevant in relation to calculation of the six-month cooling off period under the BIT, but observed, with reference in a footnote to Article 4 of the Articles, that 'actions of municipal authorities are attributable to the central government.'²⁹⁶

It may be noted that the issue before the Tribunal was *not* one of State responsibility, and Article 4 was therefore not strictly applicable, given that attribution of the acts in question was relevant to the question of whether one of the preconditions for jurisdiction contained in the relevant BIT had been fulfilled, and those acts were not relied upon as constituting an internationally wrongful act by which the responsibility of the respondent was alleged to have been entailed.

Similarly, in *CMS Transmission Company v Republic of Argentina*,²⁹⁷ the Tribunal in its decision on objections to jurisdiction was faced with an argument by the Respondent that the Claimant had in fact submitted to the Tribunal two separate disputes, the first relating to actions taken by the Ombudsman and judiciary in 2000 relating to tariffs, and a second, separate dispute relating to measures taken by the executive and legislature in late 2001 and early 2002 as a result of the financial crisis faced by Argentina, arising after the Request for Arbitration had been submitted on 12 July 2001. That second dispute, it was argued, had not been registered in accordance with the ICSID Convention, and the six-month waiting period between notification of the dispute and submission to arbitration under the applicable BIT had not been respected.²⁹⁸

The Tribunal rejected the Respondent's arguments, holding that there was a single dispute, containing incidental or ancillary claims. In that context, it observed, with reference in an accompanying footnote to Article 4 of the Articles, that:

²⁹⁴ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005, para. 84.

²⁹⁵ *Tokios Tokelés v Ukraine* (ICSID Case No. ARB/02/18), Decision on Objections to Jurisdiction of 29 April 2004.

²⁹⁶ *Ibid.*, para. 102 and note 113 (emphasis in original) (the footnote in fact refers to 'Article 17').

²⁹⁷ *CMS Transmission Company v Republic of Argentina* (ICSID Case No. ARB/01/08), Decision on Objections to Jurisdiction, 17 July 2003

²⁹⁸ *Ibid.*, para. 101.

[i]n so far as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the articles on State responsibility adopted by the International Law Commission is abundantly clear on this point. Unless a specific reservation is made in accordance with articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other State institutions does not necessarily make them separate disputes. No such reservation took place in connection with the BIT.²⁹⁹

Again, the question which the Tribunal was called upon to address was not strictly that of whether particular actions of the judiciary, executive and legislature were attributable to the State for the purposes of State responsibility (there appears to have been no dispute that they were so attributable, and the Tribunal implicitly proceeded on that basis); rather, the question was the different one of whether the fact that actions of different branches of government at different times had been relied upon by the Claimant in putting forward its claim meant that different and separate disputes were involved for the purposes of the jurisdiction of the Tribunal under the relevant provisions of the ICSID Convention and the BIT.

Article 4 was also referred to, again not in relation to a question concerning attribution of conduct alleged to constitute an internationally wrongful act, in the Report of the Panel in a case brought under the WTO dispute settlement understanding. In *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,³⁰⁰ the Panel was faced with the question of whether pronouncements of the United States International Trade Commission (USITC) relating to the US Schedule of Commitments to GATS were attributable to the United States for the purpose of ascertaining the position of the US as a supplementary means of interpretation of that Schedule, pursuant to Article 32 of the Vienna Convention on the Law of Treaties.³⁰¹

The United States had argued that the interpretation by the USITC was ‘merely an ‘explanatory’ text’ by an ‘independent agency’’, did not provide authoritative guidance as to US law and did not bind the US in that regard.³⁰²

The Panel held that, although the pronouncements of the USITC were not a binding interpretation, they were nevertheless one element which could be taken into account in interpreting the scope and meaning of the US Schedule of Commitments.³⁰³ It went on to note that the USITC was an agency of the US federal government, having certain responsibilities under US federal law which included maintaining the US Schedule of Commitments.³⁰⁴ In that regard, the Panel held that:

[...] as an agency of the United States government with specific responsibilities and powers, actions taken by the USITC pursuant to those responsibilities and powers are attributable to the United States.³⁰⁵

The Panel continued, making reference in accompanying footnotes to Article 4 and the accompanying Commentary, that that conclusion was:

²⁹⁹ Ibid., para. 108, and note 58.

³⁰⁰ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel, 11 November 2004, WTO doc. WT/DS285/R.

³⁰¹ Ibid., paras. 6.114 and 6.122.

³⁰² Ibid., para. 6.124.

³⁰³ Ibid., para. 6.125.

³⁰⁴ Ibid., para. 6.126

³⁰⁵ Ibid.

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[...] supported by the International Law Commission [...] Articles on the Responsibility for States of Internationally Wrongful Acts [*sic*]. Article 4, which is based on the principle of the unity of the State, defines generally the circumstances in which certain conduct is attributable to a State. This provision is not binding as such, but does reflect customary principles of international law concerning attribution. As the International Law Commission points out in its commentary on the Articles on State Responsibility, the rule that ‘the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognised in international judicial decisions’. As explained by the ILC, the term ‘state organ’ is to be understood in the most general sense. It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.³⁰⁶

As a result, the Tribunal went on to reject the argument of the US that the USITC was an ‘independent agency’, and that its conduct was therefore not attributable to the US, again referring in footnotes to the Commentary to Article 4:

[t]he fact that certain institutions performing public functions and exercising public powers are regarded in internal law as autonomous and independent of the executive government does not affect their qualification as a state organ. Thus, the fact that the USITC is qualified as an ‘independent agency’ does not affect the attributability of its actions to the United States, because what matters is the activity at issue in a particular case, not the formal qualification of the body concerned.³⁰⁷

Consequently, the Panel concluded that:

[...] official pronouncements by the USITC in an area where it has delegated powers are to be attributed to the United States. In this dispute, the USITC Document can legitimately be considered to be probative of the United States’ interpretation of its own GATS Schedule.³⁰⁸

Again, it bears emphasising that the question before the Panel was not that of attribution of an internationally wrongful act for the purposes of State responsibility, but the very different question of whether certain conduct was to be considered to be conduct of the State in order for it to be taken into account as a supplementary means of interpretation under the law of treaties.³⁰⁹ However, the Panel clearly took the view that the relevant rule of attribution for these purposes was that of attribution of organs in the field of State responsibility, and that that rule was encapsulated in Article 4.

Article 4 was relied upon by analogy by the European Communities in *European Communities – Selected Customs Matters*, in order to counter an argument made by the United States that only executive authorities of the Member States of the European Communities were to be considered de facto authorities of the Communities for the purposes of the notion of ‘prompt review of administrative action relating to customs matters’ contained in Article X.3(b) GATT 1994, to the

³⁰⁶ Ibid., para. 6.127 (footnotes omitted); the Panel made reference to the Commentary to Article 4, paragraphs (3) and (6).

³⁰⁷ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel, 11 November 2004, WTO doc. WT/DS285/R, para. 6.128 (footnotes omitted), referring to Commentary to Article 4, paragraphs (6) and (11).

³⁰⁸ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel, 11 November 2004, WTO doc. WT/DS285/R, para. 6.129.

³⁰⁹ See also the reliance on Article 4 of the Articles by Korea in *European Communities – Measures Affecting Trade in Commercial Vessels*, Report of the Panel of 22 April 2005, WTO doc. WT/DS301/R, para. 6.11 in order to argue that the ‘European Communities cannot disavow the stated positions of its representatives’ contained in press releases relied on as evidence of the effect and purpose of the measure in issue in that case. In that case, the Panel made no reference to Article 4 in dealing with that issue.

exclusion of the judicial authorities of the Member States. As summarised by the Panel, the EC argued in this regard, with reference to Article 4, that:

[b]oth executive and judicial authorities are relevant public authorities in each WTO Member. Both the actions of the executive and of the judicial branches may be relevant for compliance with WTO obligations. Accordingly, the EC sees no reason why only executive authorities, but not judicial authorities of the member States, should be recognized as authorities of the EC when implementing EC law.

The US arguments are also incompatible with principles of general international law regarding responsibility for wrongful acts. In this regard, the EC would refer to Article 4(1) of the Articles on responsibility of States for internationally wrongful acts elaborated by the International Law Commission (ILC).

It follows clearly from this provision that, when it comes to the acts of a State under international law, there is no distinction between acts of the legislative, executive and judicial organs. For this very same reason, it would seem unjustifiable to consider that only the executive authorities of the member States, but not the judicial authorities of the member States, can act as EC organs.

Similarly, it follows from the ILC's articles on state responsibility that the responsibility for internationally wrongful acts extends not only to organs of the central government, but also to organs of territorial units. Accordingly, the EC has never contested that it is responsible in international law for the compliance by EC member States with the obligations of the EC under the WTO Agreements.

With its argument that member States courts cannot be regarded as EC courts, the United States seems to suggest that whereas the EC is responsible for the actions of EC member States, it cannot have recourse to organs of the EC member States for discharging its obligations, such as the one under Article X:3(b) GATT. Such a result would be highly contradictory. Under the general principles of state responsibility, attribution of conduct relates to all acts and omission, regardless of their legality. Accordingly, not only must conduct be attributed for the purposes of establishing a violation of international obligations, but also in order to assess whether obligations have been complied with. In other words, it is perfectly possible for the EC to have recourse to its member States for the purposes of discharging international obligations, including the obligation to provide for prompt review under Article X:3(b) GATT.³¹⁰

The Panel concluded that, as a matter of construction of Article X:3(b) GATT, that provision did not:

[...] necessarily mean that the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular Member.³¹¹

As a result, in relation to the specific question of whether the EC was able to comply with Article X:3(b) GATT through the actions of member state courts and tribunals, the Panel concluded that:

³¹⁰ *European Communities – Selected Customs Matters*, Report of the Panel of 16 June 2006, WTO Doc: WT/DS315/R, paras. 4.705–4.709.

³¹¹ *Ibid.*, para. 7.539

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[...] the European Communities may comply with its obligations under Article X:3(b) of the GATT 1994 through organs in its member States. We consider that this follows from the fact that Article X:3(b) of the GATT 1994 does not contain any requirements regarding the institutional structure of the review mechanism required by that Article other than the requirement that the review be undertaken by judicial, arbitral or administrative tribunals.³¹²

In support of that conclusion, in a footnote, the Panel stated that it considered ‘that this also follows from Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts’, and then set out Article 4 in its entirety.³¹³

The portion of the Panel’s decision quoted above was subsequently upheld by the WTO Appellate Body, which limited its reasoning to the interpretation of the terms of Article X:3(b) GATT, without making reference to Article 4 of the Articles.³¹⁴

A number of criticism may be made in relation to the reasoning of the Panel, and its invocation of Article 4; first, the question at issue was whether particular conduct could be attributed to the European Communities, and not to a State; Article 4 on its face does not apply to that question, although there is a clear analogy.³¹⁵ Second, and more importantly, the question was not one of whether attributable conduct constituted an internationally wrongful act, i.e. a breach of an international obligation incumbent on the European Communities, but rather whether the European Communities could rely on acts of the courts of the Member States as performance of obligations incumbent upon it.

Also worthy of mention in this regard, albeit that no express reference was made by the Panel to the Articles, is the earlier Panel decision in *European Communities – Trademarks and Geographical Indications*,³¹⁶ which was relied on in argument by the European Communities before the Panel in *European Communities – Selected Customs Matters*. In that case, the European Communities had argued that:

[...] the statements made by agents of the European Commission before the Panel commit and engage the European Communities. It indicates that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, ‘act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general’.³¹⁷

The Panel accepted:

[...] this explanation of what amounts to the European Communities’ domestic constitutional arrangements and accepts that the submissions of the European Communities’ delegation to this panel proceeding are made on behalf of all the executive authorities of the European Communities.³¹⁸

³¹² Ibid., para. 7.552

³¹³ Ibid., note 932.

³¹⁴ *European Communities – Selected Customs Matters*, Report of the Appellate Body, 13 November 2006, WTO doc. WT/DS315/AB/R, paras. 288–304. In its argument supporting the conclusion of the Panel, the European Communities again referred to Article 4 of the Articles, in support of an argument based on an analogy to ‘the general principle of international law that States are responsible for the acts of all their organs and emanations, including their sub-federal and regional governments’: see *ibid.*, para. 83, and footnote 218.

³¹⁵ See now draft Articles 4, 5 and 8 of the International Law Commission’s Draft Articles on the Responsibility of International Organizations.

³¹⁶ *European Communities – Trademarks and Geographical Indications*, Panel Report of 20 April 2005, WTO doc. WT/DS174/R.

³¹⁷ Ibid., para. 7.98.

³¹⁸ Ibid., para. 7.98.

Similar reliance on Article 4 of the Articles has been made by domestic courts. In the American case of *Compagnie Noga D'Importation et D'exportation S.A. v Russian Federation*,³¹⁹ the Court of Appeals for the Second Circuit made reference to Article 4(1) and quoted from the ILC's Commentary to that provision in reversing a decision of the District Court which had refused to recognise and enforce a Swedish arbitral award against the Russian Federation on the basis that the award had been made against the Government of the Russian Federation, rather than against the Russian Federation itself.³²⁰ The Court of Appeals observed in this regard, quoting Article 4(1), that:

[t]he distinction made by the District Court between the acts of a sovereign and the acts of one of its governmental organs also finds no basis in international law. An axiomatic principle of international law is that '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.'³²¹

The Court of Appeals went on to quote from the Commentaries to Article 4. An accompanying footnote noted the history of the Articles, and the adoption of Resolution 56/83 by the General Assembly in 2001, stating:

[w]e note that the Draft Articles, as the work of scholars, are not a primary or constitutive source of authority on international law, but rather are relevant only inasmuch as they may provide accurate evidence of the practice of States. [...]³²²

Again, it may be observed that the question before the Court of Appeals was not one of international State responsibility, but rather of whether enforcement could be levied against the Russian Federation.

Similar criticisms may also be made of reference to Article 4 (and other Articles contained in Chapter II of Part One) by international tribunals not for the purposes of attribution of conduct of State organs for the purposes of international responsibility, but as a subsidiary supporting argument confirming an interpretation already arrived at on the basis of the terms contained in the provisions in issue.

In the NAFTA case of *ADF Group Inc. v United States*,³²³ the Tribunal referred to Article 4 of the Articles as a subsidiary confirmation of its interpretation of the scope of the term 'Party' in Article 1108 NAFTA. The scope of that term was relevant in ascertaining the applicability of the substantive standards relating to national treatment contained in Article 1102 NAFTA and performance requirements contained in Article 1106 NAFTA, as a result of the exceptions to the applicability of those provisions in relation to 'public procurement by a Party' contained in Article 1108(7) and (8).³²⁴ The investor had argued that the term 'Party' in that context covered procurement by only the federal government, to the exclusion of procurement by state or provincial governments.

³¹⁹ *Compagnie Noga d'Importation et d'Exportation. S.A. v Russian Federation* 361 F.3d 676 (2004) (CA,2nd Cir. N.Y.).

³²⁰ The Court of Appeals also held that no distinction was to be made between the Russian Federation and the Government of the Russian Federation and the award was enforceable under federal common law and Russian law.

³²¹ 361 F.3d 676, at 688–689

³²² *Ibid.*, note 13,

³²³ *ADF Group Inc. v United States of America* (ICSID Additional Facility Case No. ARB(AF)/00/1), Award of 9 January 2003.

³²⁴ The Tribunal also concluded that the Claimant had failed to establish on the merits that the measures in question were inconsistent with the national treatment requirements of Article 1102 NAFTA: *ibid.*, paras. 155–158.

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The Tribunal concluded that the term was apt to cover public procurement by all levels of government within a federal State. In that regard, it had regard to the definition of ‘government procurement’ contained in Article 1001(1) NAFTA,³²⁵ as well as to the provisions of Article 1108(1) relating to ‘existing non-conforming measures’, in relation to which it concluded that it was sufficiently broad to cover not only ‘a federal government measure but also a state or provincial government measure and even a measure of a local government’.³²⁶

In support of that interpretative conclusion, the Tribunal observed, with reference to Article 4 of the Articles, that its interpretation was:

[...] in line with the established rule of customary international law that acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units.³²⁷

In a footnote accompanying those observations, the Tribunal referred to the fact that the ‘international customary law status of the rule’ contained in Article 4 had been recognized by, inter alia, the International Court of Justice in its Advisory Opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,³²⁸ and made reference to and quoted from a number of paragraphs of the Commission’s Commentary to Article 4.³²⁹

The Tribunal clearly took the view that the rule of attribution contained in Article 4 was customary in nature, and contained the appropriate applicable rule of attribution. It should be emphasised however that the Tribunal’s views in this regard were made as a subsidiary argument, supportive of a conclusion on the interpretation of the provision in question which it had already reached. However, doubts may be expressed as to the appropriateness of the invocation of Article 4 in this context, and whether the analogy was apt and in reality provided any support for the Tribunal’s conclusions in that regard. Article 1108 NAFTA, the provision which the Tribunal was called upon to interpret, is concerned with express exceptions to the applicability of the substantive standards contained in Chapter 11 NAFTA; the scope of those exceptions, and the conduct of a Party covered by them, is in the end a question of interpretation of the relevant treaty provisions. Conversely, the customary international rule embodied in Article 4 is concerned with attribution of conduct to the State for the purposes of State responsibility as a result of internationally wrongful acts, and the specific question of which bodies are to be considered as constituting State organs for that purpose. These two questions are conceptually distinct, and operate in different areas, namely, on the one hand, the scope of the obligations in question, or put another way, which entities are bound by them, and on the other attribution of acts potentially constituting a breach of those obligations; in other words, whether or not an act of an organ, at whatever level, is attributable to the State of which it forms part for the purposes of responsibility is a fundamentally different question from whether or not an entity falls within the notion of ‘Party’ in a treaty provision such as that at issue in *ADF*.

On the other hand, there are undoubtedly strong logical arguments as well as arguments of consistency for arguing that if acts of its organs are to be attributable to a State, an express exception to the scope of applicability of substantive standards which would otherwise be applicable should cover all organs whose acts are so attributable. However, those are considerations of interpretation, rather than resulting from the fact that acts of all organs are attributable to the State.

³²⁵ Ibid., para. 164

³²⁶ Ibid., para. 165

³²⁷ Ibid., para. 166.

³²⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, p. 62.

³²⁹ *ADF Group Inc. v United States of America* (ICSID Additional Facility Case No. ARB(AF)/00/1), Award of 9 January 2003, note 161, referring to the Commentary to Article 4, paragraphs (8) to (10), and quoting from paras 8 and 9.

In the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention*,³³⁰ opposing Ireland and the United Kingdom in relation to access to information redacted by the United Kingdom from reports relating to the MOX plant at the Sellafield nuclear installation, the Tribunal had regard to the rules of attribution contained in Articles 4 and 5 in interpreting Article 9(1) of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).³³¹ Article 9(1) of the OSPAR Convention provides that:

The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.

The United Kingdom argued that the obligation set forth in Article 9(1) did not entail an obligation of result that the domestic competent authorities would in fact provide the information in question, but merely an obligation to make provision in the domestic legal system requiring the competent authorities to do so, with the result that any complaint as to improper withholding of information had to be brought before the domestic courts.³³² As the Tribunal framed the issue, the question was 'whether the requirement in Article 9(1) 'to ensure' the obligated result mandates a result rather than merely a municipal law system directed to obtain the result.'³³³

After careful examination, the Tribunal concluded by a majority that 'Article 9(1) is advisedly pitched at a level that imposes an obligation of result rather than merely to provide access to a domestic regime which is directed at obtaining the required result'.³³⁴

In support of that conclusion, the Tribunal observed that its conclusion as to the interpretation of Article 9(1):

[...] is consistent with contemporary principles of state responsibility. A State is internationally responsible for the acts of its organs. On conventional principles, a State covenanting with other States to put in place a domestic framework and review mechanisms remains responsible to those other States for the adequacy of this framework and the conduct of its competent authorities who, in the exercise of their executive functions, engage the domestic system.

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

It follows as an ordinary matter of obligation between States, that even where international law assigns competence to a national system, there is no exclusion of responsibility of a State for the inadequacy of such a national system or the

³³⁰ *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom)*, Final Award of 2 July 2003.

³³¹ Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992.

³³² *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom)*, Final Award of 2 July 2003, para. 123.

³³³ *Ibid.*, para. 132.

³³⁴ *Ibid.*, para. 137.

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failure of its competent authorities to act in a way conferred by an international obligation or implementing legislation. Adopting a contrary approach would lead to deferral of responsibility by States and the frustration of the international legal system.³³⁵

Again, the question before the Tribunal was strictly one of interpretation of the treaty provision in question, and what was the content of the obligation it imposed. The standard of attribution for the purposes of State responsibility is a distinct question from that of interpretation of the scope and effect of any given treaty provision.

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 5 provides for attribution to the State of conduct of persons or entities which, although not constituting organs of a State pursuant to Article 4 of the Articles, are nevertheless empowered to exercise elements of governmental authority. To the extent that conduct of such a person or entity is carried out in the context of the exercise of such governmental authority, it is to be treated as being an act of the State.

Article 5 has frequently been relied on in conjunction with Article 4, on the basis that, if conduct of a person or entity is not attributable to a State on the basis that the person or entity does not constitute an organ under Article 4, nevertheless the person or entity is to be considered to be exercising 'elements of governmental authority' in acting, with the result that its conduct in that regard is attributable to the State under Article 5.

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,³³⁶ the International Court of Justice made reference to Article 5 in the context of its discussion of whether conduct of the Congo Liberation Movement (Mouvement de libération du Congo) ('MLC'), a rebel group operating within the territory of the Democratic Republic of the Congo, was attributable to Uganda. Having rejected the DRC's argument that the MLC could be considered an 'organ' of Uganda for the purposes of Article 4 of the Articles,³³⁷ the Court went on to find that, likewise, the conduct of members of the MLC could not be attributed to Uganda on the basis of other Articles contained in Chapter II of Part One, of the Articles, stating that:

[i]n the view of the Court, the conduct of the MLC was not that of 'an organ' of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Article 5).³³⁸

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,³³⁹ having found that the acts of those responsible for the genocide at Srebrenica were not attributable to the respondent either on the basis of Article 4 or Article 8 of the Articles, the Court made reference to the other potentially relevant provisions relating to attribution contained in Chapter II of Part One, including Article 5. However, the Court expressly refrained from adopting any position as to whether those provisions reflected customary international law, given that it was of the view that none of the provisions were applicable on the facts of the case. According to the Court:

³³⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

³³⁷ *Ibid.*, para. 160

³³⁸ *Ibid.*

³³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

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[...] none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5) [...].³⁴⁰

As noted above in relation to Article 4, the Tribunal in *Eureko BV v Republic of Poland*³⁴¹ made reference to the Commentary to Article 5 in ruling upon whether conduct of the Minister of the State Treasury in relation to a share purchase agreement and subsequent agreements entered into by the Polish State Treasury and the Claimant in respect of the privatization of a State-owned insurance company (PZU) were attributable to the Respondent.

Having concluded, with reference to Article 4 of the Articles, that the conduct of any State organ is 'considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State',³⁴² and that there could be 'no doubt' that the Minister for the State Treasury was acting 'pursuant to clear authority conferred on him by the Council of Ministers of the Government of Poland in conformity with the officially approved privatization policy of that Government', and as such 'engaged the responsibility of the Republic of Poland',³⁴³ the Tribunal noted that:

[t]he principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is in fact acting on the instructions of, or under the direction or control of, that State.³⁴⁴

In that regard, the Tribunal made reference to a passage in the Commentary to Article 5, in which the Commission observed that Article 5 is intended:

[...] to take account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.³⁴⁵

As a consequence, the Tribunal concluded that, 'whatever may be the status of the State treasury in Polish law' from the perspective of international law, a point which it did not decide:

[...] the Republic of Poland is responsible to Eureko for the actions of the State Treasury. These actions, if they amount to an internationally wrongful act, are clearly attributable to the Respondent and the Tribunal so finds.³⁴⁶

As discussed above in the context of Article 4, in *Noble Ventures v Romania*³⁴⁷ the Tribunal was concerned with the question of whether the acts of two entities created under Romanian law (SOF

³⁴⁰ Ibid., para. 414.

³⁴¹ *Eureko BV v Republic of Poland*, Partial Award of 19 August 2005.

³⁴² Ibid., para. 127; the Tribunal quoted Article 4 in para. 128.

³⁴³ Ibid., para. 129.

³⁴⁴ Ibid., para. 132.

³⁴⁵ Ibid., citing Commentary to Article 5, paragraph (1).

³⁴⁶ *Eureko BV v Republic of Poland*, Partial Award of 19 August 2005, para. 134.

and APAPS) were attributable to the Respondent. Those entities had been created in the context of the privatization by Romania of various industries. In a passage which has already been cited above, the Tribunal observed generally in relation to the Articles that:

[a]s States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect. Regarding general international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001 [...]. While those Draft Articles are not binding, they are widely regarded as a codification of customary international law. The 2001 ILC Draft provides a whole set of rules concerning attribution [...]³⁴⁸

Having concluded that the acts of SFO and APAPS were not attributable to Romania on the basis of Article 4, the Tribunal observed:

[t]he 2001 Draft Articles go on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by Art. 5 2001 ILC Draft. While not being *de jure* organs, SOF as well as APAPS were at all relevant times acting on the basis of Romanian law which defined their competence.³⁴⁹

Having considered the various provisions of domestic law governing the status of two the State entities in question, which inter alia provided that SOF was an 'empowered public institution' under the Privatization Law,³⁵⁰ the Tribunal concluded that:

[...] it was not only within the competence of SOF—and APAPS which replaced SOF at the end of 2000—when acting as the empowered public institution under the Privatization Law, to conclude agreements with investors but also, acting as a governmental agency, to manage the whole legal relationship with them, including all acts concerned with the implementation of a specific investment. In the judgment of the Tribunal, no relevant legal distinction is to be drawn between SOF/APAPS, on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law.

All the acts allegedly committed by SOF/APAPS were related to the investment of the Claimant. There is no indication from the parties, and there is no reason to believe, that any act by these institutions was outside the scope of their mandate. Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and did so in all of their actions as well as omissions. The acts allegedly in violation of the BIT are therefore attributable to the Respondent for the purposes of assessment under the BIT.³⁵¹

³⁴⁷ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

³⁴⁸ *Ibid.*, para. 69.

³⁴⁹ *Ibid.*, para. 70.

³⁵⁰ *Ibid.*, para. 71–78.

³⁵¹ *Ibid.*, paras. 79–80.

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In *EnCana Corp. v Ecuador*³⁵² the Tribunal was faced with the question of whether the conduct of Petroecuador was attributable to Ecuador for the purposes of the allegations of breach of the standards of protection contained in the BIT. Petroecuador was a State entity created for the purpose of exploitation of Ecuador's hydrocarbon resources, and was wholly owned and controlled by the State. The Respondent did not deny that Petroecuador's conduct in entering into the participation contract at issue in the arbitration was attributable to it. In this regard, the Tribunal took note that it was relevant that:

Petroecuador was [...] subject to instructions from the President and others, and that the Attorney-General pursuant to the law had and exercised authority 'to supervise the performance of ... contracts and to propose or adopt for this purpose the judicial actions necessary for the defence of the national assets and public interest.' According to the evidence this power extended to supervision and control of Petroecuador's performance of the participation contracts and their potential renegotiation. Thus the conduct of Petroecuador in entering into, performing and renegotiating the participation contracts (or declining to do so) is attributable to Ecuador. It does not matter for this purpose whether this result flows from the principle stated in Article 5 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts or that stated in Article 8. The result is the same.³⁵³

In an accompanying footnote, the Tribunal set out the full text of Articles 5 and 8 of the Articles.³⁵⁴

As noted above in relation to Article 4, in *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*,³⁵⁵ the Tribunal specified the law which it would apply to the question of attribution of the acts of SCA, a State entity, at the merits stage. In doing so, the Tribunal expressly recognised that Article 5 codified customary international law in relation to the question of attribution of the acts of an entity, which, while not constituting a *de jure* organ of a State, was nevertheless empowered by the law of the State to exercise elements of governmental authority. The Tribunal observed:

[w]hen assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. In particular, the Tribunal will consider the following provisions:

[...]

- Art. 5 of the ILC Articles which goes on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. Such provision restates the generally recognized rule that the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ,

³⁵² *EnCana Corporation v Republic of Ecuador* (LCIA Case No. UN3481), Award of 3 February 2006.

³⁵³ *Ibid.*, para. 154 (footnotes omitted).

³⁵⁴ *Ibid.*, note 107.

³⁵⁵ *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006.

person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.³⁵⁶

It may be noted that to the extent that the Tribunal's formulation of the applicable customary rule refers to the attributability to the State of conduct an entity exercising elements of governmental authority 'even if exceeds its authority or contravenes instructions', it goes beyond the ILC's formulation of the rule in Article 5 of the Articles, but also incorporates elements of the rule contained in Article 7.

Similarly, as discussed above in relation to Article 4, in *Saipem SpA v People's Republic of Bangladesh*,³⁵⁷ the Tribunal announced that it would make reference to Articles 4, 5 and 8 of the Articles when assessing on the merits whether conduct of Petrobangla was attributable to Bangladesh. The Tribunal noted that it was not necessary, for the purposes of ascertaining its jurisdiction, for it to decide at that stage whether the acts of Petrobangla complained of gave rise to State responsibility unless 'it were manifest that the entity involved had no link whatsoever with the State', and observed that this was plainly not the case.³⁵⁸ The Tribunal then went on to discuss the various elements relied upon by Bangladesh to argue that the conduct of Petrobangla was not attributable to it,³⁵⁹ before stating:

[w]hen assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. The Tribunal will in particular consider the following provisions:

[...]

Art. 5 of the ILC Articles which goes on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. [...]³⁶⁰

The Tribunal also made reference to Articles 4 and 8 of the Articles as being potentially relevant.³⁶¹ It concluded that:

[a]t this jurisdictional stage, there is no indication that either the courts of Bangladesh or Petrobangla could manifestly not qualify as state organs at least *de facto*.³⁶²

As also discussed above in relation to Article 4, in *Helnan International Hotels A/S v Republic of Egypt*,³⁶³ the claimant relied on Article 4 and 5 to argue that the conduct of EGOTH, an entity owned and controlled by Egypt, was attributable to Egypt for the purposes of the applicable BIT. Egypt by contrast argued that EGOTH had separate legal personality, and that none of its contracts or acts were attributable to Egypt under Egyptian law. Although the Tribunal was of the view that

³⁵⁶ Ibid., para. 89.

³⁵⁷ *Saipem SpA v People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007.

³⁵⁸ Ibid., para. 144.

³⁵⁹ Ibid., paras. 145–147.

³⁶⁰ Ibid., paras. 148

³⁶¹ Ibid.

³⁶² Ibid., para. 149.

³⁶³ *Helnan International Hotels A/S v Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction of 17 October 2006.

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it was not necessary in order to decide upon its jurisdiction, it nevertheless ruled at that stage on the question of whether the acts of EGOTH were attributable to Egypt.³⁶⁴

The Tribunal was of the view that it had been ‘convincingly demonstrated that EGOTH [...] is under the close control of the State’,³⁶⁵ on the basis of various elements, including EGOTH’s statutory purpose, the fact that under Egyptian law its memorandum and articles of association were reviewed by the State Council and that its general assembly was headed by the chairman of its holding company, itself a company owned 100% by Egypt, the administrative and executive powers exercised by the government over the holding company, the fact that the funds of EGOTH were public funds, and that the officers of EGOTH were subject to imprisonment if they did not distribute the State’s share of the profits.

Referring to the Commentary to Article 5, the Tribunal observed however that

‘all these gathered clues are not sufficient to conclude that EGOTH’s conduct is attributable to Egypt. Indeed, as pointed out [in the Commentary to Article 5]:

‘the fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specific elements of governmental authority.’³⁶⁶

Nonetheless, the Tribunal concluded that acts of EGOTH were attributable to Egypt, relying in this regard on Article 5:

[m]ore significantly in this case, EGOTH was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government. Egypt’s privatisation program was scheduled since 2001 and always included EGOTH’s assets. The different announcements proposing to invest in Egypt, on the Ministry of Investment website, all refer to Egypt, the Holding Company and EGOTH. In this respect, it must be pointed out that according to Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts ‘the conduct of a person or entity which is not a 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 as an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’ Even if EGOTH has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State.³⁶⁷

As noted above in relation to Article 4, in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (‘*Vivendi II*’), there was a dispute as to the extent to which the actions of members of provincial legislature and the Ombudsman were attributable to Argentina. In relation to the actions of members of the provincial legislature, in particular those belonging to the opposition, Argentina argued that they lacked the necessary governmental authority in making

³⁶⁴ Ibid., para. 91.

³⁶⁵ Ibid., para. 92.

³⁶⁶ Ibid., quoting Commentary to Article 5, paragraph (3).

³⁶⁷ *Helnan International Hotels A/S v Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction of 17 October 2006, para. 93.

the statements relied upon.³⁶⁸ In relation to the Ombudsman, it was argued that it was neither a State organ, nor an agent of the State. In this regard, Argentina relied on ‘the domestic characterization of the functions of the Ombudsman [...] as a body opposed to government’,³⁶⁹ and, in what appears to have been a reference to the Introductory Commentary to Chapter II of Part One, to the ‘prime importance’ of the domestic characterization of a body under the Articles.³⁷⁰

In response, the claimants relied on Articles 4 and 5 of the Articles to argue that the actions of the provincial legislators and the Ombudsman were attributable to Argentina, on the basis that:

- (i) the provincial legislators of Tucumán, exercising as they do ‘legislative’ functions at ‘a territorial unit of the State’, individually and collectively are ‘State organs’ whose conduct shall be considered an act of the state under international law, and
- (ii) the Ombudsman, having regard to his governmental functions, relationship with the Legislature and sweeping authority, also has the status of a ‘State organ’ for whose conduct the state is responsible. And even if the Tribunal were to conclude that the Ombudsman is not a state organ, it is certainly an entity ‘empowered by the law’ of Argentina ‘to exercise elements of governmental authority’ within the meaning of Article 5 for which the state must take responsibility.³⁷¹

Although the Tribunal in the event found that it was not necessary to decide upon the issue, nevertheless it gave an indication of what its conclusion would have been, at least in relation to the Ombudsman.

Having observed that the parties had ‘spent much time on the responsibility, or lack thereof, of the Argentine Republic for the acts of individual opposition party legislators and of the Ombudsman’, and that Argentina ‘did not contest its responsibility for the acts of the Legislature in the exercise of its governmental authority, the Executive, the Attorney-General or the Regulator’, but only ‘denies responsibility for the acts of individual legislators, particularly opposition politicians and the Ombudsman’,³⁷² the Tribunal observed:

[w]e do not need to decide these questions given our conclusion that multiple acts of members of the Executive, government ministers, the Regulator (which was politically guided by the Executive) and the Legislature violated the Article 3 standard. Had it been necessary, we would have been inclined to find that many of the acts of the Ombudsman that were complained of involved the exercise of governmental authority and would thus have been attributable to Argentina in the event they too constituted a breach of Article 3.³⁷³

As noted above in relation to Article 4, in its Award on the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention* between Ireland and the United Kingdom,³⁷⁴ the Tribunal referred to the rules of attribution contained in Articles 4 and 5 of the

³⁶⁸ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (‘Vivendi II’) (ICSID Case No. ARB/97/3), Award of 20 August 2007, paras. 6.8.4–6.8.6.

³⁶⁹ *Ibid.*, para. 6.8.7–6.8.9.

³⁷⁰ *Ibid.*, para. 6.8.8; cf. Introductory Commentary to Part One, Chapter II, paragraph (6): ‘In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance.’

³⁷¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 5.4.2.

³⁷² *Ibid.*, para. 7.4.44.

³⁷³ *Ibid.*

³⁷⁴ *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention* (Ireland v United Kingdom), Final Award of 2 July 2003.

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Articles in support of its interpretation of Article 9(1) of the 1992 OSPAR Convention that the requirement in Article 9(1) 'to ensure' access to information imposed an obligation of result requiring access to the information, 'rather than merely to provide access to a domestic regime which is directed at obtaining the required result'.³⁷⁵

The Tribunal observed that that result:

[...] is consistent with contemporary principles of state responsibility. A State is internationally responsible for the acts of its organs. On conventional principles, a State covenanting with other States to put in place a domestic framework and review mechanisms remains responsible to those other States for the adequacy of this framework and the conduct of its competent authorities who, in the exercise of their executive functions, engage the domestic system.

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

It follows as an ordinary matter of obligation between States, that even where international law assigns competence to a national system, there is no exclusion of responsibility of a State for the inadequacy of such a national system or the failure of its competent authorities to act in a way conferred by an international obligation or implementing legislation. Adopting a contrary approach would lead to deferral of responsibility by States and the frustration of the international legal system.³⁷⁶

As noted above in relation to Article 4, in *Waste Management, Inc. v United Mexican States* ('*Waste Management II*'),³⁷⁷ the Tribunal canvassed whether conduct of Banobras, 'a development bank partly-owned and substantially controlled by Mexican government agencies',³⁷⁸ might have been attributable to the respondent for the purposes of NAFTA, albeit without actually deciding whether the conduct of the bank was so attributable.³⁷⁹ In doing so, in addition to referring to Article 4, as to which it expressed doubts as to its applicability to Banobras, the Tribunal made reference to Article 5:

[n]or is it clear that in its dealings with the City and the State in terms of the Line of Credit it was exercising governmental authority within the meaning of Article 5 of those Articles. The Organic Law of 1986 regulating Banobras' activity confers on it a variety of functions, some clearly public, others less so.³⁸⁰

In an accompanying footnote, the Tribunal made reference to the Commentary to Article 5, noting:

³⁷⁵ Ibid., para. 137.

³⁷⁶ Ibid., paras. 144–146.

³⁷⁷ *Waste Management, Inc. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/3) ('*Waste Management II*'), Award of 30 April 2004.

³⁷⁸ Ibid., para. 75; for discussion of the appropriateness of the Tribunal's reliance on the Articles in this regard, see above in relation to Article 4.

³⁷⁹ The Tribunal later concluded that the actions of Banobras in any case did not constitute a breach: Ibid., paras. 103 and 139.

³⁸⁰ Ibid., para. 75.

[t]he ILC's commentary describes the notion of a 'para-statal' entity as a narrow category: the essential requirement is that the entity must be 'empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity [which is the subject of the complaint] relates to the exercise of the governmental authority concerned'.³⁸¹

The case of *Ximenez-Lopes v Brazil*³⁸² before the Inter-American Court of Human Rights arose out of the ill-treatment and subsequent death of the victim in a privately run psychiatric clinic, operating within the wider context of the public health system in Brazil. It was alleged that the conditions of the victim's hospitalization were inhuman and degrading, that he was beaten and attacked by members of staff of the clinic. Further, it was alleged that Brazil had failed to carry out a proper investigation into the circumstances of his death. Brazil partially admitted responsibility, acknowledging its responsibility for violations of the right to life and physical integrity as a result of the death of the victim and his ill-treatment prior to his death.³⁸³

Notwithstanding the partial acknowledgment of responsibility by Brazil, the Inter-American Court went on to assess the merits of the case. In that regard, it referred to the work of the International Law Commission, in terms obviously referring to Article 5. The Court observed:

[a]ny form of exercise of the State power which violates rights recognized by the Convention is unlawful. In this regard, under any circumstance in which a State body or official or a public institution unduly impairs one of such rights, either as the result of an act or failure to act, there is an alleged non-compliance of the duty to respect the rights enshrined in Article 1(1) of the Convention.

The Court has further established that the State's liability may also result from acts committed by private individuals which, in principle, are not attributable to the State. The effects of the duties *erga omnes* of the States to respect and guarantee protection norms and to ensure the effectiveness of rights go beyond the relationship between their agents and the individuals under the jurisdiction thereof, since they are embodied in the positive duty of the State to adopt such measures as may be necessary to ensure the effective protection of human rights in inter-individual relationships.

The assumptions of the State's liability for the violation of rights enshrined in the Convention may include both the acts or the failure to act attributable to State bodies or officials, as well as the failure of the State to prevent third parties from impairing the juridical rights protected by human rights. Notwithstanding, between these two extremes of liability is the conduct described in the Resolution of the International Law Commission, of a person or entity which, though not a state body, is authorized by the State legislation to exercise powers entailing the authority of the State. Such conduct, either by a natural or legal person, must be deemed to be an act by the State, inasmuch as such person acted in such capacity.

Hence, the acts performed by any entity, either public or private, which is empowered to act in a State capacity, may be deemed to be acts for which the State is directly liable, as it happens when services are rendered on behalf of the State.³⁸⁴

³⁸¹ Ibid., note 23, referring to Commentary to Article 5, paragraphs (2) and (7). The quote is from paragraph (2).

³⁸² *Ximenes-Lopes v Brazil, Merits, Reparations and Costs, I-A.C.H.R., Series A, No. 149*, judgment of 4 July 2006.

³⁸³ Ibid., para. 63.

³⁸⁴ Ibid., paras. 84–86 (footnotes omitted).

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In a footnote accompanying its reference to the ‘Resolution of the International Law Commission’, the Court referred to GA Resolution 56/83.³⁸⁵

As discussed above in relation to Article 4, in *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*,³⁸⁶ the Tribunal concluded that actions of INECEL, a State entity, were attributable to Ecuador:

[...] INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State. In this case, the customary rules codified by the ILC in their Articles on Responsibility of States for Internationally Wrongful Acts are applicable. Therefore, any acts or omissions of INECEL in breach of the BIT or of other applicable rules of general international law are attributable to Ecuador, and engage its international responsibility.³⁸⁷

In an accompanying footnote, the Tribunal referred to Article 5 of the Articles. However, given the Tribunal’s conclusion that INECEL was to be considered to be ‘an organ’ of Ecuador, it would appear that the reference to Article 5 was an error, and the appropriate reference should have been to Article 4.

As discussed above in relation to Article 4, in *United Parcel Services, Inc. v Canada*,³⁸⁸ the claimant argued that certain conduct of Canada Post, a State entity created by statute and having certain regulatory powers, was directly attributable to Canada on the basis of Articles 4 and 5 of the Articles for the purposes of Articles 1102-1105 NAFTA.

The Tribunal, having concluded that the acts of Canada Post could not be attributed to Canada on the basis of Article 4, given that NAFTA Chapter 15 contained a *lex specialis* in this regard in relation to attribution of monopolies and state enterprises,³⁸⁹ turned to the question of whether the conduct of Canada Post was nevertheless attributable on the basis of Article 5. The Tribunal likewise concluded that Article 5 was not applicable to the actions of Canada Post in this regard:

[i]t will be recalled that UPS also contends, as an alternative to the argument based on the rules of customary international law reflected in article 4 of the ILC text, that the proposition reflected in its article 5 apply to make Canada directly responsible for actions of Canada Post. That provision [...] is concerned with the conduct of non-State entities. It attributes to the State ‘[t]he conduct of a person or activity [sic] which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority [...] provided the person or entity is acting in that capacity in the particular instance.’ For reasons we have already given, there is real force in the argument that in many if not all respects the actions of Canada Post over its long history and at present are ‘governmental’ in a broad sense [...]. We again recall however the proposition in article 5 of the ILC text (as in other provisions) has a ‘residual character’ and does not apply to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of a State’s international responsibility are governed by special rules of international law – the *lex specialis* principle [...]. For the reasons which we have just given in relation to the argument based on article 4, and in particular the careful structuring and drafting of chapters 11 and 15 which we need not repeat, we find that this

³⁸⁵ Ibid., note 27.

³⁸⁶ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007.

³⁸⁷ Ibid., para. 225.

³⁸⁸ *United Parcel Services, Inc. v Canada*, Award of 11 June 2007.

³⁸⁹ Ibid., para. 62.

argument also fails, as a general proposition. It would be otherwise if in a particular situation Canada Post were in fact exercising 'governmental authority', as Canada indeed accepts in one respect [...] But in the absence of such an exercise the consequence for the claim of the findings of law made in this part of the award is that the challenges to the actions of Canada Post [...] all fail. [...] The national treatment claim based on the actions of Canada Post as opposed to the direct actions of Canada [...] fails for the same reason.³⁹⁰

The particular circumstance in which Canada accepted that Canada Post exercised elements of governmental authority was in relation to the collection of customs duties. In that regard, the Tribunal observed later on in its award, in relation to various other actions complained of by the claimant as breaching Articles 1502(3)(a) and 1503(2) NAFTA, including a refusal to grant use of its infrastructure, that:

[i]t is convenient at this point to return to Article 5 of the ILC's State responsibility text, and in particular to its commentary, quoted earlier [...]. That provision, it will be recalled, attributes to the State the conduct of non-State organs 'empowered by the law of that State to exercise elements of the governmental authority' when it acts in that capacity. The final sentence of the paragraph from the commentary to which UPS has already referred to us [...] gives a further example of the contrast:

'Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).'³⁹¹

The Tribunal continued:

[a]s indicated, Canada has no quarrel with the proposition that in collecting customs duties Canada Post is exercising delegated governmental authority (as with the exercise by the railway of police powers in the ILC example). But Canada submits, by contrast, that the decisions which Canada Post makes in the course of the establishment, expansion, management, conduct and operation of its overall business, about its own use of its infrastructure for its non monopoly services and about the use by Purolator of the infrastructure are commercial decisions without the government character required by articles 1502(3)(a) and 1503(2). In terms of the ILC's example, those decisions are comparable to decisions taken by the railway company about its sales and purchase. We agree with that submission.³⁹²

For the foregoing reasons, the Tribunal concludes that the decisions of Canada Post relating to the use of its infrastructure by Purolator and by its own competitive services are not made in the exercise of 'governmental authority' either in terms of articles 1502(3)(a) and 1503(2) or (assuming it to be relevant) in terms of the rules of customary international law reflected in article 5 of the ILC text. They are rather to be seen as commercial activities. It accordingly follows that this part of the claim made by UPS in respect of the actions of Canada Post fails.³⁹³

³⁹⁰ Ibid., para. 63.

³⁹¹ Ibid., para. 76, quoting Commentary to Article 5, paragraph (5).

³⁹² *United Parcel Services, Inc. v Canada*, Award of 11 June 2007, para. 77.

³⁹³ Ibid., para. 78.

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In *Korea - Measures Affecting Trade in Commercial Vessels*,³⁹⁴ the Panel noted Korea's reliance on Article 5 of the Articles in support of its argument that the Export-Import Bank of Korea ('KEXIM'), a State-owned bank created by statute and owned by the Government, providing finance, was not a public body for the purposes of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures. As the Panel summarised that argument:

Korea refers to the International Law Commission's Articles on State Responsibility in support of its position. According to Korea, Article 5 of the Articles on State Responsibility provides for a two-step analysis that helps clarify whether an entity is a public body. First, Korea submits that, pursuant to Article 5, the entity will be a public body if it 'is empowered by the law of the State to exercise elements of the governmental authority.' Korea asserts that this is a simple and logical test, based on the substance of what an entity is required to do rather than on questions of form such as whether a statute is a 'public statute' or not. Regarding the second step, Korea submits that the acts in question will be considered acts of State only if such entities are acting pursuant to such authority in the particular instance. Thus, Korea asserts that it is not the case that an entity is a public body for all purposes simply because it might have been given authority to act for the State in some matters. Korea asserts that one must still determine that the acts in question were undertaken pursuant to the specific grant of governmental authority. According to Korea, if financing is offered as part of a commercial program by a para-statal entity, it is presumptively non-governmental and therefore should not be considered a financial contribution.³⁹⁵

The Panel rejected that argument as a matter of construction of the Agreement on Subsidies and Countervailing Measures, concluding that KEXIM was a public body for those purposes.³⁹⁶

³⁹⁴ *Korea Measures Affecting Trade in Commercial Vessels*, Report of the Panel of 7 March 2005, WTO doc WT/DS273/R.

³⁹⁵ *Ibid.*, para. 7.39.

³⁹⁶ *Ibid.*, paras. 7.44 to 7.56.

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 6 concerns the situation of the 'lending' by one State of one of its organs to another State; the conduct of the organ in question is to be treated as attributable to the State at the disposal of which the organ has been placed if it is acting in the exercise of elements of the governmental authority of that State.

The ILC's Commentary to Article 6 makes clear that what is important 'is the establishment of a functional link between the organ in question and the structure or authority of the receiving State'.³⁹⁷ The fact that organs of one State are placed at the disposal of the other State and exercise elements of the governmental authority of the latter has as a consequence that those acts are not attributable to the State of which they are in fact organs, despite the rules contained in Article 4. As the Commentaries make clear, Article 6 'deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of another State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.'³⁹⁸ Specifically in relation to the provision of armed forces by one State to another, the Commentaries explain that '[w]here the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State.'³⁹⁹

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, a question analogous to that envisaged by the ILC in the quotation above arose in relation to the question of whether the actions of the 'Scorpions', a paramilitary group involved in the genocide at Srebrenica, was attributable to the FRY. As noted above, the International Court of Justice held that, on the evidence before it, it was not established that at the time of the events at Srebrenica, the 'Scorpions' were *de jure* organs of the FRY.⁴⁰⁰ The Court further observed that:

[f]urthermore, in any event, the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.⁴⁰¹

It may be noted that the language of the passage, albeit phrased in the negative, echoes that of Article 6, although, given that the Republika Srpska was not a State, the references are to the organ being placed at the disposal of another 'public authority', rather than at the disposal of 'another State'. In this regard, the Court's formulation is in effect the mirror image of the proposition formulated by the ILC in Article 6; as explained in the Commentaries, if an organ of a State is

³⁹⁷ Commentary to Article 6, para. (4).

³⁹⁸ Commentary to Article 6, para. (1).

³⁹⁹ Commentary to Article 6, para. (3).

⁴⁰⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 389.

⁴⁰¹ *Ibid.*, para. 389.

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placed at the disposal of another public authority, its actions can not be attributed to the State which has 'lent' that organ.

The Court clearly intended this comment as a subsidiary justification for its conclusion that the acts of the 'Scorpions' were not attributable to the FRY. The necessary implication is that even if the 'Scorpions' had been organs of the FRY at the relevant time, they had been placed at the disposal of the Republika Srpska with the necessary degree of subordination, with the consequence that their conduct was not attributable to the FRY.

Further, later on in the judgment, having found that the acts of those responsible for the genocide at Srebrenica were not attributable to the respondent either on the basis of Article 4 or Article 8 of the Articles, the Court made reference to the other Articles relating to attribution contained in Chapter II of Part One, including Article 6, albeit that it expressly refrained from expressing any view as to whether those provisions reflected customary international law on the basis that it was clear that none of them were applicable:

[...] none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), [...]⁴⁰²

In its decision in the joined cases of *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*,⁴⁰³ the Grand Chamber of the European Court of Human Rights made reference to Article 6. The applications related to claims arising out of the actions of the armed forces of the respondent States as part of the NATO security presence (KFOR) in Kosovo. The *Behrami* case related to an alleged breach of Article 2 of the European Convention on Human Rights as a consequence of a failure by French troops forming part of KFOR to clear unexploded cluster bomblets; the *Saramati* case related to the allegedly illegal detention of the applicant by soldiers forming part of KFOR in breach of Article 5 of the European Convention.

In setting out the law applicable to the applications, the European Court referred to Article 6 of the Articles, and then observed:

Article 6 addresses the situation in which an organ of a State is put at the disposal of another, so that the organ may act temporarily for the latter's benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone [...]⁴⁰⁴

The formulation of the principle adopted by the Court clearly derives from the Commission's Commentaries on Article 6.⁴⁰⁵

The Court also referred to Article 5 of the International Law Commission's draft Articles on Responsibility of International Organisations, which is in substantially similar terms in relation to

⁴⁰² Ibid., para. 414.

⁴⁰³ *Behrami and Behrami v France; Saramati v France, Germany and Norway*, (Apps. Nos. 71412/01 and 78166/01), Decision on admissibility, 2 May 2007 [GC].

⁴⁰⁴ Ibid., para. 34

⁴⁰⁵ Cf. Commentary to Article 6, paragraph (1).

organs of a state placed at the disposal of an international organization, as well as the accompanying draft Commentary thereto.⁴⁰⁶

The Court concluded that KFOR was exercising lawfully delegated Chapter VII powers of the UN Security Council and that, accordingly, the actions in question were attributable to the United Nations.⁴⁰⁷ On that basis, it found that it was incompetent *ratione personae* to hear the applicants' claims, and therefore declared the applications inadmissible.⁴⁰⁸

Reference was also made to Article 6 by a German court in a case concerning the liability of the German State to a Russian airline as a result of a mid-air collision in German air space, in part as a result of the fault of Swiss air traffic controllers who were responsible for air traffic control at the time of the collision. The Court concluded that the air traffic controllers were acting as a State organ, and there was argument as to whether Germany should be regarded as having placed that organ at the disposal of Switzerland. Having referred to Article 6 of the Articles, and expressed doubt as to its customary law status, the German court however concluded that it did not have to decide that question on the basis that the rules of international law rules of attribution were not applicable in the case given that the case concerned individual claims and not an inter-State claim.⁴⁰⁹

⁴⁰⁶ *Behrami and Behrami v France; Saramati v France, Germany and Norway*, (Apps. Nos. 71412/01 and 78166/01), Decision on admissibility, 2 May 2007 [GC], paras. 29–33; the Court also referred to draft Article 3 of the International Law Commission's draft Articles on Responsibility of International Organizations; draft Article 5 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.'

⁴⁰⁷ *Behrami and Behrami v France; Saramati v France, Germany and Norway*, (Apps. Nos. 71412/01 and 78166/01), Decision on admissibility, 2 May 2007 [GC], para. 141.

⁴⁰⁸ *Ibid.*, paras. 151–152.

⁴⁰⁹ Constance Regional Court, Case No. 4 O 234/05 H), judgment of 27 July 2006; partial English translation in *'Responsibility of States for internationally wrongful acts: Comments and information received from Governments, Report of the Secretary General'*, 9 March 2007, Un doc. A/62/63, at paras 18–22.

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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 7 sets out the principle that conduct of an organ under Article 4 or of a person or entity empowered to exercise elements of governmental authority under Article 5 is to be considered an act of the State if the organ, person or entity in question acts in that capacity, even if by so acting the organ, person or entity acts *ultra vires* or disobeys instructions.

Article 7 of the Articles has been referred to on a number of occasions since 2001.

In *ADF Group Inc. v United States of America*,⁴¹⁰ the claimant had argued that an agency of the United States had acted *ultra vires* and in disregard of the applicable local legislation, and that, as a consequence, it had violated the ‘minimum standard’ of fair and equitable treatment required by Article 1105 NAFTA.

The Tribunal observed that the claimant had not made out a prima facie case that the action in question was *ultra vires*, and, in any case, it did not have authority to rule on the compliance of the acts in question with the internal administrative law of the United States. The Tribunal further emphasised that, even if the actions of the agency had been shown to be *ultra vires*, this would not of itself have given rise to a breach of the standard of fair and equitable treatment imposed by Article 1105 NAFTA. In this regard, it referred to Article 7 of the Articles in support of its observation that:

[a]n unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity. But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1) [...]⁴¹¹

As noted above in the context of Article 5, in *Noble Ventures v Romania*,⁴¹² the Tribunal concluded that the two State entities in question (SOF and APAPS) were exercising elements of governmental authority in entering into the relevant agreements with the investor and in subsequently regulating that investment. The Tribunal noted that:

[a]ll the acts allegedly committed by SOF/APAPS were related to the investment of the Claimant. There is no indication from the parties, and there is no reason to believe, that any act by these institutions was outside the scope of their mandate. Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and did so in all of their actions as well as omissions. The acts allegedly in violation of the BIT are therefore attributable to the Respondent for the purposes of assessment under the BIT.⁴¹³

⁴¹⁰ *ADF Group Inc. v United States of America* (ICSID Additional Facility Case No. ARB(AF)/00/1), Award of 9 January 2003.

⁴¹¹ *Ibid.*, para. 190 and note 184.

⁴¹² *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005.

⁴¹³ *Ibid.*, para. 80.

The Tribunal observed that, even if the two entities had acted outside their competence, this would not have affected the conclusion that the acts in question were attributable to the respondent. In this regard, the Tribunal relied explicitly on Article 7 of the Articles:

[e]ven if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.⁴¹⁴

In *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*,⁴¹⁵ the Tribunal referred to the rules of attribution under international law, and stated that it would rule on the question of attribution at the merits stage, especially by reference to 'the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 [...] as a codification of customary international law.'⁴¹⁶ The Tribunal then went on to refer to Articles 4 and 5 of the Articles as being particularly relevant, and summarised the effect of those Articles in the following terms:

- Art. 4 of the ILC Articles [...] codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so-called *de jure* organs which are empowered to act for the State within the limits of their competence.
- Art. 5 of the ILC Articles [...] goes on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. Such provision restates the generally recognized rule that the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.⁴¹⁷

As noted above, the Tribunal's summary of the rule embodied in Article 5 in reality embodies elements of the rule contained in Article 7 in relation to excess of authority or contravention of instructions. On the other hand, the Tribunal's summary of the rule embodied in Article 4 is somewhat ambiguous, and might be read as suggesting that the acts of *de jure* organs are empowered to act for the State only 'within the limits of their competence' and that to the extent that they exceed their competence, their acts are not attributable. To the extent that the Tribunal intended to so suggest, that statement is inconsistent with the rule contained in Article 7.

⁴¹⁴ Ibid., para. 81.

⁴¹⁵ *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006.

⁴¹⁶ Ibid., para. 89.

⁴¹⁷ Ibid.

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In the decision on jurisdiction in *Kardassopoulos v Georgia*,⁴¹⁸ the question before the Tribunal was not one of attributability of acts as such, given that there was no dispute as to the attributability to Georgia of the acts of the two State agencies (SakNavtobi and Transneft) which had entered into a joint venture agreement with the claimant.⁴¹⁹ Rather, the arbitral tribunal was faced with the discrete question of whether, if the joint venture agreement between the Claimant and the two entities in question and a concession agreement were void *ab initio* as a matter of the domestic law of Georgia because *ultra vires*, the acts of those entities in entering into the agreements were nonetheless in principle attributable to the respondent, and could therefore form the basis for legitimate expectations on the part of the claimant for the purposes of a claim under the applicable provisions concerning fair and equitable treatment. Having concluded that it was likely that the agreements in question were void *ab initio* as a matter of Georgian law, the Tribunal dealt with that argument shortly:

[i]t is [...] immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law. Article 7 of the Articles on State Responsibility provides that even in cases where an entity empowered to exercise governmental authority acts *ultra vires* of it, the conduct in question is nevertheless attributable to the State.⁴²⁰

The Tribunal went on to hold that:

[...] Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void *ab initio* under Georgian law. The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia (including, inter alia, President Gamsakhurdia, President Shevardnadze, Prime Minister Sigua and Prime Minister Gugushvili) were closely involved in the negotiation of the JVA and the Concession. The Tribunal also notes that the Concession was signed and 'ratified' by the Ministry of Fuel and Energy, an organ of the Republic of Georgia.⁴²¹

In *Ilasçu and others v Russia and Moldova*,⁴²² in a general section in which the European Court of Human Rights affirmed various principles of international law which it regarded as being of relevance to the case, the Court observed:

[a] State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions.⁴²³

Having referred to its previous case law, pursuant to which 'under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected', the European Court also made reference to Article 7 of the Articles.⁴²⁴

⁴¹⁸ *Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of 6 July 2007.

⁴¹⁹ In particular, it was apparently not disputed by Georgia that SakNavtobi was a State-owned entity and implicitly, subject to the question of whether its allegedly *ultra vires* actions were attributable, that Georgia was responsible for its acts; in relation to Transneft, somewhat unusually Georgia attempted to argue that it was a State-owned entity in order to rely on the provisions of domestic law which prohibited State-owned entities from alienating property, while the claimant argued that it was in fact part of the State.

⁴²⁰ *Ibid.*, para. 190.

⁴²¹ *Ibid.*, para. 191.

⁴²² *Ilasçu and others v Russia and Moldova* (App. No. 48787/99), Reports 2004–VII.

⁴²³ *Ibid.*, para. 319.

⁴²⁴ *Ibid.*; the Court also referred to *Caire* (1929) 5 RIAA 516.

In its views on *Sarma v Sri Lanka*,⁴²⁵ the Human Rights Committee was faced with a complaint that the author's son had disappeared having been abducted by an officer of the Sri Lankan army. The Committee observed in that regard:

[...] the State party has not denied that the author's son was abducted by an officer of the Sri Lankan Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer. The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.⁴²⁶

In an accompanying note, the Committee referred to Article 7 of the Articles, as well as Article 2(3) of the ICCPR.⁴²⁷

Reference can also be made in this regard to General Comment No. 31 adopted by the Human Rights Committee.⁴²⁸ Of interest in relation to Article 7 is the following passage (already referred to in relation to Article 3 of the Articles), which can be seen as mirroring the more general rule under general international law, as embodied in Article 7:

[t]he executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.⁴²⁹

As noted above in relation to Article 4, the claimant in *Azurix Corp. v Argentine Republic*⁴³⁰ had argued that Argentina was responsible for the actions of the Province of Buenos Aires, a sub-federal governmental entity of Argentina; in that regard, the claimant relied on the express terms of the applicable BIT, which provided that it was applicable to the political sub-divisions of the Parties, as well as invoking the rules of customary international law, referring in this regard 'as best evidence' to Articles 4 and 7 of the Articles.⁴³¹

Argentina did not dispute that the BIT was applicable to the Province, and did not dispute its responsibility for acts of provincial authorities under customary international law; rather, it argued that the acts complained of all constituted breaches of a contract concluded by the claimant with

⁴²⁵ *Sarma v Sri Lanka* (Communication No. 950/2000), Views of 16 July 2003, U.N. doc. CCPR/C/78/D/950/2000.

⁴²⁶ *Ibid.*, para. 9.2 (footnote omitted).

⁴²⁷ *Ibid.*, note 19.

⁴²⁸ Human Rights Committee 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004. On the status of General Comment No. 31 and of the General Comments adopted by the Human Rights Committee in general, see the comments above.

⁴²⁹ *Ibid.*, para. 4.

⁴³⁰ *Azurix Corp. v Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006.

⁴³¹ *Ibid.*, paras. 46 and 47.

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the Province of Buenos Aires, and that therefore the acts of the Province were not attributable to Argentina.⁴³²

In addressing these arguments, the Tribunal observed at the outset of its discussion of the question of whether the contractual breaches in question could be attributed to Argentina for the purposes of the BIT that:

[t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The [Articles], as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration. Moreover, Article XIII of the BIT states clearly: 'This Treaty shall apply to the political subdivisions of the Parties.' This is not in dispute between the parties. The issue is whether the acts upon which Azurix has based its claim can be attributed to the Respondent. The Respondent contends that such attribution is not feasible because all the acts are contractual breaches by the Province. This is a different matter to which the Tribunal will now turn.⁴³³

In *Armed Activities on the Republic of the Congo (Democratic Republic of the Congo v Uganda)*,⁴³⁴ the International Court of Justice was faced with the issue of whether the conduct of soldiers forming part of the Ugandan People's Defence Force (UPDF) was attributable to Uganda. The Court concluded that:

[t]he 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' [...]. The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. 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.⁴³⁵

The Court continued, albeit without making reference to Article 7 of the Articles:

[i]t 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 I 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.⁴³⁶

Later on in its judgment, in response to an argument on behalf of Uganda 'that individual acts of members of the Ugandan military forces committed in their private capacity and in violation of orders and instructions cannot serve as basis for attributing to Uganda a wrongful act violating the

⁴³² Ibid., para. 49

⁴³³ Ibid., para. 52.

⁴³⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁴³⁵ Ibid., para. 213, quoting *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, p. 62, at p. 87, para. 62.

⁴³⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168, para. 214.

principle of the permanent sovereignty of the Congolese people over their natural resources',⁴³⁷ the Court observed, again without reference to Article 7:

[a]s the Court has already noted [...], Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls [...] that it is also irrelevant for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority.⁴³⁸

Judge ad hoc Kateka in his Dissenting Opinion⁴³⁹ disagreed with the Court's conclusion that Uganda was liable for acts of looting and exploitation of the DRC's natural resources, noting that such acts were carried out in direct violation of an order by the President of Uganda. In this regard, he referred to the Commentary to Article 7:

I find myself in disagreement with the Court's conclusion that Uganda is internationally responsible for the acts of exploitation of the DRC's natural resources and has violated its obligation of due diligence in regard to these acts, of failing to comply with its obligation as an occupying Power in Ituri. The Ugandan soldiers, who committed acts of looting, did so in violation of orders from the highest Ugandan authorities. [...]

Hence, in my view, individual acts of UPDF soldiers, committed in their private capacity and in violation of orders, cannot lead to attribution of wrongful acts. Paragraph 8 of the Commentary to Article 7 of the draft Articles of the International Law Commission 2001 distinguishes between unauthorized, but still 'official' conduct, on the one hand and 'private' conduct on the other.⁴⁴⁰

As noted above in relation to Article 4, two of the members of the United Kingdom House of Lords made reference to Article 7 and the accompanying Commentary in *Jones v Ministry of Interior; Mitchell and others v Al-Dali and others and Ministry of Interior*,⁴⁴¹ in the context of their discussion of whether State officials accused of acts of torture in Saudi Arabia enjoyed immunity from suit in civil proceedings before the English courts.⁴⁴²

⁴³⁷ Ibid., para. 231.

⁴³⁸ Ibid., para. 243.

⁴³⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Dissenting Opinion of Judge ad hoc Kateka.

⁴⁴⁰ Ibid., para. 54.

⁴⁴¹ *Jones v Ministry of Interior; Mitchell and others v Al-Dali and others and Ministry of Interior*, [2006] UKHL 26; [2007] 1 AC 270.

⁴⁴² [2007] 1 AC 270 at 282, para. 12, quoting Article 7 and referring to Commentary to Article 7, paragraph (8) (Lord Bingham) and *ibid.*, at 301, para. 77, quoting Article 7 (Lord Hoffmann).

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 8 provides for attribution to a State of conduct of a person or group of persons, whose conduct would not otherwise be attributable to that State, where the person or group of persons was in fact acting on the instructions of, or under the direction or control of, the State in so acting.

As made clear by the Commentary to Article 8,⁴⁴³ the formulation adopted by the ILC was the result of a conscious choice by the Commission preferring the formulation adopted by the International Court of Justice in *Military and Paramilitary Activities*,⁴⁴⁴ over the test of ‘overall control’ proposed as an alternative test for attribution by the Appeals Chamber of the ICTY in *Prosecutor v Tadić*.⁴⁴⁵

In *Armed Activities on the Republic of the Congo (Democratic Republic of the Congo v Uganda)*,⁴⁴⁶ the International Court of Justice made reference to Article 8 of the Articles in the context of its consideration of whether conduct of paramilitary groups (the MLC) operating on the territory of the DRC was attributable to Uganda, without however finding it necessary to express a view as to the alternative test put forward by the Appeal Chamber of the ICTY in *Tadić*.

The DRC had claimed that ‘from September 1998 onwards, Uganda both created and controlled the MLC rebel group led by Mr. Bemba.’⁴⁴⁷ In this regard, it relied in the alternative on a number of the Articles relating to attribution, specifically, Articles 4, 5 and 8. As noted by the Court, Uganda, for its part,

[...] acknowledges that it assisted the MLC during fighting between late September 1998 and July 1999, while insisting that its assistance to Mr. Bemba ‘was always limited and heavily conditioned’. Uganda has explained that it gave ‘just enough’ military support to the MLC to help Uganda achieve its objectives of driving out the Sudanese and Chadian troops from the DRC, and of taking over the airfields between Gbadolite and the Ugandan border; Uganda asserts that it did not go beyond this.⁴⁴⁸

Having examined the material available, the Court concluded that:

[...] there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use.⁴⁴⁹

⁴⁴³ Commentary to Article 8, paragraph (5).

⁴⁴⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p. 14.

⁴⁴⁵ Case IT-94-1, *Prosecutor v Tadić*, (1999) I.L.M., vol. 38, p. 1518, at p. 1546, para. 145.

⁴⁴⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁴⁴⁷ Ibid., para. 155.

⁴⁴⁸ Ibid., para. 157.

⁴⁴⁹ Ibid., para. 160.

Having concluded that the MLC was not ‘an organ’ of Uganda for the purposes of Article 4 of the Articles, and that it was not ‘an entity exercising elements of governmental authority on its behalf’ for the purposes of Article 5, the Court stated that it had:

[...] considered whether the MLC’s conduct was ‘on the instructions of, or under the direction or control of’ Uganda (Article 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries [...]⁴⁵⁰

In *Armed Activities on the Territory of the Congo* the Court did not feel required to decide between the two rival formulations of the test for attribution of conduct on the basis of direction and control expressed by the Court itself in *Military and Paramilitary Activities* (as reflected in Article 4 of the Articles) and by the ICTY in *Tadić*. However, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁴⁵¹ that question was squarely before the Court, and it resolved the dispute between the two different tests in favour of the view expressed by the Court in *Military and Paramilitary Activities*.

As discussed above in the context of Article 4, the Court had earlier concluded that the conduct of the VRS and paramilitary groups in relation to the genocide at Srebrenica were not attributable to the respondent on the basis that they constituted organs of the FRY (whether *de jure* or *de facto*). Bosnia and Herzegovina had in the alternative argued that the actions of the VRS and paramilitary groups had been carried out on the instructions or under the direction and control of the FRY.

At the outset of its reasoning as to the attribution of the genocide at Srebrenica to the Respondent, the Court had observed that the question:

[...] has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.⁴⁵²

The Court prefaced its examination of the latter question by emphasising the difference between attribution of the acts of persons or groups of persons on the basis that they acted on the instructions, or under the direction and control, of a State, and attribution on the basis that the persons or groups of persons in question constituted organs of the State, whether *de jure* or *de facto*. The Court observed that it was obvious that the question of attribution on the basis of instructions or direction or control was:

[...] different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter

⁴⁵⁰ Ibid., referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, ICJ Reports 1986, p. 14, at pp. 62–65, paras. 109–115.

⁴⁵¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁴⁵² Ibid., para. 384

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question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs - this question having already been answered in the negative. What must be determined is whether FRY organs – incontestably having that status under the FRY's internal law – originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.⁴⁵³

The Court observed that '[o]n this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility',⁴⁵⁴ and set out the text of that provision, before observing that the provision had to be understood in the light of the Court's judgment in *Military and Paramilitary Activities*, which the Court went on to explain as follows:

[i]n that Judgment the Court [...], after having rejected the argument that the *contras* were to be equated with organs of the United States because they were 'completely dependent' on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' [...]; this led to the following significant conclusion:

'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'⁴⁵⁵

The Court then continued, again contrasting the test in regard to attribution on the basis of instructions or direction or control with that relating to attribution of acts of de facto organs:

[t]he test thus formulated differs in two respects from the test [...] to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this

⁴⁵³ Ibid., para. 397.

⁴⁵⁴ Ibid., para. 380.

⁴⁵⁵ Ibid., para. 399, referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 64–65, para. 115.

‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.⁴⁵⁶

The applicant had argued that genocide was of ‘a particular nature, in that in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space’, with the consequence that the Court would be justified in assessing the ‘effective control’ over the entirety of the operations carried out by the individuals committing genocide, rather than in relation to each specific act making up the genocide.⁴⁵⁷ The Court however took the view that:

[...] the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in [*Military and Paramilitary Activities*]. 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.⁴⁵⁸

In support of its argument that the actions of the VRS and paramilitary groups were attributable to the FRY, Bosnia and Herzegovina had also relied on the alternative formulation for attribution on the basis of direction and control expounded by the ICTY Appeals Chamber in *Tadić* that it was sufficient that there had been ‘overall control’ exercised over the Bosnian Serbs by the FRY, and that, in the circumstances, that test was fulfilled.⁴⁵⁹

The Court rejected the ICTY Appeals Chamber’s formulation of the test as representing customary international law on the issue before it, concluding that ‘it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility’.⁴⁶⁰ In doing so, the Court was highly critical of the approach adopted by the Appeals Chamber in *Tadić*, in a lengthy passage which is worth citing in full:

[t]he Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not

⁴⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 400.

⁴⁵⁷ *Ibid.*, para. 401.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*, para. 402.

⁴⁶⁰ *Ibid.*, para. 407.

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indispensable for the exercise of its jurisdiction. [...] the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining - as the Court is required to do in the present case - when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons - neither State organs nor to be equated with such organs - only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above [...]. 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.⁴⁶¹

Having concluded that the applicable test for attribution on the basis of instructions or direction and control was that reflected in Article 8 of the Articles (itself reflecting the Court's approach to that question adopted in *Military and Paramilitary Activities*), the Court turned to address whether

⁴⁶¹ Ibid., paras. 402–406.

that test had been satisfied in relation to the genocide at Srebrenica. Having examined all of the evidence available,⁴⁶² the Court concluded in relation to the massacres at Srebrenica that:

[...] it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which [...] constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (*dolus specialis*) characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the 'Scorpions' paramilitary militias, notably at Trnovo [...], even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY [...], it has not been proved that they took place either on the instructions or under the control of organs of the FRY.⁴⁶³

As a consequence of that finding, and of the previous finding that attribution of the acts in question was not possible on the basis of Article 4 of the Articles, the Court concluded, that:

[...] the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.⁴⁶⁴

In his dissenting opinion, Vice-President Al-Khasawneh expressed his doubts as to the choice of the majority of the Court in preferring the test in *Military and Paramilitary Activities* to that in *Tadić* for the purposes of attribution. He observed:

[...] the Court applied the effective-control test to a situation different from that presented in the *Nicaragua* case. In the present case, there was a unity of goals, unity of ethnicity and a common ideology, such that effective control over non-State actors would not be necessary. In applying the effective control test, the Court followed Article 8 of the International Law Commission Articles on State Responsibility [...].

However, with great respect to the majority, a strong case can be made for the proposition that the test of control is a variable one. It would be recalled that some ILC members drew attention to the fact of there being varying degrees of sufficient control required in specific legal contexts. The ICTY Appeals Chamber decision in the *Tadić* case, as reaffirmed in the *Celebici* case, takes this approach. In the *Celebici* case, the Appeals Chamber held that: 'the 'overall control' test could thus be fulfilled even if the armed forces acting on behalf of the 'controlling state' had autonomous choices of means and tactics although participating in a common strategy along with the controlling State' [...].

⁴⁶² Ibid., paras.408–412

⁴⁶³ Ibid., para. 414.

⁴⁶⁴ Ibid., para. 415.

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In rejecting the ICTY's context-sensitive approach, the ILC Commentary to Article 8 does little more than note a distinction between the rules of attribution for the purposes of State responsibility on the one hand, and the rules of international humanitarian law for the purposes of individual criminal responsibility on the other. However, it should be recalled that the Appeals Chamber in *Tadić* had in fact framed the question as one of State responsibility, in particular whether the FRY was responsible for the acts of the VRS and therefore considered itself to be applying the rules of attribution under international law [...].

Unfortunately, the Court's rejection of the standard in the *Tadić* case fails to address the crucial issue raised therein – namely that different types of activities, particularly in the ever evolving nature of armed conflict, may call for subtle variations in the rules of attribution. In the *Nicaragua* case, the Court noted that the United States and the *Contras* shared the same objectives—namely the overthrowing of the Nicaraguan Government. These objectives, however, were achievable without the commission of war crimes or crimes against humanity. The *Contras* could indeed have limited themselves to military targets in the accomplishment of their objectives. As such, in order to attribute crimes against humanity in furtherance of the common objective, the Court *held that the crimes themselves should be the object of control*. When, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore. The statement in paragraph 406 of the Judgment to the effect that 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’ is, with respect singularly unconvincing because it fails to consider that such a link has to account for situations in which there is a common criminal purpose. It is also far from self-evident that the overall control test is always not proximate enough to trigger State responsibility.⁴⁶⁵

Reference was also made to Article 8 of the Articles in *Consorzio Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria*⁴⁶⁶ and the subsequent related case of *L.E.S.I. SpA and Astaldi SpA v People's Democratic Republic of Algeria*.⁴⁶⁷

The disputes arose in relation to the cancellation of a contract for construction of a dam entered into by the Claimants with the National Dams Agency (*Agence National de Barrages* ('ANB')), a State entity. The claimants in both cases alleged that cancellation of the contract gave rise to various violations of the applicable BIT, and brought a claim against Algeria. Algeria in turn raised various objections to the jurisdiction of the Tribunal, including an argument that, given that the Agreement had been concluded with ANB, rather than with Algeria, that ANB was an autonomous

⁴⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Dissenting Opinion of Vice President Al-Khasawneh, at paras. 36–39 (internal references omitted); the reference to the Commentaries is to Commentary to Article 8, paragraph (5).

⁴⁶⁶ *Consorzio Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), award of 10 January 2005; *ICSID Review – FILJ*, vol. 19(2) (2005), p. 426.

⁴⁶⁷ *L.E.S.I. SpA and Astaldi SpA v People's Democratic Republic of Algeria*, (ICSID Case No. ARB/05/3), decision of 11 July 2006. The relevant portions of the decisions in the two cases are in identical terms; quotations are taken from the unofficial English translation produced by ICSID of the Award of 10 January 2005 in *Consorzio Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria*, available at http://www.worldbank.org/icsid/cases/lesi_award_en.pdf.

entity having separate legal personality, and the contract was not a 'government contract', there was no dispute 'with a Contracting State' for the purposes of Article 25 of the ICSID Convention.⁴⁶⁸

In response to that argument, the claimants argued, relying inter alia on the Articles, that the actions of ANB were attributable to Algeria for the purposes of the claims under the BIT. As the Tribunal summarised the claimants' arguments:

[t]he dispute concerns breach of the Bilateral Agreement by the Algerian State, since the Contract constitutes an investment protected by that agreement. Only the Respondent could be held responsible for any breach.

ANB is deemed equivalent to the Algerian State. According to international practice, its conduct may be attributed to the State notwithstanding its formal autonomy. ANB is part of the effective organization of the Algerian State.

The Algerian State is responsible for the acts of ANB. It was created by decree and it is managed, supervised, and administered by members of the Algerian government. Its activities are entirely subject to government decisions. Its activities depend on the budget and resources of the Algerian State. It exercises certain functions in the public interest, under rules applicable to public administrations. No special powers of representation or delegation are therefore necessary, for its institutional functions derive from the laws that constituted it and that govern its activity.⁴⁶⁹

In ruling on Algeria's objections to jurisdiction in this regard, the Tribunal in the first arbitration, *Consorzio Groupement L.E.S.I.-DIPENTA*, observed:

[i]n deciding whether the present case involves a dispute with a contracting State, within the meaning of Article 25.1 of the [ICSID] Convention, the Arbitral Tribunal considered the following elements:

(i) To judge from the wording of the provision, it is a necessary and sufficient condition that the action has been brought against a State. This point is purely formal, but it prevents an arbitral tribunal from entering at this stage into an examination of the merits and from verifying whether it is possible to attribute responsibility to the State. This is a question of substance that will have to be addressed during a detailed examination in light of the arguments put forward.

In the present case, it is sufficient for the Arbitral Tribunal to find that the claims were brought against Algeria, and this satisfies the condition, at least formally.

(ii) This prima facie approach must nevertheless be abandoned if it becomes clear that the State in question has no connection to the contract and that the action was unjustifiably brought against the State. This would be the case, in particular, if the contract has been negotiated with an enterprise totally removed from its activity and its influence. Case law accepts, however, that the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence [...]; see also

⁴⁶⁸ *Consorzio Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), Award of 10 January 2005, Section II, para. 17. In the subsequent case, it appears that the argument was not explicitly addressed by counsel for Algeria in argument, although neither was it abandoned: see *L.E.S.I. SpA and Astaldi SpA v People's Democratic Republic of Algeria*, (ICSID Case No. ARB/05/3), decision of 11 July 2006, paras. 76 and 77.

⁴⁶⁹ *Consorzio Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), Award of 10 January 2005, Section II, para. 18(i)–(iii).

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Article 8 of the Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts [...]).

(iii) In the present case, it is true that the Contract was signed by ANB, which is an independent agency of the Algerian State, with its own legal personality. The Tribunal cannot, however, on the basis of the elements submitted to date, exclude a priori an involvement of the Algerian State: it appears to have participated indirectly, at least, in the negotiation of the Contract; it has important and perhaps determining influence over the agency; and it also appears that it may have played a role in souring the relations between the Parties. The Arbitral Tribunal therefore considers, without at this stage wishing to prejudge the merits of the case, that it cannot exclude the possible involvement of the State. Naturally, this finding in no way prejudices the question of attributing responsibility.⁴⁷⁰

As a result, the Tribunal rejected Algeria's objection to jurisdiction in this regard, albeit finding that it did not have jurisdiction on other grounds.⁴⁷¹ In the second case of *L.E.S.I. SpA and Astaldi SpA*, the Tribunal set out the same reasoning in identical terms, and likewise rejected Algeria's objection to jurisdiction.⁴⁷²

As noted above in relation to Articles 4 and 5, the Tribunal in *Saipem SpA v People's Republic of Bangladesh*⁴⁷³ made reference to Article 8 in setting out the basis on which it would assess whether conduct of Petrobangla, a State entity created by statute, was attributable to Bangladesh. Having noted that it was not necessary for it to decide on whether acts of Petrobangla gave rise to State responsibility in order to confirm its jurisdiction 'except if it were manifest that the entity involved had no link whatsoever with the State', and that that was 'plainly not the case in the present dispute',⁴⁷⁴ the Tribunal went on to dismiss various arguments raised by Bangladesh as to why the conduct of Petrobangla were not attributable to it.⁴⁷⁵ The Tribunal then set out the basis upon which it would assess on the merits whether conduct of Petrobangla was attributable to Bangladesh, and in that regard made reference to Articles 4, 5 and 8 of the Articles:

[w]hen assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. The Tribunal will in particular consider the following provisions:

[...]

- Art. 8 of the ILC Articles which states that the conduct of a person or group of persons acting under the instructions of or under the direction or control of the State shall be considered an act of that State under international law.⁴⁷⁶

The Tribunal concluded:

⁴⁷⁰ Ibid., Section II, para. 19.

⁴⁷¹ Ibid., Section II, para. 20.

⁴⁷² *L.E.S.I. SpA and Astaldi SpA v People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3), decision of 11 July 2006, paras. 78 and 79.

⁴⁷³ *Saipem SpA v People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007.

⁴⁷⁴ Ibid., para. 144.

⁴⁷⁵ Ibid., paras. 145–147.

⁴⁷⁶ Ibid., para. 148.

[a]t this jurisdictional stage, there is no indication that either the courts of Bangladesh or Petrobangla could manifestly not qualify as state organs at least de facto.⁴⁷⁷

In the WTO case of *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*,⁴⁷⁸ Korea argued before the Appeal Body that the finding by the Panel in the decision under appeal that a private body, KFB, had been ‘entrusted or directed’ to undertake a financial contribution within the meaning of Article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures had been based on an erroneous interpretation of that provision, in that the Panel had concluded that there could be entrustment or direction under Article 1.1(a)(1)(iv) when the action that the private body was supposed to ‘carry out’ never in fact occurred.⁴⁷⁹

Korea argued that that interpretation ‘was legally and logically incorrect’,⁴⁸⁰ and in that regard made reference to the formulation of Article 8 of the Articles, and in particular to the ‘striking’ similarity in the use in that provision of the term ‘carrying out’; it submitted that the requirement that the conduct in question should in fact have occurred was a matter of ‘common sense’.⁴⁸¹

The Appellate Body, although accepting in substance Korea’s argument that if a financial contribution in question was never carried out, there could be no right to apply countervailing measures on that basis alone,⁴⁸² did not disturb the Panel’s holding on the facts before it in relation to entrustment and direction, finding that the Panel’s finding of fact was not as narrow as Korea had argued and did not relate solely to the actions which had not been carried out.⁴⁸³ In this regard, the Appellate Body did not make reference to Article 8 of the Articles.

However, earlier in its decision, in interpreting Article 1.1(a)(1)(iv), the Appellate Body did make reference to Article 8, observing that ‘we must not lose sight of the fact that Article 1.1(a)(1)(iv) requires the participation of the government, albeit indirectly. We therefore agree with Korea that there must be a demonstrable link between the government and the conduct of the private body.’⁴⁸⁴ In this regard, the Appellate Body made reference in a footnote to the Commentary to Article 8:

[w]e note that the conduct of private bodies is presumptively not attributable to the State. The Commentaries to the ILC Draft Articles explain that ‘[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority’.⁴⁸⁵

Further, later on in the report, the Appellate Body again made reference to the Commentary to Article 8 in its discussion of what would constitute ‘entrustment or direction’. The Tribunal observed:

⁴⁷⁷ Ibid., para. 149.

⁴⁷⁸ *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, (AB–2005–4), Report of the Appellate Body of 27 June 2005, WTO doc. WT/DS296/AB/R.

⁴⁷⁹ Ibid., para. 66; for the operative finding of the Panel in this regard, see *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, Report of the Panel of 21 February 2005, WTO doc. WT/DS296/R, at para. 7.117, and see the prior discussion, *ibid.*, at paras. 7.10–7.116.

⁴⁸⁰ *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, (AB–2005–4), Report of the Appellate Body of 27 June 2005, WTO doc. WT/DS296/AB/R, para. 67.

⁴⁸¹ Ibid., para. 69.

⁴⁸² Ibid., paras. 124–125.

⁴⁸³ Ibid., paras. 120–126.

⁴⁸⁴ Ibid., para. 112.

⁴⁸⁵ *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, (AB–2005–4), Report of the Appellate Body of 27 June 2005, WTO doc. WT/DS296/AB/R, citing Commentary to Article 8, paragraph (6).

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[i]t may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, ‘guidance’ by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case.⁴⁸⁶

The accompanying footnote to the last sentence observed:

[t]he Commentaries to the ILC Draft Articles similarly state that ‘it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it’.⁴⁸⁷

As with some instances of reliance on Article 4 of the Articles, some doubts may be raised as to the appropriateness of the Appellate Body’s reference to the Commentary to Article 8 in relation to interpretation of the treaty provision before it. Although analogies may be drawn between the two situations, the operation of the test of attribution on the basis of direction and control for the purposes of State responsibility is a separate question from the question of whether a State has entrusted or directed a private body to make a financial contribution for the purposes of Article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures, which, in the end, is a question of the interpretation of the terms of that provision.

In *EnCana Corp. v Republic of Ecuador*⁴⁸⁸ the Tribunal was faced with the question of whether the conduct of Petroecuador was attributable to Ecuador for the purposes of the allegations of breach of the standards of protection contained in the applicable BIT. Petroecuador was a State entity created for the purpose of exploitation of Ecuador’s hydrocarbon resources, and was wholly owned and controlled by the State. The Respondent did not deny that Petroecuador’s conduct in entering into the participation contract at issue in the arbitration was attributable to it. In this regard, the Tribunal took note that it was relevant that:

[...] Petroecuador was [...] subject to instructions from the President and others, and that the Attorney-General pursuant to the law had and exercised authority ‘to supervise the performance of ... contracts and to propose or adopt for this purpose the judicial actions necessary for the defence of the national assets and public interest’. According to the evidence this power extended to supervision and control of Petroecuador’s performance of the participation contracts and their potential renegotiation. Thus the conduct of Petroecuador in entering into, performing and renegotiating the participation contracts (or declining to do so) is attributable to Ecuador. It does not matter for this purpose whether this result flows from the principle stated in Article 5 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts or that stated in Article 8. The result is the same.⁴⁸⁹

In an accompanying footnote, the Tribunal set out the full text of Articles 5 and 8 of the Articles.⁴⁹⁰ Later in its Award, the Tribunal noted that ‘though conduct of Petroecuador could be attributed to

⁴⁸⁶ Ibid., para. 116.

⁴⁸⁷ *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, (AB-2005-4), Report of the Appellate Body of 27 June 2005, WTO doc. WT/DS296/AB/R, citing Commentary to Article 8, paragraph (5).

⁴⁸⁸ *EnCana Corporation v Republic of Ecuador* (LCIA Case No. UN3481), Award of 3 February 2006.

⁴⁸⁹ Ibid., para. 154 (footnotes omitted).

⁴⁹⁰ Ibid., note 107.

Ecuador in accordance with the principles of State responsibility, EnCana's claim for breach of the BIT is not made on this basis.⁴⁹¹

In *Waste Management, Inc. v United Mexican States* ('*Waste Management II*'),⁴⁹² as noted above in the context of Articles 4 and 5 of the Articles, the Tribunal briefly addressed the question of whether the actions of Banobras, a development bank 'partly-owned and substantially controlled by Mexican government agencies',⁴⁹³ might be attributable to the respondent, although it did not feel it necessary in the context of its decision to finally resolve that issue, and merely proceeded on the basis that the conduct of Banobras was attributable on some basis for the purposes of NAFTA.

Having expressed its doubts as to whether conduct of Banobras might have been attributed to the respondent on the basis of Articles 4 and 5, the Tribunal also expressed doubts as to whether it might have been attributable on the basis of Article 8; in this regard, it observed:

[a] further possibility is that Banobras, though not an organ of Mexico, was acting 'under the direction or control of' Guerrero or of the City in refusing to pay Acaverde under the Agreement: again, it is far from clear from the evidence that this was so.⁴⁹⁴

In an accompanying footnote to that passage reference was made to Article 8, as well as to the Commentary thereto.⁴⁹⁵

Article 8 has also been referred to by domestic courts; in *Villeda Aldana v Fresh Del Monte Produce and Compania de Desarrollo de Guatemala SA*,⁴⁹⁶ a federal judge made reference in passing to Article 8 in discussing the notion of State action for the purposes of a claim under the Alien Torts Claims Act.⁴⁹⁷

⁴⁹¹ Ibid., para. 159.

⁴⁹² *Waste Management, Inc. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/3) ('*Waste Management II*'), Award of 30 April 2004.

⁴⁹³ Ibid., para. 75.

⁴⁹⁴ *Waste Management, Inc. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/3) ('*Waste Management II*'), Award of 30 April 2004, para. 75.

⁴⁹⁵ Ibid., note 24, referring to the Commentary to Article 8, especially paragraph (6). In this regard, the Tribunal also referred to its particular factual findings elsewhere that conduct of Banobras did not breach Article 1105 NAFTA: see *ibid.*, note 25, referring to paras. 103 and 139.

⁴⁹⁶ *Villeda Aldana v Fresh Del Monte Produce and Compania de Desarrollo de Guatemala SA* 305 F. Supp. 2d 1285 (12 December 2003); affirmed in part, vacated in part and remanded: 416 F.3d 1242 (11th Circuit); re-hearing en banc denied: 452 F.3d 1284 (11th Circuit); cert. denied: 127 S. Ct. 596 (13 November 2006).

⁴⁹⁷ 305 F. Supp. 2d 1285 at 1303.

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 9 governs attribution of acts of persons or groups of persons who in fact exercise elements of governmental authority in the absence or default of the official authorities. Such conduct is attributable to the State to the extent that the circumstances call for the exercise of those elements of authority. The situation governed by Article 9 arises relatively rarely in practice, the normal situation being exercise of governmental authority by the official authorities; unsurprisingly, there appears to have been no case in which Article 9 has been relied on as a basis for attribution of conduct since the adoption of the Articles.

However, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁴⁹⁸ having found that the acts of those responsible for the genocide at Srebrenica were not attributable to the respondent either on the basis of Article 4 or Article 8 of the Articles, the Court made reference to the other Articles relating to attribution contained in Chapter II of Part One, including Article 9, albeit that it expressly refrained from expressing any view as to whether those provisions reflected customary international law:

[...] none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed [...] by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9) [...].⁴⁹⁹

⁴⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁴⁹⁹ *Ibid.*, para. 414.

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.

Article 10 governs the two special rules of attribution in relation to conduct of an insurrectional movement becomes the new government of a State, and conduct of a movement which succeeds in establishing a new State on the territory of a pre-existing State. The circumstances in which the two rules contained in Article 10 might find application are by their nature exceptional. There appears to have been no international judicial reference to Article 10.

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.

Article 11 deals with attribution of conduct to a State on the basis that the State has acknowledged or adopted that conduct as its own.

Although there appears to have been no case in which Article 11 has been invoked in relation to adoption or acknowledgment of conduct by a State, it has been referred to by analogy. Further, reference has been made to it in passing, including by the International Court of Justice

In the course of proceedings in *Nikolić ('Sušica Camp')*, Trial Chamber II of the ICTY was faced with a defence motion challenging the exercise of jurisdiction over the accused as a result of the manner in which he had been brought before the Tribunal.⁵⁰⁰ The facts were that 'unknown individuals' had detained the accused in the territory of the then FRY, transferred him to Bosnia and Herzegovina, and then handed him over into the custody of SFOR. In addressing the issues arising from that course of events, the Trial Chamber made reference to Article 11 of the Articles,⁵⁰¹ opining that they were relevant as 'general/legal guidance'.⁵⁰²

It should be noted that the Trial Chamber expressly referred to Article 11 by analogy, given that the entity to which the accused had been handed over, and which was alleged to have adopted or acknowledged the conduct in question was not a State, but SFOR and the Prosecution.⁵⁰³ Further, it may also be noted that the question of attribution was not relevant for the purposes of State responsibility as such (although the Trial Chamber referred to attribution to SFOR and the Prosecution of the 'illegal acts' and 'illegal conduct' of the unknown individuals)⁵⁰⁴, but was rather relevant for the purposes of deciding whether the actions of the 'unknown individuals' were to be attributed to SFOR, thus tainting the jurisdiction of the ICTY.

The Trial Chamber emphasised the first of these points at the outset of its discussion of whether the acts in question 'can somehow be attributed to SFOR', and its reference in that regard to Article 11 of the Articles:

[t]he Trial Chamber is however aware of the fact that any use of this source should be made with caution. The Draft Articles were prepared by the International Law Commission and are still subject to debate amongst States. They do not have the status of treaty law and are not binding on States. Furthermore, as can be deduced from its title, the Draft Articles are primarily directed at the responsibilities of States and not at those of international organisations or entities.⁵⁰⁵

⁵⁰⁰ Case No. IT-94-2-PT, *Prosecutor v Dragan Nikolić ('Sušica Camp')*, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002.

⁵⁰¹ *Ibid.*, para. 60.

⁵⁰² *Ibid.*, para. 61 (emphasis in original).

⁵⁰³ See now draft Article 5 of the ILC's draft Articles on the Responsibility of International Organizations.

⁵⁰⁴ See e.g. Case No. IT-94-2-PT, *Prosecutor v Dragan Nikolić ('Sušica Camp')*, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, paras. 30, 56.

⁵⁰⁵ *Ibid.*, para. 60.

In this regard, the Trial Chamber made reference to Article 57 of the Articles, which provides that the Articles are without prejudice to the international responsibility of an international organization, or of a State as a result of the acts of an international organization.⁵⁰⁶

On the agreed facts on the basis of which the Trial Chamber approached the question before it, the accused had been detained by unknown persons in the FRY, and then brought across the border into Bosnia and Herzegovina where he was handed over into the custody of SFOR. It was not alleged that the individuals in question had any link with SFOR or the ICTY, or that SFOR had participated in the illegal conduct of those unknown individuals. Rather, the defence argued that:

[...] when SFOR personnel took custody of the accused, 'they had knowledge, actual or constructive, that the accused had been unlawfully apprehended and brought from Serbia against his free will, that his freedom of movement had been unlawfully restricted, that he had been unlawfully deprived of his liberty and that he had been, and remains, detained against his will.'⁵⁰⁷

and that SFOR personnel opted to 'take advantage' of the situation by arresting the accused and transferring him to the Tribunal.⁵⁰⁸ The prosecution countered that it had been the 'fortuitous recipient' of the actions of the unknown individuals, that SFOR was not involved in their illegal acts, and that:

[...] the mere subsequent *acceptance* by the Prosecution of custody of the Accused cannot in and of itself satisfy the required level of 'collusion' or 'official involvement' on the part of the Prosecution.⁵⁰⁹

The Trial Chamber reasoned that it should first focus on 'the possible attribution of the acts of the unknown individuals to SFOR',⁵¹⁰ and it was in this regard that it referred to Article 11 as providing 'general legal guidance' on the question of attribution, albeit subject to the caveats noted above. The Trial Chamber, having set out the text of Article 11, further made reference to the Commentary thereto:

Article 11 (...) provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own. (...), article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes 'nevertheless' that conduct is to be considered as an act of State 'if and to the extent that the State acknowledges and adopts the conduct in question *as its own*.'⁵¹¹

It further noted that in the Commentary:

[...] a distinction is drawn between concepts such as 'acknowledgement' and 'adoption' from concepts such as 'support' or 'endorsement', and that the ILC had observed in the Commentary that:

'[a]s a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid., para. 58.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid., para. 59.

⁵¹⁰ Ibid., para. 61.

⁵¹¹ Ibid., para. 63.

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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*.⁵¹²

Turning to analyse the applicable test, the Trial Chamber observed that:

[...] both Parties use the same and similar criteria of ‘acknowledgement’, ‘adoption’, ‘recognition’, ‘approval’ and ‘ratification’, as used by the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have ‘acknowledged *and* adopted’ the conduct undertaken by the individuals ‘as its own’. It needs to be re-emphasised in this context that it cannot be deduced from the assumed facts that SFOR was in any way, directly or indirectly, involved in the actual apprehension of the accused in the FRY or in the transfer of the accused into the territory of Bosnia and Herzegovina. Nor has it in any way been argued or suggested that SFOR instructed, directed or controlled such acts. What can be concluded from the assumed facts is merely that the Accused was handed over to an SFOR unit after having been arrested in the FRY by unknown individuals and brought into the territory of Bosnia and Herzegovina. From the perspective of SFOR, the Accused had come into contact with SFOR in the execution of their assigned task. In accordance with their mandate and in light of Article 29 of the Statute and Rule 59 *bis* [of the Rules of Procedure of the Tribunal] they were obliged to inform the Prosecution and to hand him over to its representatives. From these facts, the Trial Chamber can readily conclude that there was no collusion or official involvement by SFOR in the alleged illegal acts.⁵¹³

The Tribunal thus concluded that the actions of the unknown individual were not attributable to SFOR. However, the Tribunal went on to observe that:

[b]oth SFOR and the Tribunal are involved in a peace mission and are expected to contribute in a positive way to the restoration of peace and security in the area. Any use of methods and practices that would, in themselves, violate fundamental principles of international law and justice would be contrary to the mission of this Tribunal.

The question that remains is, whether the fact that SFOR and the Prosecution, in the words of the Prosecution, became the ‘mere passive beneficiary of his fortuitous (even irregular) rendition to Bosnia’ could, as the Defence claims, amount to an ‘adoption’ or ‘acknowledgement’ of the illegal conduct ‘as their own’.

The Trial Chamber responds to this question in the negative. Once a person comes ‘in contact with’ SFOR, like in the present case, SFOR is obliged under Article 29 of the Statute and Rule 59 *bis* to arrest/detain the person and have him transferred to the Tribunal. The assumed facts show that SFOR, once confronted with the Accused, detained him, informed the representative of the Prosecution and assisted in his transfer to The Hague. In this way, SFOR did nothing but implement its obligations under the Statute and the Rules of this Tribunal.⁵¹⁴

⁵¹² Ibid., para. 63.

⁵¹³ Ibid., para. 64.

⁵¹⁴ Ibid., paras. 65–67.

Chapter II

The defence's argument was not grounded solely on the basis of attribution of the illegal conduct to SFOR, but also on the basis that SFOR was acting not merely in cooperation with the prosecution, but that the relationship had developed into one of agency, with the result that:

[...] were such an agency relationship to exist and in some way the Prosecution to have acknowledged and ratified the alleged illegal conduct of unknown individuals, the allegedly illegal conduct by the individuals could be attributed to SFOR and through SFOR to the Prosecution.⁵¹⁵

The Tribunal, on the basis of its conclusion that the acts of the unknown individuals were not attributable to SFOR did not find it necessary to decide that question.⁵¹⁶

As discussed above, in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁵¹⁷ the Court found that the acts of those responsible for the genocide at Srebrenica were not attributable to the respondent either on the basis of Article 4 or Article 8 of the Articles, and then went on to make reference to the other Articles relating to attribution contained in Chapter II of Part One, although it expressly abstained from commenting on whether they represented customary international law:

[...] none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. [...] the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).⁵¹⁸

In *Mondev International Ltd. v United States of America*,⁵¹⁹ the Tribunal made reference to the Commentary to Article 11 in support of its statement that '[i]n general, the State is not responsible for the acts of private parties.'⁵²⁰

⁵¹⁵ Ibid., para. 68.

⁵¹⁶ Ibid., para. 69.

⁵¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁵¹⁸ Ibid., at para. 414.

⁵¹⁹ *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002.

⁵²⁰ Ibid., para. 68 and note 47, referring to Commentary to Article 11, paragraphs (2) and (3).

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Chapter III of Part One of the Articles is concerned with questions relating to the second positive condition for State responsibility contained in Article 2, namely that there must be a breach of an international obligation of the State.

Article 12 lays down the basic proposition that there is a breach of an international obligation when action of a State is not in conformity with what is required of it by that obligation; the provision further emphasises that the origin or character of the obligation in question is irrelevant in this regard. Article 13 embodies the intertemporal principle in the law of State responsibility, reiterating that, in order for a State to be in breach of an international obligation, the State must be bound by that obligation at the time the action in question occurs. Articles 14 and 15 address more complex issues relating to breach of an international obligation: Article 14 deals with the issue of extension in time of breach of an international obligation. Article 15 deals with the question of a breach composed of composite acts, i.e. 'a series of actions or omission defined in the aggregate as wrongful'.

Given the temporal element involved in Articles 13 to 15, reference to them in international judicial practice has arisen in particular in the context of questions of jurisdiction.

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 12 states the basic but fundamental proposition that there is a breach of an international obligation when an act of the State does not comply with what is required of the State by that obligation, and further makes clear that the origin or character of the obligation in question is irrelevant.

The provision to some extent plays a bridging role between the definition of internationally wrongful act in Article 2 as consisting of an act which is attributable to the State and in breach of its international obligations, and the other provisions in Chapter III of Part One, which deal with the more difficult questions of when a breach of an international obligation is to be taken to have occurred in relation to breaches consisting of composite acts, and the duration of continuing wrongful acts.

As with many of the more fundamental structural rules contained in the Articles, it is not surprising that the rule contained in Article 12 has been only infrequently referred to in international judicial and arbitral practice. Nevertheless some references to the Article and its Commentary have been made.

In its Decision on Annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*,⁵²¹ the ad hoc Committee formed to hear the application for annulment made reference to Article 12 in its criticism of the terminology used by the Tribunal in the decision under challenge, observing, in relation to the Tribunal's reference to 'a strict liability standard of attribution' that

[a]ttribution has nothing to do with the standard of liability or responsibility. The question whether a state's responsibility is 'strict' or is based on due diligence or on some other standard is a separate issue from the question of attribution (cf. ILC Articles, Arts. 2, 12).⁵²²

In *Petrobart Limited v Kyrgyz Republic*,⁵²³ the Tribunal recorded the claimant's reliance on Article 12 of the Articles in relation to 'The Republic's breaches of the Treaty'. The Claimant had argued that:

[t]he relevant general principle of international law has been stated clearly in Article 12 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts which 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'. The crucial issue in this case is whether there has been a violation of the Treaty.⁵²⁴

⁵²¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002.

⁵²² *Ibid.*, footnote 17.

⁵²³ *Petrobart Limited v Kyrgyz Republic*, (Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003), Award of 29 March 2005.

⁵²⁴ *Ibid.*, at p. 24.

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The Tribunal in addressing that question made no express reference to the Articles, or the claimant's argument based on Article 12:

[h]aving found that Petrobart was an investor and had an investment under the Treaty, the Arbitral Tribunal must examine whether the Kyrgyz Republic acted in breach of the Treaty. The Arbitral Tribunal emphasises that this question is a preliminary to the question as to whether Petrobart suffered any damage as a result of a possible breach. The initial examination will therefore be limited to ascertaining whether there was any breach of the Republic's obligations under the Treaty. Provided that such a breach is found, the Arbitral Tribunal will proceed to an examination of whether or to what degree the breach resulted in damage to Petrobart.⁵²⁵

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 13 states a further elementary proposition of the law of State responsibility, implicit in the notion of breach itself, namely that an act which is attributable to a State does not constitute a breach of an international obligation unless the State was bound by the obligation in question at the time that the act occurred. The rule may be stated alternatively as being that an act attributable to a State only constitutes a breach an obligation if that obligation is in force for it at the time of the act.⁵²⁶ In relation specifically to the law of treaties, a parallel principle is enunciated in Article 28 of the Vienna Convention of the Law of Treaties, which provides that:

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.

The rule contained in Article 13 has been the subject of reference on a number of occasions, often in conjunction with Articles 14 and/or 15 of the Articles. Unsurprisingly, reference to Article 13 has principally occurred in the context of arguments as to the jurisdiction *ratione temporis* of international judicial bodies, in particular in the context of investment treaty arbitration, and particularly in relation to situations where the conduct complained of by the claimant straddles the date of entry into force of the relevant obligations.

It may be noted that, in relation to treaty obligations, including where a BIT is involved, in many cases the entry into force of substantive obligations coincides with the entry into force of dispute resolution provisions contained elsewhere in the same treaty; in these circumstances, questions of the temporal applicability of the treaty in question have a double-faceted nature. On the one hand, the conduct complained of normally cannot constitute a breach if the treaty containing the obligation alleged to have been breached was not in force at the relevant time. On the other hand, the jurisdiction of a court or tribunal called upon to rule on the dispute will in many cases be limited to events occurring after the entry into force of the treaty.

The NAFTA case of *Mondev International Limited v United States of America*⁵²⁷ concerned the claimant's participation in a property development project in Boston. The course of conduct complained of by the investor consisted of actions by the administrative authorities which had taken place prior to the entry into force of NAFTA on 1 January 1994 and had resulted in the claimant losing its rights in the project. The claimant had obtained a court decision from the courts of the Commonwealth of Massachusetts following the entry into force of NAFTA, but was unsuccessful in obtaining any remedy for its complaints.

The Tribunal held that, no matter how the claimant's claim of expropriation under Article 1110 NAFTA was framed, the conduct in question had been completed by the relevant date when NAFTA entered into force;⁵²⁸ in this regard, it observed:

⁵²⁶ Cf. specifically in relation to treaties, Article 28 of the Vienna Convention of the Law of Treaties: '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.'

⁵²⁷ *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002.

⁵²⁸ *Ibid.*, paras. 59–61.

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[a]s to the loss of LPA's and Mondev's rights in the project as a whole, this occurred on the date of foreclosure and was final. Any expropriation, if there was one, must have occurred no later than 1991. In the circumstances it is difficult to accept that there was a continuing expropriation of the project as a whole after that date. All that was left thereafter were LPA's *in personam* claims against Boston and BRA for breaches of contract or torts arising out of a failed project. Those claims arose under Massachusetts law, and the failure (if failure there was) of the United States courts to decide those cases in accordance with existing Massachusetts law, or to act in accordance with Article 1105, could not have involved an expropriation of those rights.⁵²⁹

In relation to the specific actions of the municipal authorities complained of, the Tribunal held that the conduct in question had likewise been completed prior to the relevant date, and therefore could not amount to a breach of the applicable standards contained in NAFTA.⁵³⁰ Similarly, as regards the claimant's reliance on certain anti-Canadian statements made by officials of the local authority, the Tribunal observed that 'the statements in question were all made well before NAFTA's entry into force'.⁵³¹

In an attempt to surmount the problems caused by the fact that most of the events in question had occurred prior to the entry into force of NAFTA, the claimant had argued that the conduct of the domestic authorities prior to the entry into force of NAFTA constituted a breach of the international minimum standard of treatment, and would have breached the 'minimum standard' under Article 1105 NAFTA (including the fair and equitable treatment standard) had NAFTA been in force at the time. Therefore, according to the Claimant, the subsequent failure of the domestic courts to provide it any remedy in respect of its claims following the entry into force of NAFTA constituted a denial of justice which was itself a violation of the minimum standard contained in Article 1105 NAFTA.

In that regard, the Tribunal observed, referring to both Article 28 of the Vienna Convention on the Law of Treaties and Article 13 of the Articles, that:

[t]he basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties and in the ILC's Articles on State Responsibility, and has been repeatedly affirmed by international tribunals. There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that 'this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter'. Thus, as the *Feldman* Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA.⁵³²

The Tribunal went on to emphasise that

[...] events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. However, it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by [the court decisions rejecting the

⁵²⁹ Ibid., para. 61.

⁵³⁰ Ibid., para. 63.

⁵³¹ Ibid., para. 65.

⁵³² Ibid., para. 68 (footnotes omitted).

claimant's claims]. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist *Mondev*. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.⁵³³

Although no express reference was made to the ILC's Commentary to Article 13 in that regard, it may be noted that the Tribunal's observation that 'events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation',⁵³⁴ implicitly follows and endorses the approach adopted by the Commission in affirming in the Commentary that:

[n]or does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant.⁵³⁵

The discussion by the Tribunal in *Mondev* is to some extent ambiguous as to whether the basis of its eventual holding was that the claims relating to conduct prior to the entry into force of NAFTA were incapable of amounting to a violation of the substantive standards of protection contained therein and for that reason failed, or that it had no jurisdiction *ratione temporis* over conduct alleged to constitute a breach of the substantive protections of Chapter 11 NAFTA prior to the entry into force of that agreement.⁵³⁶ Various passages of the Award can be read as being consistent with either view,⁵³⁷ or may support the view that the Tribunal's decision was based on both. In this regard, it may be noted that the actual basis of the Tribunal's decision, as set out in the *dispositif* of the Award, was both that its jurisdiction was limited to complaints concerning conduct (i.e. the decisions of the courts) after the entry into force of NAFTA, and that the claims were only admissible to that extent.⁵³⁸ [

The passage of the Award in *Mondev* referred to above, which appears to endorse the view of the Commission expressed in the Commentary to Article 13 that facts prior to the entry into force of an obligation may nevertheless be 'taken into account' for certain purposes was itself relied upon by the arbitral tribunal in *Técnicas Medioambientales Tecmed S.A. v United Mexican States*.⁵³⁹ Having concluded that the provisions of the BIT could not be interpreted as having retroactive effect,⁵⁴⁰ the Tribunal observed, before citing the relevant passage from *Mondev*, that:

[h]owever, it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force. For this purpose, it will still be necessary to

⁵³³ Ibid., para. 70.

⁵³⁴ Ibid.

⁵³⁵ Commentary to Article 13, paragraph (9).

⁵³⁶ Cf. the Tribunal's discussion of the various arguments as to jurisdiction and admissibility: *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002, para. 45, and its statement that 'It is convenient to deal with these arguments together, irrespective of whether they may be considered as going to jurisdiction, admissibility or the merits' (ibid., para. 46).

⁵³⁷ See in particular, ibid., para. 75

⁵³⁸ The Tribunal held that 'its jurisdiction is limited to *Mondev*'s claims concerning the decisions of the United States courts' (dispositif, paragraph (a)), and 'that to this extent only, *Mondev*'s claims are admissible' (dispositif, paragraph (b)).

⁵³⁹ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

⁵⁴⁰ Ibid., para. 65.

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identify conduct—acts or omissions—of the Respondent after the entry into force of the Agreement constituting a violation thereof.⁵⁴¹

In *Kardassopoulos v Georgia*,⁵⁴² the claimant purported to bring claims on the basis of both a bilateral investment treaty and the Energy Charter Treaty (ECT). Georgia had signed the ECT on 17 December 1994, and it had entered into force for it on 16 April 1998. The applicable BIT had entered into force on 3 August 1996. The Respondent challenged the jurisdiction of the Tribunal, arguing that the conduct causing the claimant's loss had occurred and had been completed prior to the respective dates of entry into force of the BIT and ECT in respect of Georgia; as discussed further below, in this regard Georgia relied on Article 15 of the Articles to argue that the breaches alleged did not have a continuing character, that the relevant conduct had been completed prior to the entry into force of the BIT, and that the alleged expropriation could not be considered to be a 'continuing process', given that, prior to the entry into force of the BIT, the acts in question could not be considered to violate it.⁵⁴³

The Tribunal resolved the objection to its jurisdiction *ratione temporis* under the ECT on the basis of the provisional application of the ECT pursuant to Article 45 ECT. As regards the Respondent's objection *ratione temporis* in relation to the its jurisdiction under the BIT, the Tribunal observed:

[t]he parties agree that the substantive protections set out in the BIT apply from 3 August 1996 onward, and that the BIT does not apply retrospectively to conduct which occurred *and ended* prior to 3 August 1996. It is Respondent's position that the Tribunal lacks jurisdiction *ratione temporis* over Claimant's BIT claims because all acts which caused Claimant's purported loss occurred *prior* to the BIT's entry into force.

It is a well-known and accepted principle of international law that treaties do not have retroactive effect. This principle is set out in Article 28 of the Vienna Convention and in Article 13 of the ILC Articles on State Responsibility.

The Tribunal accepts that the BIT does not apply retrospectively to acts of Respondent that took place prior to the entry into force of the BIT. In the Tribunal's view, this does not, however, mean that Respondent's conduct prior to 3 August 1996 is irrelevant.⁵⁴⁴

In relation to the Claimant's claims of expropriation, the Tribunal recalled that the parties had referred to seven events 'which they consider essential to determine the moment when the alleged acts took place and when the alleged breach of the BIT occurred.'⁵⁴⁵ Three of those events predated the entry into force of the BIT, while the other four had taken place thereafter. The Tribunal considered that the objection to jurisdiction *ratione temporis* was not ripe for decision, and therefore joined it to the merits, observing:

[t]he Tribunal cannot determine whether the alleged BIT breaches occurred before or after 3 August 1996 without having considered the testimony and other evidence that can only be obtained through a full hearing of the case. A thorough examination of the events which may have led to the expropriation of Claimant's investment in Georgia is necessary to determine whether Article 4 of the BIT was breached and, if so, when it was breached. This must be left to the merits stage of the proceeding when a full evidentiary hearing will take place.⁵⁴⁶

⁵⁴¹ Ibid., para. 66, citing *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002, para. 70.

⁵⁴² *Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007.

⁵⁴³ Ibid., paras. 86–87.

⁵⁴⁴ Ibid., paras. 253–255.

⁵⁴⁵ Ibid., para. 256.

⁵⁴⁶ Ibid., para. 257.

Similarly, in relation to the claims based on breach of legitimate expectation in violation of the fair and equitable treatment standard, breach of the prohibition of impairment by unjustifiable or discriminatory measures contained in the BIT, and breach of an ‘umbrella’ clause, the Tribunal was of the view that:

[...] in order to decide whether or not it has jurisdiction over the alleged ‘stand-alone’ violations of the BIT, it must determine whether the conduct complained of occurred after the entry into force of the BIT. Claimant again refers to no less than seven different sets of ‘assurances’ that were allegedly given by Respondent after the entry into force of the BIT. Claimant also refers to four separate ‘commitments’ which were purportedly given by Respondent before the entry into force of the BIT on 3 August 1996, but which were allegedly breached after that date.

In the Tribunal’s view, this is not a case where Claimant’s bare allegations that these assurances and commitments were given and made after the entry into force of the BIT can be accepted *pro tem*. The Tribunal must be briefed by the parties on the nature of these ‘assurances’ and ‘commitments’. The Tribunal is unable to resolve the jurisdictional question of timing of these ‘assurances’ and ‘commitments’ without a complete picture of their scope and content, the circumstances in which they were made, the different actors involved and the impact they may have had on Claimant’s investment in Georgia.⁵⁴⁷

In the circumstances, the Tribunal also joined the respondent’s jurisdictional objection *ratione temporis* in relation to those complaints to the merits.⁵⁴⁸

In *Blečić v Croatia*,⁵⁴⁹ a Grand Chamber of the European Court of Human Rights was faced with a situation in which a substantial part of the events forming the basis for the complaint had occurred prior to the entry into force of the European Convention on Human Rights for Croatia.⁵⁵⁰

The applicant had been granted a secure tenancy of a flat in 1953. In 1992, the local authorities brought proceedings as a result of which, after various appeals, the applicant’s secure tenancy was eventually definitively terminated in 1996 following a decision of the Supreme Court. The European Convention entered into force for Croatia on 5 November 1997. A constitutional complaint in relation to the judicial decisions terminating the secure tenancy, lodged by the applicant prior to the entry into force of the Convention for Croatia, was rejected by the Constitutional Court on 8 November 1999 after the entry into force of the Convention. The applicant complained of violations of her right to peaceful enjoyment of her property pursuant to Article 1 of Protocol No. 1 to the European Convention, and of her right to respect for her home under Article 8 of the European Convention.

In the section of the judgment relating to the ‘relevant law’, the European Court, as well as setting out Article 28 of the Vienna Convention of the Law of Treaties, and referring to relevant jurisprudence of the Permanent Court of International Justice and the International Court of Justice

⁵⁴⁷ Ibid., paras. 258–259.

⁵⁴⁸ Ibid., paras. 260–261.

⁵⁴⁹ *Blečić v Croatia*, Appl. No. 59532/00, judgment of 8 March 2006 [GC]

⁵⁵⁰ No preliminary objection *ratione temporis* had been raised by Croatia in the proceedings before the Chamber, which had raised the issue of its own motion; although acknowledging that many of the events had occurred prior to the entry into force of the Convention, the Chamber held that the crucial event constituting interference with the applicant’s rights was the decision of the Constitutional Court: *Blečić v Croatia*, Appl. No. 59532/00, final decision on admissibility of 30 January 2003. At the merits phase, the Chamber had subsequently held that on the facts of the case there had in any case been no violation of the substantive rights relied upon: *Blečić v Croatia*, Appl. No. 59532/00, judgment of 29 July 2004.

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relating to the issue of jurisdiction *ratione temporis*,⁵⁵¹ quoted the text of Articles 13 and 14 of the Articles.⁵⁵²

In addressing the question of its jurisdiction *ratione temporis*, the European Court observed, referring back to its reference to the Vienna Convention, that:

[i]n accordance with the general rules of international law [...] the provisions of the Convention do not bind a Contracting 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 Convention with respect to that Party.⁵⁵³

Having recalled Croatia's declarations in relation to its recognition of the competence of the European Court, which, pursuant to Article 6 of Protocol No. 11 remained valid despite the modifications to the enforcement mechanisms under the Convention,⁵⁵⁴ the Court concluded:

[a]ccordingly, the Court is not competent to examine applications against Croatia in so far as the alleged violations are based on facts having occurred before the critical date. However, the question of whether an alleged violation is based on a fact occurring prior or subsequent to a particular date gives rise to difficulties when, as in the present case, the facts relied on fall partly within and partly outside the period of the Court's competence.⁵⁵⁵

The Court, having discussed its prior relevant jurisprudence, observed:

[...] the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction.

An applicant who considers that a State has violated his rights guaranteed under the Convention is usually expected to resort first to the means of redress available to him under domestic law. If domestic remedies prove unsuccessful and the applicant subsequently applies to the Court, a possible violation of his rights under the Convention will not be caused by the refusal to remedy the interference, but by the interference itself, it being understood that this may be in the form of a court judgment.

Therefore, in cases where the interference pre-dates ratification while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention entered into force in respect of that State. However, this would be contrary to the general rule of non-retroactivity of treaties [...].

Moreover, affording a remedy usually presupposes a finding that the interference was unlawful under the law in force when the interference occurred (*tempus regit*

⁵⁵¹ *Blečić v Croatia*, Appl. No. 59532/00, judgement of 8 March 2006 [GC], paras 45–48.

⁵⁵² *Ibid.*, para. 48.

⁵⁵³ *Ibid.*, para. 70.

⁵⁵⁴ Upon ratification, in accepting the jurisdiction of the European Commission Croatia had declared that it accepted the right of petition 'where the facts of the alleged violation of these rights occur after the Convention and its Protocols have come into force in respect of the Republic of Croatia'; similarly in accepting the jurisdiction of the Court, Croatia had restricted its acceptance to 'all matters concerning the interpretation and application of the Convention and its Protocols and relating to facts occurring after the Convention and its Protocols have come into force in respect of the Republic of Croatia': see *ibid.*, paras. 49 and 71.

⁵⁵⁵ *Ibid.*, para. 72.

actum). Therefore, any attempt to remedy, on the basis of the Convention, an interference that had ended before the Convention came into force, would necessarily lead to its retroactive application.

In conclusion, while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the Convention [...], the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date [...]. Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility.⁵⁵⁶

On the facts of the case, the Court concluded that the facts constitutive of the alleged interference with the applicant's rights was the final judgment of the Supreme Court in the domestic proceedings resulting in the termination of the secure tenancy, which had occurred prior to the entry into force of the Convention for Croatia:

[...] the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to subsist. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court's judgment, the interference falls outside the Court's temporal jurisdiction.

As to the applicant's argument that the termination of her tenancy resulted in a continuing situation [...], the Court recalls that the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of 'deprivation' of these rights [...] Therefore, the termination of the applicant's tenancy did not create a continuing situation.⁵⁵⁷

The European Court went on to hold that the refusal by the Constitutional Court did not constitute a separate interference with the applicant's rights, as the Constitutional Court could not have applied the Convention in order to provide a remedy without itself violating the principle of non-retroactivity:

[i]n the light of the conclusion that the interference occurred prior to the critical date [...], the applicant's constitutional complaint should be regarded as the exercise of an available domestic remedy. It cannot be argued that the Constitutional Court's refusal to provide redress, that is, to quash the Supreme Court's judgment, amounted to a new or independent interference since such obligation cannot be derived from the Convention [...].

[...] affording a remedy usually presupposes a finding that the impugned decision was unlawful under the law as it stood when the case was decided by a lower court. For the Court, proceedings concerning a constitutional complaint to the Croatian Constitutional Court are by no means different. The Constitutional Court was asked to review the constitutionality of the Supreme Court's judgment of 15 February 1996. The law in force at the time when the Supreme Court gave its

⁵⁵⁶ Ibid., paras. 77–81. Compare the final sentence of the passage quoted with the observations of the Tribunal in *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002, para. 70: 'The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.'

⁵⁵⁷ *Blečić v Croatia*, Appl. No. 59532/00, judgement of 8 March 2006 [GC], paras. 85–86.

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judgment did not include the Convention and that court could not therefore apply it.

Under the general rule of international law expressed in Article 28 of the Vienna Convention, treaty provisions do not apply retroactively unless the parties have expressly agreed otherwise. That is true in particular of a treaty such as the Convention, which comprises more than mere reciprocal engagements between the Contracting States. It directly creates rights for private individuals within their jurisdiction [...]. Therefore the above rule on non-retroactivity of treaties is relevant not only for the Court itself but also, first and foremost, for the domestic courts when they are called upon to apply the Convention. The Court, on account of its subsidiary role in safeguarding human rights, must be careful not to reach a result tantamount to compelling the domestic authorities to apply the Convention retroactively.

In this connection, the Court notes that the Constitutional Court, when deciding the applicant's constitutional complaint, could not have applied the Convention as an international treaty without having faced the difficulty posed by Article 28 of the Vienna Convention providing for the non-retroactivity of treaties. [...] To hold otherwise would mean that the Constitutional Court was bound to take account of the Convention, even though the Convention was not in force in Croatia when the Supreme Court adopted its judgment.⁵⁵⁸

As a result, the European Court concluded that an examination of the merits of the application could not be undertaken 'without extending the Court's jurisdiction to a fact which, by reason of its date, is not subject thereto. To do so would be contrary to the general rules of international law', and therefore declared the application inadmissible.

A further illustration of the principle contained in Article 13 is the case of *Impregilo v Islamic Republic of Pakistan*, albeit that the Tribunal did not refer explicitly to Article 13 of the Articles. In that case, the claimant had relied on a series of acts alleged to have been attributable to the Respondent, which it said breached the applicable BIT. Some of those acts had occurred prior to the entry into force of the BIT; as discussed below, the claimant relied on Article 14 of the Articles in attempting to argue that the course of conduct had to be considered as a whole in violation of the BIT. The applicable BIT contained a clause limiting jurisdiction thereunder to disputes arising after its entry into force. The Tribunal observed that the dispute as to the alleged breach of the BIT (as opposed to those under the contract constituting the claimant's investment) appeared to have arisen after the entry into force of the BIT, but emphasised that a distinction had to be drawn between the Tribunal's jurisdiction *ratione temporis* under the BIT (i.e. in relation to disputes arising after the entry into force of the BIT), and the applicability *ratione temporis* of the substantive provisions of the BIT.⁵⁵⁹ Noting that the BIT in question did not provide for retrospective application of its substantive provisions, the Tribunal concluded that:

[t]hus, the normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies, and the provisions of the BIT:

'do not bind the Party in relation to any act of facts which took place or any situation which ceased to exist before the date of entry into force of the Treaty.'⁵⁶⁰

The Tribunal accordingly held that the legality of the acts complained of by the claimant:

⁵⁵⁸ Ibid., para. 88–91

⁵⁵⁹ *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005, para. 309.

⁵⁶⁰ Ibid., para. 310.

[...] must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only the acts effected after that date had to conform to its provisions.⁵⁶¹

Although only referring explicitly to Article 28 of the Vienna Convention on the Law of Treaties, the Tribunal might equally well have invoked Article 13 of the Articles, which reflects the same principle generally for the law of State responsibility as is contained in Article 28 of the Vienna Convention specifically in relation to obligations arising under treaties.

In *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*,⁵⁶² the Tribunal made reference to Article 13 and the Commentary thereto in the context of discussion of the arguments of the Parties as to whether the acts complained of amounted to continuing or composite wrongful acts. As discussed below, the Claimant had also relied on Articles 14 and 15 of the Articles in order to argue that acts prior to the entry into force of the relevant BIT were nevertheless relevant in assessing whether Ecuador had complied with its obligations.

The Tribunal stated at the outset of its discussion of its jurisdiction that it would:

[...] decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN [...] Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries [...]⁵⁶³

Before examining the specific arguments raised by the Claimant as to the continuing and/or composite nature of the breaches alleged, the Tribunal made a number of general observations as to the temporal application of the BIT, referring in this regard to Article 28 of the Vienna Convention on the Law of Treaties. It held that the BIT was not retroactive,⁵⁶⁴ and that, accordingly, disputes arising prior to its entry into force were excluded from the Tribunal's jurisdiction.⁵⁶⁵ It then stated:

[t]he Tribunal distinguishes acts and omissions prior to the entry into force of the BIT from acts and omissions subsequent to that date as violations of the BIT. The Tribunal holds that a dispute that arises that is subject to its Competence is necessarily related to the violation of a norm of the BIT by act or omission subsequent to its entry into force.

[...]

With respect to acts or omissions alleged by the Claimants to be breaches of the BIT subsequent to its entry into force, the Tribunal considers that it has Competence insofar and as those facts are proven to be a violation of the BIT. This determination of the Tribunal does not prejudice the subsequent evaluation of the allegations of both parties on the existence or not of a violation at the time of a decision on the Merits.⁵⁶⁶

⁵⁶¹ Ibid., para. 311.

⁵⁶² *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007.

⁵⁶³ Ibid., para. 42.

⁵⁶⁴ Ibid., para. 59.

⁵⁶⁵ Ibid., para. 61 (although the Tribunal recognized that a dispute arising prior to the BIT's entry into force could evolve into a new dispute: *ibid.*, para. 66).

⁵⁶⁶ Ibid., paras. 62 and 64.

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The Tribunal then turned to address the various arguments as to the alleged continuing or composite nature of the wrongful acts alleged by the claimant, referring, as discussed below, to Articles 14 and 15. In this context, it noted in relation to Article 13 that:

[...] the wrongful acts defined as continuing or composite referred to in Articles 14 and 15 of the ILC Draft are internationally wrongful acts. This means that they are identified with the violation of a norm of international law. According to Article 13 of the Draft Articles, in order for a wrongful act or omission to constitute a breach of an international obligation there must have been a breach of a norm of international law in force at the time that the act or omission occurs.⁵⁶⁷

The Tribunal then went on to set out the text of Article 13 in full, as well as making reference to the observations of the Commission in the Commentary thereto that:

[t]he evolutionary interpretation of treaty provisions is permissible 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.⁵⁶⁸

The Tribunal continued:

[t]he Claimants' arguments with respect to the relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it. The Tribunal holds that it has Competence over events subsequent to the entry into force of the BIT when those acts are alleged to be violations of the BIT. Prior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.

The non-retroactivity of treaties as a general rule postulates that only from the entry into force of an international obligation does the latter give rise to rights and obligations for the parties. Therefore, for any internationally wrongful act to be considered as consummated, continuing, or composite, there must be a breach of a norm of international law attributed to a State.

The Tribunal holds that the Claimants' allegations in respect of Ecuador's acts and omissions after the entry into force of the BIT serve to affirm the Competence of this Tribunal to determine whether there was a violation of the BIT independently of whether those acts or omissions were composite or continuing

The Tribunal observes that the existence of a breach of a norm of customary international law before a BIT enters into force does not give one a right to have recourse to the BIT's arbitral Jurisdiction. A case in point is the *Mondev v United States of America* case in which the tribunal pointed out the difference between a claim made under a Treaty and a diplomatic protection claim for conduct contrary to customary international law.

For the above reasons, and in accordance with the principle of non-retroactivity of treaties, the Tribunal holds that the acts and omissions alleged by the Claimants

⁵⁶⁷ Ibid., para. 90.

⁵⁶⁸ Ibid., paras. 91 and 92, quoting Commentary to Article 13, paragraph (9).

as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT.’⁵⁶⁹

Later on in its Award, the Tribunal again referred to the Commentary to Article 13 in addressing the Claimant’s argument that events prior to the entry into force of the BIT were relevant in determining injury, and that ‘Article [28] of the Vienna Convention as well as Article 13 of the ILC Draft do not limit the powers of a tribunal to examine events that occurred prior to the entry into force of a treaty for purposes of determining the extent of injury caused by the events that occurred after that date.’⁵⁷⁰

Ecuador had responded that acts prior to the entry into force of the BIT could not be invoked as violations of a treaty that ‘that had not yet generated obligations for the Contracting States’, and that, therefore, ‘neither can they be invoked for purposes of determining compensation for a non-existent wrongful act.’⁵⁷¹

In this regard, the Tribunal, referring to the same passage from the Commentary to Article 13 referred to above, which expresses the view that events prior to the entry into force of a treaty may nonetheless be taken into account, observed that:

[...] the Claimants’ argument regarding the relevance of events occurring before the BIT entered into force in determining the injury caused is restricted to the ILC’s Commentary on Article 13 *in fine* of its Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries.

In referring to the inter-temporality of law in ensuring that a State will only be found liable for breach of an obligation in force for a State at the time of the breach, the ILC commented:

Nor does the principle of the inter-temporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.

On this matter the ILC also stated:

In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the ‘first’ of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).⁵⁷²

⁵⁶⁹ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, paras. 93–97.

⁵⁷⁰ *Ibid.*, para. 129; the Award in fact refers to Article 18 of the Vienna Convention; this would appear to be an error.

⁵⁷¹ *Ibid.*, paras. 131.

⁵⁷² *Ibid.*, paras. 132–134, quoting Commentary to Article 13, paragraph (9) and Commentary to Article 14, paragraph (11).

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In that regard, the Tribunal, concluded that, ‘following the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility’,⁵⁷³ it would:

[...] take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date.

The Tribunal reiterates its views on the possibility of exercising Competence over all acts or omissions alleged by the Claimants to have occurred after the entry into force of the BIT and as having been in violation thereof. Acts or omissions prior to the entry into force of the BIT may be taken into account by the Tribunal in cases in which those acts or omissions are relevant as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached. The Tribunal, however, finds that it has no Competence to determine damages for acts that do not qualify as violations of the BIT as they occurred prior to its entry into force.⁵⁷⁴

⁵⁷³ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 135.

⁵⁷⁴ *Ibid.*, paras. 135–136.

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 14 covers the question of when a breach of an international obligation in fact occurs: the first paragraph of the provision provides that, in the case of a breach which does not have a continuing character, the breach occurs when the act in question is performed, even if its effects continue in time. Paragraph 2 provides that, in relation to continuing breaches, the breach extends in time during the entire period during which the act in question continues and does not comply with what is required by the international obligation in question; Paragraph 3 clarifies that, in relation to obligations requiring prevention of a particular event, the breach occurs when that event in question takes place, and extends over the entire period during which the event continues and the situation remains not in conformity with that obligation.

The International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁵⁷⁵ referred to Article 14 of the Articles on State Responsibility in the context of its discussion of whether the respondent had breached its obligation to prevent genocide.

Having observed that ‘a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed’,⁵⁷⁶ the Court made clear that:

[i]t 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.⁵⁷⁷

In support of this proposition, the Court referred to ‘a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility...’, and set out the text of that provision.⁵⁷⁸

The Court went on to observe that, in the case of the obligation to prevent genocide:

[t]his obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to

⁵⁷⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁵⁷⁶ *Ibid.*, para. 431.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

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prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent. In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.⁵⁷⁹

As a matter of logic, the Court's reference to the rule contained in Article 14(3) in the preceding paragraph of its judgment does not have any bearing on that question of when the obligation to prevent genocide 'arises'; Article 14 itself is concerned with the extension in time of a *breach* of an international obligation, not when the obligation in question 'arises' or becomes binding upon the State. However, some brief comment is nevertheless justified in relation to the Court's observation that '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'.⁵⁸⁰ The formulation adopted by the Court in this regard is somewhat unhappy, insofar as it suggests that the obligation to prevent genocide 'arises' at the time that a State acquires, or should have acquired, knowledge of genocide or of a serious risk that genocide was about to take place.

As a matter of general principle, the obligation to prevent genocide under the Genocide Convention subsists from the moment that the Convention enters into force for any State, and does not 'arise' at a later date dependent upon the State's knowledge of an impending genocide, or of a risk that genocide might take place. Up to that point, the obligation is undoubtedly binding on the State, even if it does not require any particular action by the State (apart, perhaps, from a continuing duty of vigilance). Rather, the point which the Court appears to have intended to make is that that obligation only finds particular application, and therefore requires concrete action by the State (i.e. the 'corresponding duty to act'), at the time when the State acquires knowledge of genocide or the risk of genocide. It is only in this sense that the obligation to prevent genocide can be said to 'arise' at that time.

In his separate opinion in *Avena and Other Mexican Nationals (Mexico v United States of America)*,⁵⁸¹ Judge ad hoc Sepúlveda made reference to Article 14 in the context of his discussion of cessation and assurances and guarantees of non-repetition requested by Mexico in that case:

The International Law Commission (ILC), in its Draft Articles on State Responsibility, has introduced the criteria governing the extension in time of the breach of an international obligation. In its Commentary to Article 14, paragraph 2, it indicates:

'a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

⁵⁸¹ *Avena and Other Mexican Nationals (Mexico v United States of America)*, Separate Opinion, of Judge ad hoc Sepúlveda, *ICJ Reports 2002*, p. 99.

conformity with the international obligation, provided that the State is bound by the international obligation during that period. Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State.⁵⁸²

As discussed further below, Judge ad hoc Sepúlveda went on to refer to Articles 29 and 30 and the accompanying commentaries.⁵⁸³

As noted above, Article 14 of the Articles has been referred to frequently in relation to questions of jurisdiction, in particular in situations in which the conduct alleged to constitute an international wrongful act occurs prior to the entry into force of the relevant obligation.

In the NAFTA case of *Mondev International Ltd. v United States of America*,⁵⁸⁴ the Tribunal made reference to Article 14 in dealing with the claimant's argument that conduct prior to the entry into force of NAFTA had been in violation of the 'international minimum standard', and would therefore have violated the substantive standards of protection contained in Article 1105 NAFTA if NAFTA had been in force at the time. As a result, the Claimant argued, there was a continuing situation such that, when NAFTA did enter into force, the United States was under a obligation to remedy the situation, and its failure to do so had breached Article 1105.

In dealing with those arguments, the Tribunal made express reference to Article 14(1) of the Articles, noting that:

[b]oth parties accepted that the dispute as such arose before NAFTA's entry into force, and that NAFTA is not retrospective in effect. They also accepted that in certain circumstances conduct committed prior to the entry into force of a treaty might continue in effect after that date, with the result that the treaty could provide a basis for determining the wrongfulness of the continuing conduct. They disagreed, however, over whether and how the concept of a continuing wrongful act applied to the circumstances of this case.

For its part the Tribunal agrees with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations. But there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage. Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached.⁵⁸⁵

In a footnote to the penultimate sentence, the Tribunal made reference to Article 14(1) of the Articles.

The Tribunal further held that in whatever way the claimant's other claim of expropriation under Article 1110 NAFTA was framed, the conduct in question had been completed by the relevant date when NAFTA entered into force.⁵⁸⁶ The Tribunal accordingly held that 'there was no

⁵⁸² Ibid., at p. 126, para. 77, quoting Commentary to Article 14, paragraph (3).

⁵⁸³ *Avena and Other Mexican Nationals (Mexico v United States of America)*, Separate Opinion, of Judge ad hoc Sepúlveda, *ICJ Reports 2002*, p. 99, at p. 128, paras. 79 and 80.

⁵⁸⁴ *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002.

⁵⁸⁵ Ibid., paras. 57 and 58.

⁵⁸⁶ Ibid., paras. 59–61; see in particular, para. 61 'Any expropriation, if there was one, must have occurred no later than 1991. In the circumstances it is difficult to accept that there was a continuing expropriation of the project as a whole

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continuing wrongful act in breach (or potentially in breach) of Article 1110 at the date NAFTA entered into force.⁵⁸⁷ Similarly, in relation to the actions of the municipal authorities complained of, the Tribunal held that the conduct in question had been completed prior to the relevant date, and therefore could not amount to a breach of the applicable standards contained in NAFTA.⁵⁸⁸

In *Técnicas Medioambientales Tecmed S.A. v United Mexican States*⁵⁸⁹ the applicable bilateral investment treaty had entered into force on 18 December 1996. The claimant, which had acquired the landfill site constituting the investment prior to that date, early in 1996, relied on various actions attributable to the Respondent prior to the entry into force of the BIT as forming the background to its claims, and to the eventual violation of its rights under the BIT, which it alleged had taken place as a result of the decisions to withdraw its authorisation to operate the landfill site and to refuse the renewal of its licence to operate the landfill site in November 1998. Conversely, the Respondent contended that the Tribunal had no jurisdiction *ratione temporis* 'to consider the application of the [BIT] to the Respondent's conduct prior to 18 December 1996'.⁵⁹⁰

The Tribunal observed that it perceived:

[a] certain fluctuation in the Claimant's position as to whether the Respondent's conduct prior to December 18, 1996, can be taken into account in order to determine whether the Respondent has violated the Agreement. In any case, the Arbitral Tribunal concludes that the Claimant does not include in its claims submitted to this Tribunal acts or omissions of the Respondent prior to such date which, considered *in isolation*, could be deemed to be in violation of the Agreement prior to such date.

A more difficult issue is whether such acts or omissions, combined with acts or conduct of the Respondent after December 18, 1996, constitute a violation of the Agreement after that date.⁵⁹¹

The Tribunal noted that the claimant, 'in order to determine whether there has been a violation of the Agreement, holds that the investment and the Respondent's conduct are to be considered as a process and not as an unrelated sequence of isolated events'.⁵⁹² The Tribunal saw two consequences of that approach; first:

[...] the Respondent, prior to December 18, 1996, and through the conduct of different agencies or entities in the state structure, gradually but increasingly appears to have weakened the rights and legal position of the Claimant as an investor. Such conduct would appear to have continued after the entry into force of the Agreement, and would have resulted in the refusal to extend the authorization on November 25, 1998, which would have caused the concrete damage suffered by the Claimant as a result of such conduct. The common thread weaving together each act or omission into a single conduct attributable to the Respondent is not a subjective element or intent, but a converging action towards the same result, i.e. depriving the investor of its investment, thereby violating the Agreement.⁵⁹³

after that date. All that was left thereafter were LPA's *in personam* claims against Boston and BRA for breaches of contract or torts arising out of a failed project. Those claims arose under Massachusetts law, and the failure (if failure there was) of the United States courts to decide those cases in accordance with existing Massachusetts law, or to act in accordance with Article 1105, could not have involved an expropriation of those rights.'

⁵⁸⁷ Ibid., para. 73.

⁵⁸⁸ Ibid., paras. 63 and 64.

⁵⁸⁹ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

⁵⁹⁰ Ibid., para. 54.

⁵⁹¹ Ibid., para. 61.

⁵⁹² Ibid.

⁵⁹³ Ibid., para. 62.

The second consequence perceived by the Tribunal was that:

[...] before getting to know the final result of such conduct, this conduct could not be fully recognized as a violation or detriment for the purpose of a claim under the Agreement, all the more so if, at the time a substantial part of such conduct occurred, the provisions of the Agreement could not be relied upon before an international arbitration tribunal because the Agreement was not yet in force.⁵⁹⁴

In that regard, in a footnote to the first part of that passage, the Tribunal observed:

[w]hether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused [...]⁵⁹⁵

and cited Article 14 and the Commentary thereto relating to continuing wrongful acts, as well as the Commentary to Article 15 relating to the question of when a breach consisting of a composite act occurs.⁵⁹⁶

Later in its Award, the Tribunal, having concluded that the provisions of the BIT were to be interpreted as not having retroactive effect, observed:

[h]owever, it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force. For this purpose, it will still be necessary to identify conduct – acts or omissions – of the Respondent after the entry into force of the Agreement constituting a violation thereof.⁵⁹⁷

In that regard, the Tribunal cited the passage from the Award of the Tribunal in *Mondev International Ltd. v United States of America*⁵⁹⁸ noted above, which seems to implicitly endorse the approach of the Commission in its Commentary to Article 13 that facts occurring prior to the entry into force of an obligation may nevertheless be taken into account by a tribunal.

In *Impregilo SpA v Islamic Republic of Pakistan*,⁵⁹⁹ the claimant, in putting forward various claims both of breach of contract and breach of the BIT, had relied on various conduct which it alleged was attributable to Pakistan; some of that conduct had occurred prior to the entry into force of the applicable BIT. The respondent objected that the Tribunal lacked jurisdiction *ratione temporis* under the BIT in relation to that conduct.

⁵⁹⁴ Ibid. (footnotes omitted).

⁵⁹⁵ Ibid., note 26.

⁵⁹⁶ Commentary to Article 14, paragraphs (3) to (8) and Commentary to Article 15, paragraphs (8) and (9). The reference in the footnote was limited to citing the relevant pages corresponding to those paragraphs (pp. 136–137 and 143) in J.R. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), which reproduces the ILC's Commentaries in their entirety, and the particular paragraphs to which reference was intended is therefore to some extent a matter of conjecture.

⁵⁹⁷ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003, para. 66.

⁵⁹⁸ *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No. ARB(AF)/99/2), Award of 11 October 2002, para. 70; the Tribunal also referred to the ILC's commentary on the provision which eventually became Article 28 of the Vienna Convention on the Law of Treaties

⁵⁹⁹ *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005.

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Having noted that the dispute resolution provisions of the BIT only gave it jurisdiction over disputes arising after the entry into force of the BIT,⁶⁰⁰ the Tribunal concluded that '[a]t first sight', it appeared that the dispute relating to the claimant's treaty claims had indeed arisen after the entry into force of the BIT.⁶⁰¹

However, the Tribunal observed that care needed to be taken to differentiate between the Tribunal's jurisdiction *ratione temporis* (i.e. in relation to disputes arising after the entry into force of the BIT), and the applicability *ratione temporis* of the substantive provisions of the BIT.⁶⁰² Noting that the BIT in question did not provide for retrospective application of its substantive provisions,⁶⁰³ the Tribunal concluded that the legality of the acts complained of by the claimant:

[...] must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only the acts effected after that date had to conform to its provisions.⁶⁰⁴

In order to counter the problems caused by the fact that some of the conduct relied upon had occurred prior to the entry into force of the BIT, the claimant had attempted to rely on Article 14 of the Articles, which it claimed reflected customary international law, in order to argue that the course of conduct was a single continuing act, and therefore conduct occurring prior to the entry into force of the applicable BIT likewise had to comply with the substantive obligations contained therein.⁶⁰⁵

The Tribunal, without expressing a view as to the customary nature of Article 14, concluded that the conduct was not in any case of a continuing character and Article 14 was therefore not applicable:

[w]hether or not [Article 14] does in fact reflect customary international law need not be addressed for present purposes. It suffices to observe that, in the Tribunal's view, the present case is not covered by Article 14. Acts attributed to Pakistan and perpetrated before 22 June 2001 could without any doubt have consequences after that date. However, the acts in question had no 'continuing character' within the meaning of Article 14; they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date.⁶⁰⁶

The Tribunal went on to distinguish the situation from that in *SGS Société Générale de Surveillance SA v Philippines*,⁶⁰⁷ which had been relied upon by the claimant, noting that in that case the alleged breach was a continuing failure to pay sums due under a contract. The Tribunal continued, referring to and quoting from the Commentary to Article 14, that:

[i]n contrast, the current dispute is to be compared with cases of expropriation [...], in which the effects may be prolonged, whereas the act itself occurred at a specific point in time, and must be assessed by reference to the law applicable at that time:

⁶⁰⁰ Ibid., para. 300.

⁶⁰¹ Ibid., para. 308.

⁶⁰² Ibid., para. 309.

⁶⁰³ Ibid., para. 310; the Tribunal also invoked Article 28 of the Vienna Convention on the Law of Treaties for the proposition that the provisions of the BIT did not bind Pakistan in relation to events prior to its entry into force.

⁶⁰⁴ Ibid., para. 311.

⁶⁰⁵ Ibid., para. 312.

⁶⁰⁶ Ibid.

⁶⁰⁷ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction of 29 January 2004.

'The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.'⁶⁰⁸

In *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*,⁶⁰⁹ the Tribunal made extensive reference to Articles 13, 14 and 15 of the Articles and the accompanying Commentaries, in the context of its ruling on the scope of its jurisdiction. The Tribunal announced at the beginning of its Award that it would:

[...] decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN [...] Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries [...]'⁶¹⁰

The Claimants alleged that Ecuador had breached its obligations under the BIT by continuing and composite wrongful acts; some of the acts relied upon had taken place prior to the entry into force of the applicable BIT.⁶¹¹ Ecuador, by contrast, argued that the alleged acts prior to the entry into force of the BIT were neither continuing nor composite, and that, even if those acts had in fact occurred, they did not continue after the entry into force of the BIT so as to fall within the scope of the BIT.⁶¹² Ecuador further emphasised that a distinction was to be drawn between a continuing wrongful act, and a wrongful act whose effects continued, in this regard making reference to the Commentary to Article 14.⁶¹³ With respect to the alleged composite nature of the acts, Ecuador argued that that notion 'requires a series of actions or omissions defined as a whole as wrongful', and in that regard referred to the Commentary to Article 15.⁶¹⁴ It concluded that the alleged damage to the claimants had been consummated prior to the entry into force of the BIT by a completed act.⁶¹⁵

The Tribunal noted at the outset of its discussion of the issue that:

[...] in accordance with customary international law, the relevant element to determine the existence of a continuing wrongful act or a composite wrongful act is the violation of a norm of international law existing at the time when that act that extends in time begins or when it is consummated.

The line of reasoning adopted by intergovernmental bodies for the protection of human rights as well as human rights tribunals in order to typify acts of a continuing wrongful nature, stresses the continuity of those acts after the treaty giving rise to the breached obligation entered into force.⁶¹⁶

⁶⁰⁸ *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005, para. 313, referring to Commentary to Article 14, paragraph (6)

⁶⁰⁹ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007.

⁶¹⁰ *Ibid.*, para. 42.

⁶¹¹ For the Tribunal's summary of the claimants' arguments, see *ibid.*, paras. 69–73.

⁶¹² *Ibid.*, paras. 74–75.

⁶¹³ *Ibid.*, para. 78 and note 6.

⁶¹⁴ *Ibid.*, and note 7.

⁶¹⁵ *Ibid.*, para. 81.

⁶¹⁶ *Ibid.*, paras. 82–83.

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The Tribunal then made reference to the decision in *Técnicas Medioambientales Tecmed S.A. v United Mexican States*,⁶¹⁷ which had been relied upon by both parties. In that regard, the Tribunal observed:

[...] the only interpretation possible is that which is consistent with the international law applicable to the case. In light of this, it is arguable that the *Tecmed* tribunal determined its jurisdiction on the basis of allegations that an internationally wrongful act had occurred after the treaty had entered into force. Thus, the tribunal understood that in order to determine its jurisdiction it should consider the necessary existence of a dispute that arose under the terms of the BIT after the treaty had entered into force. In the view of that tribunal, events or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date.⁶¹⁸

The Tribunal then stated that it took note:

[...] of the content of the norms of customary international law set out in the ILC Draft in order to clarify the scope of continuing wrongful acts as well as composite wrongful acts.⁶¹⁹

The Tribunal then referred to both Articles 14 and 15 of the Articles, and cited passages from the accompanying Commentaries.⁶²⁰ In relation to Article 14, the Tribunal noted that:

[i]n its Commentary to [Article 14] the ILC states:

‘In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.’⁶²¹

The Tribunal then referred to Article 13, noting that:

[...] wrongful acts defined as continuing or composite referred to in Articles 14 and 15 of the ILC Draft are internationally wrongful acts. This means that they are identified with the violation of a norm of international law. According to Article 13 of the Draft Articles, in order for a wrongful act or omission to constitute a breach of an international obligation there must have been a breach of a norm of international law in force at the time that the act or omission occurs.⁶²²

Having cited Article 13 and made reference to a passage from the Commentary thereto,⁶²³ the Tribunal upheld its jurisdiction over events subsequent to the entry into force of the BIT, and held that prior events could only be taken into account ‘for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.’⁶²⁴

⁶¹⁷ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

⁶¹⁸ *Ibid.*, para. 84.

⁶¹⁹ *Ibid.*, para. 85.

⁶²⁰ *Ibid.*, paras. 86–89.

⁶²¹ *Ibid.*, para. 89, quoting Commentary to Article 14, paragraph (3).

⁶²² *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 90.

⁶²³ *Ibid.*, paras. 91–92, referring to Commentary to Article 13, paragraph (3).

⁶²⁴ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 93.

The Tribunal next referred to the principle of non-retroactivity of treaties, noting that:

[...] for any internationally wrongful act to be considered as consummated, continuing, or composite, there must be a breach of a norm of international law attributed to a State.⁶²⁵

before affirming that the allegations in relation to:

[...] Ecuador's acts and omissions after the entry into force of the BIT serve to affirm the Competence of this Tribunal to determine whether there was a violation of the BIT independently of whether those acts or omissions were composite or continuing.⁶²⁶

The Tribunal concluded:

[f]or the above reasons, and in accordance with the principle of non-retroactivity of treaties, the Tribunal holds that the acts and omissions alleged by the Claimants as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT.⁶²⁷

As discussed above in relation to Article 13, later on in its decision, in relation to a separate but similar argument by the Claimant that events prior to the entry into force of the BIT were relevant to the injury caused, the Tribunal made reference to a passage from the Commentary to Article 13, as well as a passage from the Commentary to Article 15,⁶²⁸ before concluding that it would:

[...] following the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility, [...] take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date.⁶²⁹

As noted above in relation to Article 13, in *Blečić v Croatia*,⁶³⁰ a Grand Chamber of the European Court of Human Rights set out Articles 13 and 14 of the Articles under the heading 'relevant international law and practice'.⁶³¹ Pursuant to a court decision rendered prior to the entry into force of the European Convention on Human Rights for Croatia, the applicant's secure tenancy in relation to a flat had been terminated; the applicant's subsequent complaint to the Constitutional Court had been rejected in a decision rendered after the entry into force of the Convention.

In its judgment, the European Court, although not referring expressly to Article 14 in its reasoning, clearly took note of the rule contained in Article 14(1) in reaching its conclusion that on the facts of the case, the interference with the applicant's right to peaceful enjoyment of property and respect for her home had occurred with the final judgment of the Supreme Court in the termination proceedings, rather than as a result the subsequent rejection of her complaint by the Constitutional Court:

[...] the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to

⁶²⁵ Ibid., para. 94.

⁶²⁶ Ibid., para. 95.

⁶²⁷ Ibid., paras. 96–97.

⁶²⁸ Ibid., paras. 133–134, quoting Commentary to Article 13, paragraph (9) and Commentary to 15, paragraph (11).

⁶²⁹ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 135.

⁶³⁰ *Blečić v Croatia*, Appl. No. 59532/00, judgment of 8 March 2006 [GC].

⁶³¹ Ibid., para. 48.

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subst. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court's judgment, the interference falls outside the Court's temporal jurisdiction.

As to the applicant's argument that the termination of her tenancy resulted in a continuing situation [...], the Court recalls that the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of 'deprivation' of these rights [...] Therefore, the termination of the applicant's tenancy did not create a continuing situation.⁶³²

In her dissenting opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*,⁶³³ Judge ad hoc van den Wyngaert made reference to Article 14 of the Articles in explaining her vote against the Court's ruling that Belgium was required to cancel the arrest warrant issued for Mr Yerodia.⁶³⁴ Judge ad hoc van den Wyngaert explained:

I still need to give reasons for my vote against paragraph 78 (3) of the *dispositif* calling for the cancellation and the 'de-circulation' of the disputed arrest warrant. Even assuming, *arguendo*, that the arrest warrant was illegal in the year 2000, it was no longer illegal at the moment when the Court gave Judgment in this case. Belgium's alleged breach of an international obligation did not have a continuing character: it may have lasted as long as Mr. Yerodia was in office, but it did not continue in time thereafter.⁶³⁵

In an accompanying footnote, Judge ad hoc Van den Wyngaert made reference to Article 14, and set out the text of Article 14(1) and (2).⁶³⁶

In *Ilaşcu and others v Russia and Moldova*,⁶³⁷ the European Court of Human Rights was faced with a course of conduct consisting of the arrest of the applicants by Russian forces, and their subsequent detention and ill-treatment by the authorities of the break-away secessionist 'Trans-Dniestrian Republic'. It was argued by the applicants that, as a result of the support provided by the Russian Federation to the Trans-Dniestrian administration, they were to be held to have been within the 'jurisdiction' of the Russian Federation for the purposes of Article 1 of the European Convention, and, accordingly, that the Russian Federation had thereby violated its obligations under the European Convention as a result of the actions of the Trans-Dniestrian authorities. [It was further argued that Moldova, by failing to take all the measures available to it to attempt to ameliorate the situation of the applicants, had failed to comply with its positive obligations under the Convention.

In a general discussion of State responsibility, having referred to the 'recognized principle of international law [...] of State responsibility for the breach of an international obligation',⁶³⁸ the European Court made reference to the ILC's Commentary on Article 14(2) of the Articles:

⁶³² Ibid., paras. 85–86.

⁶³³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *ICJ Reports 2002*, p. 3.

⁶³⁴ For the *dispositif*, see *ibid.*, at p. 34, para. 78(3); for the Court's reasoning in this regard, see *Ibid.*, p. 33, para. 76: 'The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. 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.'

⁶³⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Dissenting Opinion of Judge ad hoc Van den Wyngaert, *ICJ Reports 2002*, p. 137, at p. 183, para. 83. Cf. the similar conclusion of Judges Higgins, Kooijmans and Buergenthal in the Joint Separate Opinion, (*ICJ Reports 2002*, p. 64, at p. 90, para. 89)(discussed below), referring in this regard to Article 30 of the Articles.

⁶³⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Dissenting Opinion of Judge ad hoc Van den Wyngaert, *ICJ Reports 2002*, p. 137 at p. 183, note 154.

⁶³⁷ *Ilaşcu and others v Russia and Moldova*, (App. No. 48787/99), Reports 2004–VII,

⁶³⁸ *Ibid.*, para. 320.

A wrongful act may be described as continuing if it extends over the entire period during which the relevant conduct continues and remains at variance with the international obligation (see the commentary on draft Article 14 § 2, p. 139 of the work of the ILC).⁶³⁹

The Court also made reference to Article 15(2) of the Articles:

In addition, the Court considers that, in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned.⁶⁴⁰

The European Court found that the applicants fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention during the entire course of their arrest and detention. However, the Court noted that certain parts of that course of events, including the applicants' detention and interrogation by soldiers of the Russian Federation, and the subsequent handing over to the authorities of the 'Trans-Dniestrian Republic', had occurred at a time when the European Convention had not been in force for the Russian Federation.⁶⁴¹

The Convention had entered into force for Moldova on 12 September 1997 and for the Russian Federation on 5 May 1998; the Russian Federation argued that the acts complained of by the applicants had occurred prior to that date, and that accordingly the European Court lacked jurisdiction *ratione temporis* in relation to Russia.⁶⁴² The applicants and Moldova asserted that the violations complained of were of a continuing nature.⁶⁴³ In this regard, the Court noted that 'in respect of each Contracting Party the Convention applies only to events subsequent to its entry into force with regard to that Party'.⁶⁴⁴

In relation to the applicant's complaints under Articles 3, 5 and 8, based on the illegality of their detention, the restrictions on their ability to communicate with and receive visits from their families, and the conditions of their detention, the Court observed that 'the alleged violations concern events which began with the applicants' incarceration in 1992, and are still ongoing'. The European Court therefore held that it had jurisdiction *ratione temporis* to examine the complaints relating to the periods after the respective dates of entry into force of the Convention for each of the respondent States.⁶⁴⁵ A similar conclusion was reached as regards the complaint under Article 2 of the Convention by one of the applicants concerning a death sentence which had been imposed upon him, and which, the Court observed, 'was still operative'.⁶⁴⁶

By contrast, with regard to the applicants' complaints of violation of their right to a fair trial under Article 6 of the European Convention, the Court observed that the conduct in question had ended with the applicants' conviction by the Trans-Dniestrian court, which had occurred before the entry into force of the Convention for the Russian Federation and Moldova, and was 'not a continuing situation'. The Court therefore concluded that it did not have jurisdiction *ratione temporis* over that complaint.⁶⁴⁷

⁶³⁹ Ibid., para. 321.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid., paras. 384–385; 393–394.

⁶⁴² Ibid., para. 396.

⁶⁴³ Ibid., paras. 397 and 395, respectively.

⁶⁴⁴ Ibid., para. 399.

⁶⁴⁵ Ibid., paras. 402 and 403.

⁶⁴⁶ Ibid., paras. 407 and 408.

⁶⁴⁷ Ibid., para. 400.

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In *Marangopoulos Foundation for Human Rights v Greece*⁶⁴⁸ the complainant alleged that Greece had not taken sufficient account of the environmental effects or developed an appropriate strategy to prevent and combat public health risks of lignite mining, in violation of its obligations under the European Social Charter. In its decision, the European Committee of Social Rights made reference to Article 14 of the Articles in dealing with an objection to its jurisdiction *ratione temporis* raised by Greece on the basis that the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints⁶⁴⁹ had only entered into force for it on 1 August 1998. The Committee made reference to Article 14, and in particular Article 14(3):

[...] the origin of several of the complaints is long-term exposure to air pollution, partly preceding 1998, whose effects have either been felt continuously since lignite mining began in the regions concerned or may only be felt several years after exposure. The Committee considers that under these circumstances, the main question raised by the current complaint is how to make the distinction between performed and continued wrongful acts, bearing in mind the state's particular duty to take all reasonable measures to ensure that a given event does not occur. In this connection, it notes that Article 14 of the draft articles prepared by the International Law Commission on responsibility of states for internationally wrongful acts deals with the extension in time of the breach of an international obligation and states 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 what is required by that obligation' (§ 3). In so doing, it is simply endorsing an established legal interpretation of national and international courts. In the present case, the Committee considers that there may be a breach of the obligation to prevent damage arising from air pollution for as long as the pollution continues and the breach may even be progressively compounded if sufficient measures are not taken to put an end to it. Consequently, the Committee considers that it is competent *ratione temporis* to consider all the facts raised in this complaint.⁶⁵⁰

⁶⁴⁸ *Marangopoulos Foundation for Human Rights v Greece* (Complaint No. 30/2005), Decision on the Merits of 6 December 2005

⁶⁴⁹ *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, Strasbourg, 9 November 1995, CETS, No. 158.

⁶⁵⁰ *Marangopoulos Foundation for Human Rights v Greece* (Complaint No. 30/2005), Decision on the Merits of 6 December 2005, para. 193.

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.

Article 15 embodies rules relating to the time when a breach consisting of a composite act occurs, and the period in relation to which such a breach extends. Article 15(1) provides that a breach of an obligation through a series of actions and omissions ‘defined in the aggregate as wrongful’ occurs when the last action necessary to constitute the breach occurs. Article 15(2) provides that, in such a situation, the breach extends over the period from the first relevant act or omission, and continues for so long as the actions or omission continue and the situation remains not in conformity with the international obligation.

In *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, a provision of one of the two potentially applicable BITs provided that the BIT in question did not apply to disputes arising prior to its entry into force. The claimant alleged that the dispute had arisen subsequent to the relevant date, but as a subsidiary argument, contended in the alternative that on the basis of Article 15 of the Articles:

[...] the alleged breaches by Egypt occurred through a composite act within the meaning of Article 15 of the ILC Articles on State Responsibility and that, for the purpose of assessing the jurisdiction *ratione temporis*, this kind of composite act does not ‘occur’ until the completion of the series of acts of which it is composed.⁶⁵¹

Given its conclusion that the dispute in question had in any case arisen after the entry into force of the BIT, the Tribunal did not find it necessary to rule on the claimant’s argument on the basis of Article 15.⁶⁵²

In the context of the resubmitted case in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (‘*Vivendi II*’),⁶⁵³ the claimants argued, relying on Article 15(1) that ‘it is well established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts, taken together, can warrant a finding that such obligation has been breached.’⁶⁵⁴ The claimants further observed that ‘Article 15(1) also defines the time at which a composite act ‘occurs’ to be the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act without it necessarily having to be the last of the series.’⁶⁵⁵

⁶⁵¹ *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction of 16 June 2006.

⁶⁵² *Ibid.*, para. 122.

⁶⁵³ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (‘*Vivendi II*’)(ICSID Case No. ARB/97/3), Award of 20 August 2007.

⁶⁵⁴ *Ibid.*, para. 5.3.16.

⁶⁵⁵ *Ibid.*

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As the Tribunal noted in summarising the argument of the claimants:

Claimants contend that the Province's actions, beginning in the opening months of the concession and culminating in the secret and unilateral changes to the 8 April Agreement in 1997, had the necessary consequence of forcing the CAA to terminate the Concession Agreement. The accumulation of the Province's failures to live up to its obligations, including those of the Concession Agreement and of good faith commercial dealing, resulted in the termination, and thus expropriation of Claimants' investment.⁶⁵⁶

In accepting that argument, the Tribunal noted in relation to the cumulative series of acts relied upon by the claimants that:

[i]t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached.⁶⁵⁷

Having referred, *inter alia*, to the earlier decision of the ad hoc Committee on annulment in the case, which had recognised (albeit without reference to the Articles in this regard) that '[i]t was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT',⁶⁵⁸ the Tribunal went on to refer to Article 15(1) of the Articles, noting that it was:

[...] to like effect where it defines the time at which a composite act 'occurs' as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.⁶⁵⁹

Applying that principle to the facts of the case before it, the Tribunal continued:

[h]ere, the Province's actions – from the very opening months of the concession, continuing through its wrongful regulatory action and culminating in the unilateral amendments to the 8 April Agreement – had the necessary consequence of forcing CAA to terminate the Concession Agreement. The provincial government was simply not prepared to countenance and support CAA's operation of the concession on the terms of the Concession Agreement as originally agreed. Ultimately, the Province simply left CAA with no choice. It could not continue in the face of mounting losses, under significantly reduced tariffs and with no reasonable prospect of improved collection rates. CAA's contractual rights under the Concession Agreement were rendered worthless by the Province's actions while its losses would only continue to mount. Vivendi suffered direct harm in its capacity as CAA's principal shareholder, with the value of its shareholding being eradicated.⁶⁶⁰

⁶⁵⁶ Ibid..

⁶⁵⁷ Ibid., para. 7.5.31

⁶⁵⁸ Ibid., para. 7.5.31, citing *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, Decision on Annulment of 3 July 2002, para. 112. The Tribunal also cited the decision in *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, ICISD Review –FILJ, vol. 15 (2000), p. 169, at para. 76.

⁶⁵⁹ *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ('Vivendi II') (ICSID Case No. ARB/97/3), Award of 20 August 2007, para. 7.5.32.

⁶⁶⁰ Ibid., para. 7.5.33.

In *Siemens A.G. v Argentine Republic*,⁶⁶¹ the claimant had argued that a series of acts by the respondent had led to the expropriation of its investment in Argentina. In this regard, the Tribunal referred with approval to the notion of composite acts as defined in Article 15(1) of the Articles, and the accompanying Commentary:

[b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.

We are dealing here with a composite act in the terminology of the Draft Articles. Article 15 of the Draft Articles provides the following:

'(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.'

As explained in the ILC's Commentary on the Draft Articles:

'Paragraph 1 of Article 15 defines the time at which a composite act 'occurs' as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.'

The concept could not be better explained.⁶⁶²

Later on in its award, the Tribunal likewise referred to the date at which it had held the expropriation had occurred, with reference again to Article 15 of the Articles:

[t]he Tribunal has considered that the issuance of Decree 669/01 was determinant for purposes of its finding of expropriation and it is also the date that would be in consonance with Article 15 of the Draft Articles on the date of occurrence of a composite act.⁶⁶³

As noted above in relation to Article 14, the Tribunal in *Técnicas Medioambientales Tecmed S.A. v United Mexican States*⁶⁶⁴ made reference to the Commentary to Article 15 in the context of its discussion of the claimant's argument that 'in order to determine whether there has been a violation of the Agreement, [...] the investment and the Respondent's conduct are to be considered as a process and not as an unrelated sequence of isolated events'.⁶⁶⁵

The Tribunal observed that one consequence of that approach was that:

⁶⁶¹ *Siemens A.G. v Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007.

⁶⁶² *Ibid.*, paras. 263–266, quoting Commentary to Article 15, paragraph (8).

⁶⁶³ *Siemens A.G. v Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007, para. 361.

⁶⁶⁴ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

⁶⁶⁵ *Ibid.*, para. 61.

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[...] before getting to know the final result of such conduct, this conduct could not be fully recognized as a violation or detriment for the purpose of a claim under the Agreement, all the more so if, at the time a substantial part of such conduct occurred, the provisions of the Agreement could not be relied upon before an international arbitration tribunal because the Agreement was not yet in force.⁶⁶⁶

In support of those observations, the Tribunal made reference to Article 14 of the Articles and the accompanying Commentary, as well as the Commentary to Article 15, stating:

[w]hether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused.⁶⁶⁷

In *Ilasçu and others v Russia and Moldova*,⁶⁶⁸ having affirmed, with reference to ‘the work of the ILC’, the ‘recognised principle of international law [...] of State responsibility for the breach of an international obligation’ and recalled, with reference to the Commentary to Article 14(2), that ‘[a] wrongful act may be described as continuing if it extends over the entire period during which the relevant conduct continues and remains at variance with the international obligation’, the European Court of Human Rights stated, referring to Article 15(2) of the Articles:

[i]n addition, the Court considers that, in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned [...].⁶⁶⁹

In *Kardassopoulos v Georgia*,⁶⁷⁰ the Claimant invoked a number of acts, some occurring before and others after, the entry into force of the applicable BIT. Georgia argued that the relevant acts causing the claimant’s alleged loss were those occurring prior to the entry into force of the BIT, that they had been completed by the critical date, and that the Tribunal did not have jurisdiction over them. In this regard, it referred to Article 15 of the Articles. The Tribunal recorded Georgia’s argument in this regard as follows:

[r]elying on arbitral authority and Article 15 of the International Law Commission’s [...] *Articles on Responsibility of States for Internationally Wrongful Acts* [...], Respondent argues that acts which occur prior to a treaty’s entry into force do not have a ‘continuing character’ simply because they have consequences after that date. Respondent contends that while the effect of the acts may be said to be continuing, in the same manner that an alleged expropriation may have a continuing effect if compensation is not paid, this fact alone is insufficient to confer jurisdiction.

In respect of Claimant’s contention that Georgia’s conduct should be considered a continuing process, Respondent notes that this proposition is based on the assumption that Georgia’s alleged expropriation could not be recognised as a

⁶⁶⁶ Ibid., para. 62 (footnotes omitted).

⁶⁶⁷ Ibid., note 26, referring to Commentary to Article 14, paragraphs (3) to (8) and Commentary to Article 15, paragraphs (8) and (9). As noted above, the reference in the footnote was limited to citing the relevant pages corresponding to those paragraphs (pp. 136–137 and 143) in J.R. Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge University Press, 2002), and the particular paragraphs to which the Tribunal intended to make reference is therefore to some extent a matter of conjecture.

⁶⁶⁸ *Ilasçu and others v Russia and Moldova*, (App. No. 48787/99), Reports 2004–VII.

⁶⁶⁹ Ibid., para. 321

⁶⁷⁰ *Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of 6 July 2007.

violation of the BIT at the time the relevant acts occurred. [...] In Respondent's words: '[T]he alleged breach in this case is not a composite act, such that it is necessary to take a series of alleged acts in aggregate in order for them to constitute a wrongful act. Rather, the Decrees and the AIOC Agreement are in themselves acts which, without further acts, are alleged to be wrongful and in breach of the BIT and to have caused the alleged damage.'⁶⁷¹

In the event, as noted above in relation to Article 13, the Tribunal held that it was not in a position to be able to assess which of the acts relied upon were the important ones for the purposes of the alleged breach of the BIT and accordingly joined Georgia's objection to jurisdiction to the merits.⁶⁷² It therefore did not have to rule on the relevance of Article 15 and the question of composite wrongful acts.

In *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*,⁶⁷³ the Tribunal made extensive reference to Article 15 of the Articles and the accompanying Commentary, as well as Articles 13 and 14, in the context of its discussion as to the scope of its jurisdiction. The Tribunal announced at the beginning of its Award that it would:

[...] decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN [...] Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries [...]⁶⁷⁴

The Claimants alleged that Ecuador had breached its obligations under the BIT by continuing and composite wrongful acts; some of the acts relied upon had taken place prior to the entry into force of the applicable BIT.⁶⁷⁵ Ecuador, by contrast, argued that the alleged acts prior to the entry into force of the BIT were neither continuing nor composite, and that even if those acts had in fact occurred, they did not continue after the entry into force of the BIT so as to fall within the scope of the BIT.⁶⁷⁶ Ecuador emphasised that a distinction was to be drawn between a continuing wrongful act, and a wrongful act whose effects continued, in this regard making reference to the Commentary to Article 14.⁶⁷⁷ As regards the alleged composite nature of the acts, Ecuador argued that that notion 'requires a series of actions or omissions defined as a whole as wrongful', and, in that regard, referred to the Commentary to Article 15.⁶⁷⁸ It concluded that the alleged damage to the claimants had been consummated prior to the entry into force of the BIT by a completed act.⁶⁷⁹

The Tribunal noted at the outset of its discussion of the issue that:

[...] in accordance with customary international law, the relevant element to determine the existence of a continuing wrongful act or a composite wrongful act is the violation of a norm of international law existing at the time when that act that extends in time begins or when it is consummated.

⁶⁷¹ Ibid., para. 86.

⁶⁷² Ibid., paras. 256–261.

⁶⁷³ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007.

⁶⁷⁴ Ibid., para. 42.

⁶⁷⁵ For the Tribunal's summary of the claimants' arguments, see Ibid., paras. 69–73.

⁶⁷⁶ Ibid., paras. 74–75.

⁶⁷⁷ Ibid., para. 78 and note 6.

⁶⁷⁸ Ibid., para. 80, and note 7.

⁶⁷⁹ Ibid., para. 81.

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The line of reasoning adopted by intergovernmental bodies for the protection of human rights as well as human rights tribunals in order to typify acts of a continuing wrongful nature, stresses the continuity of those acts after the treaty giving rise to the breached obligation entered into force.⁶⁸⁰

In relation to the decision in *Técnicas Medioambientales Tecmed S.A. v United Mexican States*,⁶⁸¹ which had been relied upon by both parties, the Tribunal observed:

[...] the only interpretation possible is that which is consistent with the international law applicable to the case. In light of this, it is arguable that the *Tecmed* tribunal determined its jurisdiction on the basis of allegations that an internationally wrongful act had occurred after the treaty had entered into force. Thus, the tribunal understood that in order to determine its jurisdiction it should consider the necessary existence of a dispute that arose under the terms of the BIT after the treaty had entered into force. In the view of that tribunal, events or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date.⁶⁸²

The Tribunal then stated that it:

[...] takes note of the content of the norms of customary international law set out in the ILC Draft in order to clarify the scope of continuing wrongful acts as well as composite wrongful acts.⁶⁸³

The Tribunal then referred to Articles 14 and 15 of the Articles, and cited passages from the accompanying Commentaries.⁶⁸⁴ In relation to Article 15, the Tribunal noted that:

[i]n its Commentary to the Draft Articles, the ILC states that in accordance with the principle of the inter-temporality of law:

‘...the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the ‘first’ of the actions or omissions of the series for the purposes of State Responsibility will be the first occurring after the obligation came into existence.’⁶⁸⁵

The Tribunal then noted that:

[the] wrongful acts defined as continuing or composite referred to in Articles 14 and 15 of the ILC Draft are internationally wrongful acts. This means that they are identified with the violation of a norm of international law. According to Article 13 of the Draft Articles, in order for a wrongful act or omission to constitute a breach of an international obligation there must have been a breach of a norm of international law in force at the time that the act or omission occurs.⁶⁸⁶

⁶⁸⁰ Ibid., paras. 82–83.

⁶⁸¹ *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/2), Award of 29 May 2003.

⁶⁸² *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 84.

⁶⁸³ Ibid., para. 85.

⁶⁸⁴ Ibid., paras. 86–89.

⁶⁸⁵ Ibid., para. 89, referring to Commentary to Article 15, paragraph (11).

⁶⁸⁶ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 90.

The Tribunal then cited Article 13 and made reference to a passage from the Commentary thereto.⁶⁸⁷ As discussed above in relation to Article 13, the Tribunal affirmed that it had jurisdiction over events subsequent to the entry into force of the BIT, and that prior events could only be taken into account 'for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.'⁶⁸⁸ The Tribunal then referred to the principle of non-retroactivity of treaties, noting that:

[...] for any internationally wrongful act to be considered as consummated, continuing, or composite, there must be a breach of a norm of international law attributed to a State[...]⁶⁸⁹

before affirming that the allegations in relation to:

[...] Ecuador's acts and omissions after the entry into force of the BIT serve to affirm the Competence of this Tribunal to determine whether there was a violation of the BIT independently of whether those acts or omissions were composite or continuing.⁶⁹⁰

The Tribunal concluded:

[f]or the above reasons, and in accordance with the principle of non-retroactivity of treaties, [...] the acts and omissions alleged by the Claimants as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT.⁶⁹¹

As discussed above in relation to Article 13, later on in its decision, in relation to an argument by the Claimant that events prior to the entry into force of the BIT were relevant to the injury caused, the Tribunal made reference to a passage from the Commentary to Article 13, as well as a passage from the Commentary to Article 15, which provides:

[i]n cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).⁶⁹²

The Tribunal concluded that it would:

[...] following the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility, [...] take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date.

The Tribunal reiterates its views on the possibility of exercising Competence over all acts or omissions alleged by the Claimants to have occurred after the entry into force of the BIT and as having been in violation thereof. Acts or omissions prior to

⁶⁸⁷ Ibid., paras. 91–92, referring to Commentary to Article 13, paragraph (3).

⁶⁸⁸ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, para. 93.

⁶⁸⁹ Ibid., para. 94.

⁶⁹⁰ Ibid., para. 95.

⁶⁹¹ Ibid., paras. 96–97.

⁶⁹² Ibid., para. 134, quoting Commentary to Article 15, paragraph (11).

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the entry into force of the BIT may be taken into account by the Tribunal in cases in which those acts or omissions are relevant as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached. The Tribunal, however, finds that it has no Competence to determine damages for acts that do not qualify as violations of the BIT as they occurred prior to its entry into force.⁶⁹³

⁶⁹³ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, (ICSID Case No. ARB/03/6), Award of 31 July 2007, paras. 135–136.

CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION
WITH THE ACT OF ANOTHER STATE

Chapter IV of Part One of the Articles contains provisions governing the situations in which a State may be responsible in connection with the internationally wrongful act of another State. Three distinct situations are covered: Article 16 relates to responsibility for providing aid and assistance to a State in the commission of an internationally wrongful act, Article 17 covers the situation where a State directs and controls another State in the commission of an internationally wrongful act, while Article 18 relates to responsibility of a State as a result of coercion of another State to commit an internationally wrongful act. Article 19 is a saving clause making clear that the other provisions contained in the Chapter are without prejudice to the responsibility of the State which actually commits the internationally wrongful act, or the responsibility of any other State.

Given the nature of the situations governed by Articles 16 to 19, it is entirely unsurprising that few cases have arisen in recent years concerning situations which might give cause to refer to the Articles. As a matter of conjecture, the specific circumstances covered by the provisions of Chapter IV of Part One only occur relatively infrequently; international litigation in that regard will be even more infrequent. In particular, it is to be expected that instances of direction and control exercised by one State over another State's breach of its obligations, and coercion by one State of another State to breach its international obligations, arise extremely rarely in practice, and will even more rarely be the subject of judicial scrutiny in proceedings before the consensual jurisdiction of international courts and tribunals. However, even in the case of aid and assistance by a State in the breach by another State of its international obligations, which one might speculate may be more common-place than coercion or direction or control of another State, there appear to have been no instances calling for application of the Articles.

ARTICLE 16

**Aid or assistance in the commission
of an internationally wrongful act**

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Article 16 provides for the responsibility of a State which ‘aids or assists’ another State in committing an internationally wrongful act. It provides that, in order for responsibility to arise for the State providing aid or assistance, in addition to conduct aiding or assisting in the breach of its international obligations by that other State, the aiding or assisting State must have ‘knowledge of the circumstances of the internationally wrongful act’ committed by the other State. In addition, the act in relation to which aid or assistance is provided must be one which, if committed by the State providing aid or assistance, would constitute a breach of its own international obligations.

As noted above, there appears to have been no case before an international judicial body since 2001 involving facts even potentially giving rise to the application of Article 16 of the Articles.

However, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,⁶⁹⁴ the International Court of Justice made reference to Article 16 and endorsed it as reflecting customary international law. The Court’s reference arose in the context of arguments that, in relation to the genocide committed at Srebrenica, the Respondent was internationally responsible as the result of its own acts contrary to Art. III (b)–(e) of the Genocide Convention, namely for acts constituting conspiracy to commit genocide, attempt to commit genocide, direct and public incitement to commit genocide and complicity in genocide, respectively.

As noted above in relation to Chapter II of Part One, on the material before it, the Court found that there was no evidence that organs of the FRY or persons acting upon its instructions or under its effective control had committed any act which could be characterised as conspiracy or incitement to commit genocide.⁶⁹⁵

The Court then turned to the question of whether any conduct which could be characterised as complicity in genocide under Article III, paragraph (e), of the Genocide Convention was attributable to the Respondent. The Court first of all emphasised that ‘complicity’ for these purposes was to be distinguished from the question of whether the actors or groups which committed the genocide had been acting upon the instructions or under the direction or effective control of the Respondent. In this regard, the Court made the obvious point that, if that were the case, any responsibility would be not for complicity, but for the acts of genocide themselves.⁶⁹⁶ The Court then went on to comment that ‘complicity’ under Article III (e) of the Genocide Convention ‘includes the provision of means to enable or facilitate the commission of the crime’, and that the notion of complicity in this sense under the Genocide Convention was similar to the concept found in the customary international law of State responsibility in relation to aid or

⁶⁹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁶⁹⁵ *Ibid.*, para. 417.

⁶⁹⁶ *Ibid.*, para. 419.

assistance provided by one State to another in relation to the commission of an internationally wrongful act.⁶⁹⁷

It was in this connection that the Court made reference to Article 16 of the Articles,⁶⁹⁸ which in the Courts view 'reflect[s] a customary rule',⁶⁹⁹ and this despite the fact that the acts in question were those of individuals and/or groups, rather than of a State and that, accordingly, Article 16 could not on its terms be directly applicable. The Court commented:

[a]lthough this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between 'complicity in genocide' within the meaning of Article III, paragraph (e), of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 – setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for 'complicity in genocide' within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.⁷⁰⁰

Although without referring explicitly to Article 16(a) in this regard, the Court went on to note that, given the special intent necessary for the crime of genocide:

[...] 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 (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity.⁷⁰¹

The Court however left open the question whether in addition 'complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator'.⁷⁰²

Similarly, the Court later discussed the differences between liability for breach of the obligation to prevent genocide under Article I of the Genocide Convention, and liability for complicity in genocide under Article III(e) of the Convention. The Court considered that it was 'especially important to lay stress on the differences between the requirements to be met' in relation to the two situations, and went on to observe:

[...] as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the

⁶⁹⁷ Ibid.

⁶⁹⁸ See also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Dissenting Opinion of Judge ad hoc Mahiou, para. 124 who also quoted Article 16 of the Articles.

⁶⁹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, para. 420.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid., para. 421.

⁷⁰² Ibid.

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moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts.⁷⁰³

The Court's interpretation of the notion of complicity under Article III(e) of the Genocide Convention as being analogous to the rule contained in Article 16 of the Articles, including the requirement that the aid or assistance had to be provided at the least with knowledge of the perpetrator's specific intent to commit genocide, had determinative results in the Court's assessment of whether the Respondent was in fact responsible for complicity in genocide. In this regard, the Court concluded that, despite 'the substantial aid of a political, military and financial nature'⁷⁰⁴ provided to the Republika Srpska and the VRS, both before the massacres at Srebrenica and during those events, and the fact that there could therefore be 'little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance',⁷⁰⁵ it had not been established beyond any doubt that the aid or assistance in question was provided at a time when the authorities of the respondent were:

[...] clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide [...]⁷⁰⁶

The Court thus equated the rules relating to responsibility for 'complicity' in genocide under Article III, paragraph (e), of the Genocide Convention, with the test for aid or assistance under the general law of State responsibility, which it found to be reflected in Article 16 of the Articles, and effectively imported that formulation of the rule wholesale into the specific treaty context of the Genocide Convention. It may also be noted that the Court implicitly accepted (at least by analogy) that the general rules of State responsibility relating to attribution in effect apply cumulatively with those relating to aid or assistance; thus it is not only actions of the State *strictu sensu* which may constitute aid or assistance giving rise to responsibility on this basis, but also the actions of any person or group which is attributable to the State as a matter of the general law of State responsibility. It therefore would appear to follow that, in addition to the conduct of organs of a State, actions of persons acting on the instructions or under the direction or effective control of State may give rise to responsibility as a consequence of aid or assistance in the commission of an internationally wrongful act.

However, as acknowledged by the Court itself, the analogy drawn is not exact and is not without its conceptual difficulties; in this regard, it may be noted that the Commentary to Article 16 makes clear that, in situations of aid or assistance, '[t]he State primarily responsibility in each case is the acting State, and the assisting State has only a supporting role'.⁷⁰⁷ However, under the Genocide Convention, the responsibility of a state which has been guilty of complicity is a primary one, resulting from the breach of its own obligation prohibiting it from taking any action rendering it complicit in genocide.

⁷⁰³ Ibid., para. 432.

⁷⁰⁴ Ibid., para. 422.

⁷⁰⁵ Ibid.

⁷⁰⁶ Ibid. para. 422. Cf. the criticism of Judge ad hoc Mahiou, in his Dissenting Opinion (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Dissenting Opinion of Judge ad hoc Mahiou, paras. 125–128), emphasising the tension of that finding with the Court's finding in relation to breach of the obligation of prevention, in relation to which the Court observed that 'although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent [...], they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 436.

⁷⁰⁷ Commentary to Paragraph 16, paragraph (1).

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 17 deals with the exceptional case of direction and control by one State of another State in the commission of an internationally wrongful act; it provides that a State which directs and controls another State in committing an internationally wrongful act is internationally responsible for that act so long as it has knowledge of the circumstances of the internationally wrongful act in question committed by the other State, and the act in question would have been internationally wrongful if committed by the State providing the direction and control.

There appear to have been no references to Article 17 since the adoption of the Articles on second reading in 2001.

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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 18 deals with the equally exceptional situation of coercion by one State of another to commit an internationally wrongful act. It provides that the coercing State is internationally responsible if the act, but for the coercion, would have been an internationally wrongful act of the coerced State, and the coercion is carried out with knowledge of the circumstances of the act.

As with Article 17 of the Articles, there appears to have been no reference made to Article 18 since the adoption of the Articles in 2001.

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.

Article 19 operates as a saving clause, providing that the responsibility of a state for providing aid or assistance, or as a result of direction and control or coercion under Articles 16 to 18 is without prejudice to the responsibility of the State which in fact commits the act in question, or any other State.

Given the lack of situations calling for application of Articles 16 to 18 of the Articles, similarly Article 19 has not been referred to since the adoption of the Articles.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

In addition to the two positive conditions for State responsibility contained in Article 2 of the Articles, namely that there must be conduct attributable to the State, which constitutes a breach of that State's international obligations, there is a negative condition, that the wrongfulness of the act should not be precluded. The circumstances precluding wrongfulness are the subject of Chapter V of Part One of the Articles.

Chapter V of Part One, deals with six circumstances precluding wrongfulness: namely, consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). In addition, the Chapter contains two further provisions: Article 26 provides that none of the enumerated circumstances precluding wrongfulness operates to preclude the wrongfulness of an act of a State not in conformity with a peremptory norm of international law. Article 27 is a saving clause, which provides that reliance on a circumstance precluding wrongfulness is without prejudice both to compliance with obligations once the circumstance precluding wrongfulness has ceased to exist, and issues of compensation for any loss caused by the act in question.

In the *Guyana/Suriname* arbitration,⁷⁰⁸ the Tribunal made reference to the Introductory Commentary to Chapter V of Part One in relation to Suriname's reliance on the doctrine of clean hands in resisting the admissibility of Guyana's claims of State responsibility for alleged breaches of the prohibition of the threat or use of force.⁷⁰⁹ The Tribunal observed:

[t]he doctrine of clean hands, as far as it has been adopted by international courts and tribunals, does not apply in the present case. No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms.⁷¹⁰

The Tribunal went on to reject Suriname's objection on this basis; having discussed relevant international jurisprudence on the question,⁷¹¹ the Tribunal found that:

Guyana's conduct does not satisfy the requirements for the application of the doctrine of clean hands, to the extent that such a doctrine may exist in international law.⁷¹²

Similarly, as discussed below in the context of Article 25, in its decision on annulment in *CMS Gas Transmission Company v Argentine Republic*⁷¹³ the ad hoc Committee made reference to a number of paragraphs from the Introductory Commentary to Chapter V of Part One⁷¹⁴ in distinguishing between the operation of an 'emergency' clause contained in the BIT, and the operation of Article 25 as a circumstance precluding wrongfulness, and discussing whether the state of necessity was to be regarded as a primary rule or, as the Commission had concluded, as a secondary rule. In that latter regard, the Committee expressed no view one way or the other:

⁷⁰⁸ *Guyana/Suriname*, Award of 17 September 2007.

⁷⁰⁹ Suriname also argued that the clean hands doctrine should be taken into account in assessing the merits of the claim, should it be held to be admissible: *ibid.*, para. 417.

⁷¹⁰ *Ibid.*, para. 418, referring to Introductory Commentary to Part One, Chapter V, paragraph (9).

⁷¹¹ *Guyana/Suriname*, Award of 17 September 2007, paras. 417–420.

⁷¹² *Ibid.*, para. 421. The Tribunal clarified that that ruling extended not 'both to Suriname's admissibility argument based on clean hands and to its argument that clean hands should be considered on the merits of Guyana's Third Submission to bar recovery': *Ibid.*, para. 422.

⁷¹³ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007.

⁷¹⁴ *Ibid.*, note 155, citing Introductory Commentary to Part One, Chapter V, paragraphs (2)–(4) and (7).

[i]f state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. In other terms, [...] if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been 'no breach' of the BIT. Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25.

If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law – and this was the position taken by the ILC. In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.⁷¹⁵

⁷¹⁵ Ibid., paras. 133–134 (footnotes omitted).

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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 20 is concerned with situations where a State has consented to the commission of acts by another State. To the extent that such consent was validly given, the wrongfulness of the acts in question is precluded to the extent that the act falls within the consent given.

No express references have been made to Article 20 in international judicial decisions. Nevertheless, a number of decisions have involved issues of consent as precluding responsibility; this has particularly been the case in relation to cases involving the use of force. These examples provide implicit support for the existence of a rule of the law of State responsibility that consent validly given to actions which would otherwise constitute a wrongful act precludes international responsibility for those acts.

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*⁷¹⁶ before the International Court of Justice, the DRC claimed violation of, inter alia, the prohibition of the use of force and the principle of non-intervention as the result of the presence and actions of Ugandan troops on the territory of the DRC,⁷¹⁷ its claims in that regard being limited to events after 2 August 1998.⁷¹⁸ In response, Uganda argued that the presence of Ugandan troops on the territory of the DRC at various times had been with the consent of the DRC, as well as arguing that in periods where consent had been withdrawn, it was operating in self-defence.

No reference was made to Article 20 of the Articles in this regard, nor indeed is there any express articulation in the Court's judgment as to the relevance of the fact that consent had been given by the DRC; however various passages of the Court's judgment permit the inference that the Court clearly implicitly proceeded on the basis that, to the extent that consent had been given, the presence of Ugandan troops on the territory of the DRC would not have involved any violation of the rules of international law relied upon by the DRC.

Having discussed the various events on the basis of which it was argued that DRC had consented to the presence of Ugandan troops had been with the consent of the DRC, the Court concluded that:

[...] from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever.⁷¹⁹

In relation to Uganda's reliance on the various agreements concluded after July 1999 with the aim of securing an orderly withdrawal of foreign troops from the territory of the DRC, the Court held that:

[...] the various treaties directed to achieving and maintaining a ceasefire, the withdrawal of foreign forces and the stabilization of relations between the DRC

⁷¹⁶ *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁷¹⁷ For the precise formulation of the claim, see *ibid.*, para. 28.

⁷¹⁸ *Ibid.*, paras. 44 and 54

⁷¹⁹ *Ibid.*, para. 149; the Court also found that those actions had not been justified on the basis of self-defence, as discussed below in the context of Article 21

and Uganda did not (save for the limited exception regarding the border region of the Ruwenzori Mountains contained in the Luanda Agreement) 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.⁷²⁰

Finally, it may be noted that the Court prefaced its discussion of Uganda's argument based on self-defence by noting that it had earlier found that

[...] with regard to the presence of Ugandan troops on Congolese territory near to the common border after the end of July 1998, President Kabila's statement on 28 July 1998 was ambiguous [...]. The Court has further found that any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998.⁷²¹

Those statements are all consistent with the view that, insofar as the DRC had consented to the presence of Ugandan troops on its territory, the wrongfulness of Uganda's acts would, to the extent that their acts fell within the scope of that consent, have been precluded.

The Court's discussion of the factual basis on which it was alleged that there had been consent is also of some interest, and is fully consistent with the rule encapsulated in Article 20. Uganda claimed that it operated on the territory of the DRC with its consent from May 1997 until 11 September 1998 (the date on which it asserted that it had become entitled to so operate on the basis of self-defence).⁷²² It further argued that, from 10 July 1999, further consent to the presence of its troops on the territory of the DRC derived from the terms of the Lusaka Agreement.⁷²³ Despite the fact that the DRC's claims were limited to the period after 2 August 1998, the Court examined events prior to that date in order to elucidate whether consent had been given by the DRC, and at what point that consent had been withdrawn.

The Court concluded that from mid-1997 and into 1998, Ugandan troops had been permitted to operate on the territory of the DRC:

[i]t seems certain that from mid-1997 and during the first part of 1998 Uganda was being allowed to engage in military action against anti-Ugandan rebels in the eastern eastern Congo by President Kabila when he came to power in May 1997. The DRC has acknowledged that 'Ugandan troops were present on the territory of the Democratic Republic of the Congo with the consent of the country's lawful government'. It is clear from the materials put before the Court that in the period preceding August 1998 the DRC did not object to Uganda's military presence and activities in its eastern border area.⁷²⁴

The Court went on to find that a Protocol on Security along the Common Border signed on 27 April 1998 was consistent with consent by the DRC to operations by Ugandan troops on the DRC's territory; however, the Court emphasized in this regard that:

[w]hile the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, it was not the legal basis for such authorization or consent. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol and this prior authorization or consent could thus be withdrawn at

⁷²⁰ Ibid., para. 105.

⁷²¹ Ibid., para. 106.

⁷²² Cf. Ibid., para. 43.

⁷²³ Ibid.

⁷²⁴ Ibid., para. 45.

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any time by the Government of the DRC, without further formalities being necessary.⁷²⁵

Similarly, later on in its judgment, in the context of its discussion of Uganda's attempted justification of its actions based on self-defence, the Court observed that certain of the actions of the Ugandan forces after 11 September 1998 were inconsistent with the suggestion that they were based on consent:

[...] while it is true that those localities are all in close proximity to the border, 'as per the consent that had been given previously by President Kabila', the nature of Ugandan action at these locations was of a different nature from previous operations along the common border. Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults[...]

The Court finds these actions to be quite outside any mutual understanding between the Parties as to Uganda's presence on Congolese territory near to the border. The issue of when any consent may have terminated is irrelevant when the actions concerned are so clearly beyond co-operation 'in order to ensure peace and security along the common border', as had been confirmed in the Protocol of 27 April 1998.⁷²⁶

In relation to a statement by the President of the DRC on 28 July 1998 relied upon by the DRC as constituting a withdrawal of consent, the Court concluded that its terms were ambiguous as to whether it withdrew the previous consent for the operations of Ugandan troops, although again emphasising that 'no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil'.⁷²⁷

In this regard, the Court further emphasized the limited nature of the consent previously granted:

[...] the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. The DRC accepted that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the common border. Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.⁷²⁸

That passage of the Court's judgment is in full concordance with the position taken by the ILC in Article 20, as also explained in the Commentaries, that the wrongfulness of an act is precluded only to the extent 'that the act remains within the limits of that consent'.⁷²⁹

In the event, the Court did not decide precisely at what point consent was withdrawn, or whether the actions of Uganda in the period July to August 1998 had exceeded the limited scope of that consent; rather, it observed:

[i]n the event, the issue of withdrawal of consent by the DRC, and that of expansion by Uganda of the scope and nature of its activities, went hand in hand. The Court observes that at the Victoria Falls Summit [...] the DRC accused Rwanda and Uganda of invading its territory. Thus, it appears evident to the

⁷²⁵ Ibid., para. 48.

⁷²⁶ Ibid., paras. 110–111.

⁷²⁷ Ibid., para. 51.

⁷²⁸ Ibid., para. 52.

⁷²⁹ See also Commentary to Article 20, paragraphs (1) and (9).

Court that, whatever interpretation may be given to President Kabila's statement of 28 July 1998, any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Victoria Falls Summit.⁷³⁰

Also of interest in relation to the issue of consent is the Court's discussion of Uganda's argument that the Lusaka Agreement of 10 July 1999 and subsequent agreements constituted consent by the DRC to the presence of Ugandan troops on its territory.⁷³¹

The Court observed that the Lusaka Agreement did not refer to 'consent', but to 'final withdrawal of all foreign forces from the national territory of the DRC'. Although the Agreement had provided for the 'Orderly Withdrawal' of foreign troops over a specified time-frame, and had stipulated that, pending such withdrawal, foreign troops should remain where they were,⁷³² this was not to taken as constituting consent by the DRC to the presence of Ugandan troops on its territory for the period foreseen for the orderly withdrawal. The Court observed that the Lusaka Agreement:

[...] took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed *modus operandi* for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this *modus operandi* the DRC did not 'consent' to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.⁷³³

The Court likewise concluded that the effect of the Lusaka Agreement was not affected by the revised timetables for withdrawal agreed in the Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000:

While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar.⁷³⁴

Similarly, the Court concluded that the terms of the bilateral Luanda Agreement entered into between the DRC and Uganda which further modified the timetable for withdrawal, did not constitute a generalised consent to presence of Ugandan forces, and this despite the fact that it was agreed that Ugandan forces should remain in a defined and circumscribed area on the slopes of Mount Ruwenzori 'until the Parties put in place security mechanisms guaranteeing Uganda's

⁷³⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168, para. 53.

⁷³¹ On this point, Judge Parra-Aranguren and Judge ad hoc Kateka dissented from the majority, taking the view that the Lusaka Agreement embodied the consent of the DRC to the continued presence of Ugandan troops on its territory.

⁷³² See the provisions of the Lusaka Agreement referred to in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168, para. 95.

⁷³³ *Ibid.*, para. 99.

⁷³⁴ *Ibid.*, para. 101.

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security, including training and co-ordinated patrol of the common border.⁷³⁵ The Court observed:

[...] as with the Lusaka Agreement, none of these elements purport generally to determine that Ugandan forces had been legally present on the territory of the DRC. The Luanda Agreement revised the *modus operandi* for achieving the withdrawal of Ugandan forces in a stable security situation. It was now agreed - without reference to whether or not Ugandan forces had been present in the area when the agreement was signed, and to whether any such presence was lawful - that their presence on Mount Ruwenzori should be authorized, if need be, after the withdrawal elsewhere had been completed until appropriate security mechanisms had been put in place. The Court observes that this reflects the acknowledgment by both Parties of Uganda's security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere.⁷³⁶

From the Court's discussion in relation to consent in *Armed Activities on the Territory of the Congo*, a number of points may be derived which are capable of more general application. First, at least in circumstances such as those at issue in *Armed Activities on the Territory of the Congo*, consent to presence of troops on the territory of a State is susceptible to withdrawal at any time, and without any particular formalities; it is sufficient that the consenting State makes clear that it no longer consents to the carrying out of operations by foreign troops on its territory, although any communication of withdrawal of consent has to be sufficiently clear. Second, the scope of any consent in fact given has to be carefully examined, and the wrongfulness of any conduct falling outside the scope of that consent will not be precluded. Third, consent to conduct which is otherwise internationally wrongful has to be clearly expressed, and the mere fact that a State accepts the 'factual realities' resulting from a breach of an international obligation, and agrees to a mechanism to remedy the situation, does not necessarily entail that it is to be taken thereby to have consented to the legality of the situation for the purposes of international responsibility.

⁷³⁵ See the text of the Luanda Agreement quoted *ibid.*, para. 103.

⁷³⁶ *Ibid.*, para. 104.

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 21 provides that, to the extent that an act constitutes a lawful measure of self-defence in conformity with the Charter of the United Nations, its wrongfulness is precluded.

There have been a number of references to self-defence since the adoption of the Articles in decisions of the International Court of Justice, although the Court itself has not referred to Article 21. On the other hand, a number of judges of the Court in their separate opinions have made express reference to Article 21.

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁷³⁷ the International Court of Justice, having concluded that ‘the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel’, went on to consider whether Israel’s conduct could be justified on the basis of self-defence. In this regard, the Court did not make express reference to Article 21, and did not explicitly state that if it were established that the actions of Israel were taken in self-defence, that would have necessarily precluded their wrongfulness under the international law of State responsibility. However, that conclusion may be inferred from the Court’s later statement in relation to self-defence (and necessity) that:

[Israel] cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall.⁷³⁸

In addressing the question of self-defence, having set out the text of Article 51 of the Charter, the Court observed:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.⁷³⁹

By contrast, Judge Buergenthal in his Separate Declaration,⁷⁴⁰ made express reference to Article 21 in the context of his criticism of the Court’s approach in the Advisory Opinion. Judge Buergenthal

⁷³⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

⁷³⁸ Ibid., at p. 195, para. 142.

⁷³⁹ Ibid., at p. 194, para. 139.

⁷⁴⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Declaration of Judge Buergenthal, ICJ Reports 2004, p. 240.

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was of the view that the Court ‘did not have before it the requisite factual bases for its sweeping findings’ in several regards, including in relation to self-defence.⁷⁴¹ In that regard, he stated:

I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected. But assuming without necessarily agreeing that this right is relevant to the case before us and that it is being violated, Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard. See Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which declares: ‘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.’

Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations. Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case.⁷⁴²

The issues of self defence also arose in the International Court of Justice's judgment on the merits in *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda)*.⁷⁴³

In relation to the period after 11 September 1998, in relation to which it was clear that any consent to the presence of Ugandan troops on the territory of the DRC had been withdrawn, Uganda argued that its actions had nevertheless been justified on the basis that it was acting in self-defence, in response to a threat arising from preparations of Congolese and Sudanese forces operating in eastern Congo in August–September 1998.⁷⁴⁴

The Court's judgment in this regard, although again containing no reference to Article 21 of the Articles, does not disclose an approach at variance with the rule formulated by the ILC in Article 21. In relation to various actions taken by Uganda after 11 September 1998 against eastern border towns, the Court noted that, given that those actions had gone far beyond the scope of any consent which might have been given by the DRC, even if such consent had not already been withdrawn by that time, they:

[...] could therefore only be justified, if at all, as actions in self-defence. However, at no time has Uganda sought to justify them on this basis before the Court.⁷⁴⁵

In relation to the actions in relation to which self-defence was expressly relied upon, the Court observed:

⁷⁴¹ Ibid., at p. 240, para. 1.

⁷⁴² Ibid., at pp. 241–242, paras. 4–5. See also the reservations expressed by Judge Higgins as to the Court's analysis that Israel's action could not be justified on the basis of self-defence: Separate Opinion of Judge Higgins, *ICJ Reports 2004*, p. 207, at pp. 215–216, paras. 33 and 35.

⁷⁴³ *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda)*, *ICJ Reports 2005*, p. 168.

⁷⁴⁴ Ibid., para. 39.

⁷⁴⁵ Ibid., para. 112.

[...] before this Court Uganda has qualified its action starting from mid-September 1998 as action in self-defence. The Court will thus examine whether, throughout the period when its forces were rapidly advancing across the DRC, Uganda was entitled to engage in military action in self-defence against the DRC. For these purposes, the Court will not examine whether each individual military action by the UPDF could have been characterized as action in self-defence, unless it can be shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC in the period from August 1998 till June 2003.⁷⁴⁶

In relation specifically to 'Operation Safe Haven',⁷⁴⁷ the Court had earlier observed that the operation 'was firmly rooted in a claimed entitlement 'to secure Uganda's legitimate security interests' rather than in any claim of consent on the part of the DRC.'⁷⁴⁸ In this regard, the Court regarded it as significant that:

[...] the objectives of operation 'Safe Haven', as stated in the Ugandan High Command document [...] were not consonant with the concept of self-defence as understood in international law.⁷⁴⁹

Having considered the various factual allegations as to involvement of third States in assisting rebels, and the DRC's alleged involvement in that regard, the Court observed that the legality of the various actions by Uganda 'must stand or fall by reference to self-defence as stated in Article 51 of the Charter.' In that regard, the Court observed:

[t]he Court would first observe that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.

It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The 'armed attacks' to which reference was made came rather from the ADF. The Court has found above [...] that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.⁷⁵⁰

The Court continued:

[f]or all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the

⁷⁴⁶ Ibid., para. 118.

⁷⁴⁷ An operation authorised by the Ugandan High Command on 11 September 1998 against Ugandan dissident groups present on the territory of the DRC, and other groups who had allegedly launched attacks against Uganda from the territory of the DRC, allegedly with the support of Sudan and the DRC: see *ibid.*, para. 109 for the terms of the Ugandan High Command decision.

⁷⁴⁸ Ibid., para. 113, and see the document cited *ibid.*, para. 109.

⁷⁴⁹ Ibid., para. 119; see also *ibid.*, para. 143.

⁷⁵⁰ Ibid., paras. 145–146.

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circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.⁷⁵¹

Later on in the judgment, in the context of its discussion of the legal principles applicable to the question of whether Uganda had violated the prohibition of the use of force and the principle of non-intervention, the Court, having quoted Article 2(4) of the United Nations Charter, observed that:

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

The Court has found that, from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defence.⁷⁵²

The question of self-defence also arose in the context of Uganda's counterclaim that the DRC had itself breached the prohibition of the use of force. In relation to the period following 2 August 1998, the Court observed that:

[...] the legal situation after the military intervention of the Ugandan forces into the territory of the DRC was, after 7 August, essentially one of illegal use of force by Uganda against the DRC [...]. In view of the finding that Uganda engaged in an illegal military operation against the DRC, the Court considers that the DRC was entitled to use force in order to repel Uganda's attacks. The Court also notes that it has never been claimed that this use of force was not proportionate nor can the Court conclude this from the evidence before it. It follows that any military action taken by the DRC against Uganda during this period could not be deemed wrongful since it would be justified as action taken in self-defence under Article 51 of the United Nations Charter.⁷⁵³

⁷⁵¹ Ibid., para. 147.

⁷⁵² Ibid., paras. 148 and 149.

⁷⁵³ Ibid., para. 304.

ARTICLE 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.

Article 22 provides that the wrongfulness of an act of a State which would otherwise constitute a breach by the State of its international obligations is precluded to the extent that it constitutes a countermeasure taken in accordance with the provisions of Chapter II of Part Three.

No references appears to have been made to Article 22 of the Articles in judicial practice. However, as noted below in relation to Chapter II of Part Three a number of references have been made to the provisions of that Chapter which regulates in detail the question of countermeasures. In particular, Judge Simma in his Separate Opinion at the merits stage of *Oil Platforms (Islamic Republic of Iran v United States of America)*,⁷⁵⁴ made reference to the provisions of that Chapter as a whole (Articles 49 to 54) in discussing whether measures involving the use of armed force were permissible reactions in response to a use of armed force falling short of an armed attack.⁷⁵⁵

⁷⁵⁴ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, ICJ Reports 2003, p. 161.

⁷⁵⁵ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, Separate Opinion of Judge Simma, ICJ Reports 2003, p. 324, at p. 332, para. 12 and note 19.

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 23 provides that the wrongfulness of an act which would otherwise constitute a breach of an international obligation of a State is precluded if the act was due to *force majeure*. For these purposes, *force majeure* is defined as events constituting 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.' In line with the requirement that the event or force in question must be beyond the control of the State in question, paragraph 2 provides that a State is not able to rely on *force majeure* as a circumstance precluding wrongfulness if the situation is due to the conduct of the State, and makes clear that a situation of *force majeure* may not be relied upon if the State had assumed the risk of the situation occurring.

The rule contained in Article 23 is a tightly circumscribed justification for non-compliance by a State with its international obligations, and it is accordingly not surprising that it should have been infrequently invoked.

In *Autopista Concesionada de Venezuela C.A. v Bolivarian Republic of Venezuela*,⁷⁵⁶ the claimant, which operated a motorway under a concession, complained of the respondent's failure to increase the applicable toll rates which it was entitled to charge in accordance with the Concession Agreement. The claim before ICSID was brought purely on the basis of breach of Venezuela's contractual obligations under the Concession Agreements, and did not concern allegations of breach by Venezuela of any of its international obligations. Nevertheless, in light of Article 42 ICSID Convention, the Tribunal considered that it might be appropriate to have regard to international law in a corrective or supplemental role, and the parties were agreed that international law would prevail over Venezuelan law in case of conflict.⁷⁵⁷

In response to the claims, Venezuela relied upon the public opposition to the increase in tolls and related civil unrest as constituting *force majeure* preventing Venezuela from increasing the tolls, and argued that the claimant had failed 'to demonstrate that the Republic's inability to increase toll rates was not excused by *force majeure* events.'⁷⁵⁸

The Tribunal recalled that it was:

[...] common ground between the parties that *force majeure* is a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law. It is further common ground that the following conditions must be fulfilled for a *force majeure* excuse:

⁷⁵⁶ *Autopista Concesionada de Venezuela C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) Award of 23 September 2003.

⁷⁵⁷ *Ibid.*, paras. 102–103.

⁷⁵⁸ *Ibid.*, para. 106.

- Impossibility [...], i.e., the force majeure event made performance impossible to achieve [...]
- Unforeseeability [...], i.e., the force majeure event was not foreseeable [...]
- Non-attributability [...], i.e., the force majeure event was not attributable to the defeating party.⁷⁵⁹

Those three conditions correspond to the formulation of *force majeure* as a circumstance precluding wrongfulness contained in Article 23 of the Articles.

Before turning to consider whether each of those conditions was made out in relation to the civil unrest in question, the Tribunal first of all addressed the issue of the incidence of the burden of proof, raised by Venezuela's submission the Claimant had 'failed to demonstrate' that the failure to increase the tolls was not caused by *force majeure*. The Tribunal dealt with that issue briefly, observing that:

[a]s a matter of principle, each party has the burden of proving the facts upon which it relies. This is a well-established principle of both Venezuelan and international law. Accordingly, it is up to Venezuela, which relies upon the *force majeure* excuse, to prove that the conditions of *force majeure* are met.⁷⁶⁰

The Tribunal first dealt with the issue of unforeseeability. In relation to Venezuela's argument that the possibility of violent civil unrest was not foreseeable, the Tribunal concluded that, as a result of a previous episode of civil unrest in 1989 as a consequence of increases in the price of petrol (the 'Caracazo'):

[...] one cannot reasonably argue that Venezuelan officials negotiating the Agreement could ignore that the increase in transportation price resulting from the contractual mechanism of toll rate increase could at least potentially lead to violent popular protest similar to the one of 1989.

[...]

Venezuela did not establish, or even explain, the reasons why the strong public resistance was apparent shortly after the signature of the Agreement and before any actual attempt to increase the tolls, while it was unforeseeable shortly before during the negotiation of the contract. In these conditions, the Tribunal is not convinced that the possibility of strong popular resistance to toll increase became apparent only after the conclusion of the Concession Agreement.⁷⁶¹

The Tribunal further observed, rejecting an argument that the magnitude of the unrest was unforeseeable, that:

Venezuela seems to recognize (or at least not to deny) that some public resistance was foreseeable. What it denies is the foreseeability of the magnitude of such resistance. The Tribunal finds that the evidence before it, and in particular the testimony concerning the impact of the *Caracazo* on Venezuela society, clearly demonstrated that if popular protest could be foreseen, then the possibility of very violent protest could not be ruled out.⁷⁶²

⁷⁵⁹ Ibid., para. 108.

⁷⁶⁰ Ibid., para. 110.

⁷⁶¹ Ibid., paras. 115–116.

⁷⁶² Ibid., para. 117.

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Accordingly, the Tribunal concluded:

[g]iven the well known tragic precedent of the *Caracazo* and the similar impact on the population of the contractual toll increase, Venezuela did not convince the Tribunal that the possibility of civil unrest could not be foreseen at the time of the negotiation of the Concession Agreement. In conclusion, the Tribunal finds that the alleged impossibility of raising the toll was not unforeseeable.

For lack of unforeseeability, Venezuela's non-performance cannot be excused on the ground of *force majeure*. Hence, whether the conditions of impossibility and attributability are met is not decisive.⁷⁶³

In spite of that finding, which was sufficient to dispose of the issue of *force majeure*, the Tribunal went on to consider the arguments in relation to the conditions of impossibility of compliance and attributability of the events constituting *force majeure*.

In relation to the standard of impossibility under international law, the Tribunal referred to, *inter alia*, the Articles, in reaching its conclusion that international law did not impose a different standard of impossibility from that applicable under Venezuelan law, and accordingly, the latter was not displaced.⁷⁶⁴ In that regard, the Tribunal observed that under Venezuelan law:

[...] it is not necessary that the *force majeure* event be irresistible; it suffices that by all reasonable judgment the event impedes the normal performance of the contract.⁷⁶⁵

As to whether the level of impossibility in the case before the Tribunal in fact rose to that standard, the Tribunal abstained from deciding the point, in light of its earlier conclusion as to unforeseeability; it observed:

Venezuela admits that the civil protest was not irresistible in the sense that it could not have been mastered by the use of force. This being so, the question then becomes: by all reasonable judgment how much force can a State be legally required to deploy to perform its contract obligations? The answer to this question implies a delicate assessment that calls in part for political judgment. Considering its determination on unforeseeability, the Arbitral Tribunal will not finally resolve it. Suffice it to state that this Tribunal is rather inclined to find that, in consideration of the events of 1989 and of the risk of repetition, the impossibility requirement appears met.⁷⁶⁶

Some doubts may be raised as to the Tribunal's conclusion in this regard, at least as concerns the requirement of impossibility of performance as a matter of international law; in particular, reference may be made in this regard to the Commentary to Article 23, which emphasizes that in a situation of *force majeure* 'the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice' and that 'the situation must be irresistible, so that the state concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis.'⁷⁶⁷

In relation to the final condition of non-attributability of the situation of *force majeure* to the State, the Tribunal observed that, although it was disputed whether municipal authorities had supported

⁷⁶³ Ibid., paras. 118–119.

⁷⁶⁴ Ibid., para. 123.

⁷⁶⁵ Ibid., paras. 121 and 122.

⁷⁶⁶ Ibid., para. 125.

⁷⁶⁷ Commentary to Article 23, paragraphs (1) and (3).

the protests, it was not apparent what the causative effect of that involvement had been; in the circumstances, the Tribunal abstained from reaching any decision on that point.⁷⁶⁸

In *Enron and Ponderosa Assets L.P. v Argentina*,⁷⁶⁹ the Tribunal made reference to Article 23 and the Commentary thereto in the context of a discussion of a domestic law defence based on the theory of '*imprevisión*', noting that:

[...] it must be kept in mind that, at least as the theory of '*imprevisión*' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation should in addition be the occurrence of an irresistible force, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. In the commentary to this article it is stated that '*Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.⁷⁷⁰

The Tribunal in *Sempra Energy International and Argentine Republic*⁷⁷¹ in its award made an observation in identical terms, again referring to Article 23 and the Commentary thereto.⁷⁷²

⁷⁶⁸ *Autopista Concesionada de Venezuela C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) Award of 23 September 2003, para. 128.

⁷⁶⁹ *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Award of 22 May 2007.

⁷⁷⁰ *Ibid.*, para. 217 and note 33, referring to Commentary to Article 23, para. (3).

⁷⁷¹ *Sempra Energy International and Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007.

⁷⁷² *Ibid.*, para. 246 and note 67, referring to Commentary to Article 23, para. (3).

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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 24 provides that the wrongfulness of an act not in conformity with an international obligation is precluded if the author of the act in question was in a state of distress and therefore had no other reasonable way of saving his own life or the lives of others. As with other provisions contained in Chapter V of Part One, the circumstances in which a situation of distress may be invoked as precluding wrongfulness are narrowly circumscribed; Article 24(2) clarifies that distress can not be invoked if the situation is due, even if only in part, to the conduct of the State invoking it, or if the act in question is likely to create a comparable or greater peril.

Given the exceptional circumstances to which it relates, Article 24 appears not to have been referred to judicially since the adoption of the Articles in 2001.

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 25 regulates the circumstances in which a state may rely on a state of necessity in order to preclude the wrongfulness of an act which would otherwise be internationally wrongful. It is restrictively phrased in the negative, setting out the circumstances in which necessity may not be invoked. The first paragraph of the provision provides that necessity may not be invoked unless the act in question is the only way for the State to safeguard an essential interest against a grave and imminent peril, and only if such invocation does not seriously impair an essential interest of the State or States to which the obligation is owed, or of the international community as a whole. The second paragraph further qualifies the circumstances in which necessity may be relied upon, precluding such reliance if excluded by the international obligation in question, or if the State has contributed to the situation of necessity.

Even before its definitive adoption of the Articles on second reading, the ILC's approach to the question of necessity as a circumstance precluding wrongfulness was referred to by the International Court of Justice in its decision in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.⁷⁷³ There the International Court of Justice made reference to the draft provision adopted on first reading in 1996 which was to become Article 25.⁷⁷⁴

In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁷⁷⁵ the International Court of Justice, having considered whether Israel's action could be justified on the basis of self-defence in accordance with Article 51 of the Charter of the United Nations, and concluded in the negative, turned to consider whether the construction of the wall could be justified on the basis of the existence of a state of necessity, and in this regard, made reference to Article 25 of the Articles. The Court stated that it had:

[...] considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation [...]. Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in

⁷⁷³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7

⁷⁷⁴ Ibid., at pp. 39–46, paras. 50–58, referring to draft Article 33 as adopted on first reading, and the accompanying draft Commentary.

⁷⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

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customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ‘the state of necessity is a ground recognized by customary international law’ that ‘can only be accepted on an exceptional basis’; it ‘can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met’ [...]. One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be ‘the only way for the State to safeguard an essential interest against a grave and imminent peril’ (Article 25 of [the Articles...]). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.⁷⁷⁶

The Court continued:

[t]he fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall [...]. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.⁷⁷⁷

Article 25 has been frequently relied upon in investment treaty arbitrations, in particular in relation to the slew of arbitrations arising from the financial crisis in Argentina. Although the various awards handed down to date have all accepted the applicability of Article 25 as representing customary international law, the results have been to some extent divergent.

The cases against Argentina have raised the issue of whether the economic crisis faced by the country in the late 1990s qualified as a state of necessity for the purposes of Article 25 of the Articles. It was argued by Argentina that if that were the case, to the extent that the various measures adopted in an attempt to stabilize the situation (including the freezing of dollar-indexed tariffs in concession agreements and the devaluing of the peso) violated its international obligations in relation to foreign investors, the wrongfulness of those measures would have been precluded.

In *CMS Gas Transmission Company v Argentine Republic*,⁷⁷⁸ the claimant had invested in a privatized company (‘TGN’) which was involved in the transportation of gas. Following the onset of the economic crisis, tariffs under the relevant concession agreement were frozen and no further adjustments were made in accordance with the US Producer Price Index (PPI). Thereafter, an Emergency Law promulgated in January 2002, inter alia, revoked the pegging of the Argentine peso to the US dollar, and the peso was devalued.

⁷⁷⁶ Ibid., at p. 194–195, para. 140, quoting *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p. 7, at p. 40, para. 51; the Court also made reference to the text adopted on first reading (Article 33) which became Article 25, and noted that it had had slightly different wording in the English text.

⁷⁷⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at p. 195, paras. 141–142.

⁷⁷⁸ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005.

The Tribunal held that there had been no expropriation of the claimant's investment as a result of the various measures, nor had there been any impairment of the investment by arbitrary or discriminatory measures. However, the Tribunal concluded that there had been a breach of the fair and equitable treatment standard as well as a breach of the umbrella clause contained in the BIT due to of violation of the two stabilization clauses contained in the licence granted to TGN, relating to non-freezing of the tariff regime and non-alteration of the basic rules covering the licence, respectively.

Argentina had argued that, as a result of the economic and social crisis, 'it should be exempted from liability in light of the existence of a state of necessity or state of emergency.'⁷⁷⁹ In this regard, Argentina argued, as summarised by the Tribunal, that the Emergency Law:

[...] was enacted with the sole purpose of bringing under control the chaotic situation that would have followed the economic and social collapse that Argentina was facing. State of necessity based on this crisis would exclude, in the Respondent's argument, any wrongfulness of the measures adopted by the government and in particular would rule out compensation.⁷⁸⁰

As regards international law, that plea gave rise to issues both as to whether Argentina was exempted from liability as a result of application of the customary international law rule relating to the state of necessity, as well as whether it was exempted by reason of Article XI of the applicable US-Argentine BIT which provided:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.⁷⁸¹

In relation to the customary law rule relating to the state of necessity as a justification for non-compliance with its international obligations under the BIT, Argentina relied upon various previous decisions, including in particular the judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project*, in which the Court had held that the state of necessity was recognized under customary international law as a circumstances 'precluding the wrongfulness of an act not in conformity with an international obligation',⁷⁸² as well as Article 25 of the Articles.⁷⁸³ The Claimant relied on essentially the same sources in support of its position that Argentina had not satisfied the burden of proof in establishing the existence of a state of necessity, and had not fulfilled the various conditions for operation of the state of necessity set out in Article 25, as there had been no grave or imminent peril, it had not been shown that Argentina had not contributed to the emergency, and it had not been shown that the measures adopted were the only means to overcome the crisis.⁷⁸⁴

In this regard, the Tribunal noted that it:

[...] like the parties themselves, considers that article 25 of the Articles on State responsibility adequately reflects the state of customary international law on the

⁷⁷⁹ The Tribunal had earlier rejected a parallel defence under Argentine law on the basis that 'the state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights. This is particularly so if the application of such measures extends beyond a strictly temporary period': *ibid.*, para. 217

⁷⁸⁰ *Ibid.*, para. 306.

⁷⁸¹ Quoted *ibid.*, para. 332.

⁷⁸² *Ibid.*, para. 309.

⁷⁸³ *Ibid.*, para. 311.

⁷⁸⁴ *Ibid.*, paras. 313–314.

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question of necessity. This article, in turn, is based on a number of relevant historical cases discussed in the Commentary [...].⁷⁸⁵

The Tribunal then proceeded to set out the text of Article 25 in full,⁷⁸⁶ before observing:

[w]hile the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.⁷⁸⁷

The Tribunal turned to address what it characterised as 'the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization'.⁷⁸⁸

The Tribunal dealt with the conditions contained in Article 25 one by one. It first addressed the question of whether 'an essential interest' of the State was involved; in that regard, it noted:

[a]gain here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the legal requirements set out by customary international law.⁷⁸⁹

In that regard, having observed that some economists had expressed the view that the crisis was of catastrophic proportions, while others had taken a more qualified view, the Tribunal stated that it was:

[...] convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey.

It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued.⁷⁹⁰

As regards the requirement of a 'grave and imminent peril', as required by Article 25(1)(a), the Tribunal observed:

⁷⁸⁵ Ibid., para. 315.

⁷⁸⁶ Ibid., para. 316.

⁷⁸⁷ Ibid., para. 317.

⁷⁸⁸ Ibid., para. 318.

⁷⁸⁹ Ibid., para. 319.

⁷⁹⁰ Ibid., paras. 320–321.

[h]ere again the Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness.⁷⁹¹

Turning to the question of whether the measures were the ‘only way’ for the State to safeguard its essential interests, the Tribunal observed that this was ‘indeed debatable’, and made reference to the Commentary to Article 25:

[T]he views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternative would have been better is a decision beyond the scope of the Tribunal’s task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.

The International Law Commission’s comment to the effect that the plea of necessity is ‘excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,’ is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.⁷⁹²

It is notable that in this regard the Tribunal did not go on to assess whether the other solutions suggested would have been ‘otherwise lawful’, but appears to merely have concluded, without any debate, that this was the case in relation to at least some of the other suggested alternative measures available.

The Tribunal next turned to the requirement contained in Article 25(1)(b) that the measure adopted not seriously impair an interest of the State or States to which the obligation exists. In this regard, the Tribunal noted

[a]s the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles.⁷⁹³

The Tribunal returned to the question of whether the measures had seriously impaired an interest of the State to which the obligation was owed in the context of its consideration of Article XI of the BIT exempting from the scope of the BIT the adoption of measures by a State party ‘necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.’ In that regard, the Tribunal observed:

[a] second issue the Tribunal must determine is whether, as discussed in the context of Article 25 of the Articles on State Responsibility, the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists. If the Treaty was made to protect investors it must be

⁷⁹¹ Ibid., para. 322

⁷⁹² Ibid., para. 323–324, referring to Commentary to Article 25, paragraph (15)

⁷⁹³ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 325.

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assumed that this is an important interest of the States parties. Whether it is an essential interest is difficult to say, particularly at a time when this interest appears occasionally to be dwindling.

However, be that as it may, the fact is that this particular kind of treaty is also of interest to investors as they are specific beneficiaries and for investors the matter is indeed essential. For the purpose of this case, and looking at the Treaty just in the context of its States parties, the Tribunal concludes that it does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole. Accordingly, the plea of necessity would not be precluded on this count.⁷⁹⁴

Turning to the conditions contained in Article 25(2), the Tribunal made reference to the Commission's Commentary, in stating that:

[...] the use of the expression 'in any case' in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.⁷⁹⁵

In relation to the question of whether the international obligations in question excluded reliance on the state of necessity for the purposes of Article 25(2)(a), the Tribunal also addressed that issue later on in the decision, again in the context of its discussion of the 'emergency' provision contained in Article XI of the BIT.⁷⁹⁶ At the outset of its discussion of the issue, the Tribunal again relied on the Commentary to Article 25, noting:

[t]here are of course treaties designed to be applied precisely in the case of necessity or emergency, such as those setting out humanitarian rules for situations of armed conflict. In those cases, as rightly explained in the Commentary to Article 25 of the Articles on State Responsibility, the plea of necessity is excluded by the very object and purpose of the treaty.⁷⁹⁷

The Tribunal continued:

[t]he Treaty in this case is clearly designed to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government. The question is, however, how grave these economic difficulties might be. A severe crisis cannot necessarily be equated with a situation of total collapse. And in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any plea of necessity. However, if such difficulties, without being catastrophic in and of themselves, nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy, emergency and necessity might acquire a different meaning.

[...] the Tribunal is convinced that the Argentine crisis was severe but did not result in total economic and social collapse. When the Argentine crisis is compared to other contemporary crises affecting countries in different regions of the world it may be noted that such other crises have not led to the derogation of international contractual or treaty obligations. Renegotiation, adaptation and

⁷⁹⁴ Ibid., para. 358.

⁷⁹⁵ Ibid., para. 326, referring to Commentary to Article 25, paragraph (19).

⁷⁹⁶ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 327.

⁷⁹⁷ Ibid., para. 353, referring to Commentary to Article 25, paragraph (19).

postponement have occurred but the essence of the international obligations has been kept intact.

[...] while the crisis in and of itself might not be characterized as catastrophic and while there was therefore not a situation of *force majeure* that left no other option open, neither can it be held that the crisis was of no consequence and that business could have continued as usual, as some of the Claimant's arguments seem to suggest. Just as the Tribunal concluded when the situation under domestic law was considered, there were certain consequences stemming from the crisis. And while not excusing liability or precluding wrongfulness from the legal point of view they ought nevertheless to be considered by the Tribunal when determining compensation.⁷⁹⁸

A little later in its discussion of Article XI, the Tribunal observed:

[t]he third issue the Tribunal must determine is whether Article XI of the Treaty can be interpreted in such a way as to provide that it includes economic emergency as an essential security interest. While the text of the Article does not refer to economic crises or difficulties of that particular kind, as concluded above, there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI.

It must also be kept in mind that the scope of a given bilateral treaty, such as this, should normally be understood and interpreted as attending to the concerns of both parties. If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.

Again, the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest, a matter discussed above.⁷⁹⁹

In relation to the second condition contained in Article 25(2), namely that the State in question must not have contributed to the situation of necessity, the Tribunal observed, referring to the Commentary to Article 25:

[t]he Commentary clarifies that this contribution must be 'sufficiently substantial and not merely incidental or peripheral'. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.⁸⁰⁰

The Tribunal continued:

⁷⁹⁸ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, paras. 354–356.

⁷⁹⁹ *Ibid.*, paras. 359–361.

⁸⁰⁰ *Ibid.*, para. 328, referring to Commentary to Article 25, paragraph (20).

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[t]he issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.⁸⁰¹

In summarising its overall conclusions as to the existence of a state of necessity, the Tribunal recalled the reference by the International Court of Justice in *Gabčíkovo-Nagymaros Project* to the International Law Commission's view in relation to the provision that became Article 25 that all of the conditions for the state of necessity had to be present 'cumulatively' before the wrongfulness of a conduct in breach of the State's international obligation would be precluded.⁸⁰² The Tribunal accordingly held that, in the light of its findings in relation to the several elements, the state of necessity was not made out:

[i]n the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.⁸⁰³

Necessity was similarly raised as a circumstance precluding wrongfulness in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentine Republic*.⁸⁰⁴ The Tribunal concluded that, other things being equal, the measures adopted by Argentina would have breached the umbrella clause and the standard of fair and equitable treatment, and were discriminatory, although it held that they were not arbitrary and were not expropriatory. However, in contrast to the Tribunal in *CMS*, here the Tribunal held that Argentina was 'excused [...] from liability for any breaches of the Treaty'⁸⁰⁵ in the period between 1 December 2001 and 26 April 2003 under the 'emergency' clause contained in Article XI of the BIT (also at issue in *CMS*), due to the existence of 'a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests.'⁸⁰⁶ The Tribunal referred to that period as one of 'state of necessity'.⁸⁰⁷

Having reached that result, the Tribunal went on to observe that its conclusion in that regard found support in the state of necessity under customary international law, and in that context referred to Article 25 of the Articles, which it quoted in a footnote:

[t]he concept of excusing a State for the responsibility for violation of its international obligations during what is called a 'state of necessity' or 'state of emergency' also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are

⁸⁰¹ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 329.

⁸⁰² *Ibid.*, para. 330, referring to *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Reports 1997*, p. 7, at pp. 40–41 paras. 51–52, itself referring to the Commission's draft Commentary in relation to the provision as adopted on first reading: *ILC Yearbook 1980*, Vol. II(2), p. 51, para. 40.

⁸⁰³ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 331.

⁸⁰⁴ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006.

⁸⁰⁵ *Ibid.*, para. 229; see also para. 245.

⁸⁰⁶ *Ibid.*, para. 226.

⁸⁰⁷ *Ibid.*, para. 227.

sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion.⁸⁰⁸

The Tribunal went on to make a number of general comments as to the state of necessity under customary international law, interspersed with references to the ILC's work on the state of necessity, as eventually embodied in Article 25, but curiously omitting any reference to the Commission's Commentary as adopted on second reading. The Tribunal first noted that:

[i]n international law, a state of necessity is marked by certain characteristics that must be present in order for a State to invoke this defense. As articulated by Roberto Ago, one of the mentors of the draft articles on State Responsibility, a state of necessity is identified by those conditions in which a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory. In other words, the State must be dealing with interests that are essential or particularly important.

The United Nations Organization has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it.

The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its draft articles on State responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.

James Crawford, who was rapporteur of the Draft Articles approved in 2001, noted that when a State invokes the state of necessity, it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation. [sic] This deliberate action on the part of the State is therefore subject to the requirements of Article 25 of the Draft Articles, which must concur jointly and without which it is not possible to exclude under international law the wrongfulness of a State's act that violates an international obligation.⁸⁰⁹

Turning to address the question whether the requirements contained in Article 25 for invocation of a state of necessity had been fulfilled, the Tribunal observed:

[t]aking each element in turn, article 25 requires first that the act must be the only means available to the State in order to protect an interest. According to S.P.

⁸⁰⁸ Ibid., para. 245, and note 62. In the footnote, the Tribunal set out the text of Article 25. The Tribunal also noted 'The ILC's Draft Articles, after some debate regarding the original prepared under the auspices of the Society of Nations in 1930, was abandoned and then resumed by the General Assembly in 1963. Its definitive version, due mainly to the works of Mssrs. Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz, was approved in 1981 and subject to a revision in 1998, which was approved in 2001, during the 85th plenary session of the United Nations' General Assembly.'

⁸⁰⁹ Ibid., paras. 246–248.

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Jagota, a member of the Commission, such requirement implies that it has not been possible for the State to 'avoid by any other means, even a much more onerous one that could have been adopted and maintained the respect of international obligations. The State must have exhausted all possible legal means before being forced to act as it does.' Any act that goes beyond the limits of what is strictly necessary 'may not be considered as no longer being, as such, a wrongful act, even if justification of the necessity may have been admitted.'

The interest subject to protection also must be essential for the State. What qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests. Roberto Ago has stated that essential interests include those related to 'different matters such as the economy, ecology or other.' Julio Barboza affirmed that the threat to an essential interest would be identified by considering, among other things, 'a serious threat against the existence of the State, against its political or economic survival, against the maintenance of its essential services and operational possibilities, or against the conservation of internal peace or its territory's ecology.'

The interest must be threatened by a serious and imminent Danger. The threat, according to Roberto Ago, 'must be 'extremely grave' and 'imminent.' In this respect, James Crawford has opined that the danger must be established objectively and not only deemed possible. It must be imminent in the sense that it will soon occur.

The action taken by the State may not seriously impair another State's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action. The idea is to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest.

The international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a bilateral investment treaty constitutes the acceptance, in the relations between States, of the possibility that one of them may invoke the state of necessity.

The State must not have contributed to the production of the state of necessity. It seems logical that if the State has contributed to cause the emergency, it should be prevented from invoking the state of necessity. If there is fault by the State, the exception disappears, since in such case the causal relationship between the State's act and the damage caused is produced.⁸¹⁰

Having made those observations, the Tribunal went on to apply the requirements for necessity in Article 25 to the circumstances of the case; it briefly concluded that those requirements were fulfilled:

[...] in the first place, Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country; secondly, the attitude adopted by the Argentine Government has shown a desire to slow down by all the means available the severity of the crisis.

The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this circumstances [*sic*], an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed. It cannot be said that any other State's rights were seriously impaired by the measures taken by Argentina during the crisis. Finally, as addressed above, Article XI of the Treaty exempts Argentina of responsibility for measures enacted during the state of necessity.⁸¹¹

The Tribunal's analysis in this regard is somewhat cursory in its assessment of whether the conditions for necessity were fulfilled. It is also somewhat surprising given that the decision was unanimous, and one of the members of the Tribunal had also participated in the (unanimous) decision in *CMS*, which had reached a diametrically opposite conclusion on a number of those issues, including whether the crisis threatened an essential interest of Argentina, whether Argentina had contributed to the crisis, and whether the measures adopted were the only way for it to face the crisis.

The Tribunal's decision is also somewhat ambiguous as whether it was purporting to find that the state of necessity as a matter of customary international law, as embodied in Article 25, had in fact been made out. Certain passages may be read as suggesting only that the fulfilment of the elements of the customary international law rule supported the Tribunal's conclusion that Argentina's actions were exempted from liability under the 'emergency' provision of the BIT. The Tribunal concluded its discussion of Article 25 by observing:

[w]hile this analysis concerning article 25 of the draft articles on State responsibility alone does not establish Argentina's defence, it supports the Tribunal's analysis with regard to the meaning of article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.⁸¹²

On the other hand, in the paragraphs immediately following that passage, the Tribunal observed:

[h]aving found that the requirements for invoking the state of necessity were satisfied, the Tribunal considers that it is the factor excluding the State from its liability vis-à-vis the damage caused as a result of the measures adopted by Argentina in response to the severe crisis suffered by the country.

Following this interpretation the Tribunal considers that article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability.⁸¹³

However this may be, it is clear that the actual ground of decision was that the state of necessity had been established for the purposes of Article XI of the BIT, and that Argentina's liability was therefore excluded in relation to the relevant period.

⁸¹¹ Ibid., paras. 256–257.

⁸¹² Ibid., para. 259

⁸¹³ Ibid., paras. 260–261.

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In *Enron and Ponderosa Assets v Argentine Republic*,⁸¹⁴ a further case arising out of the Argentine financial crisis, Argentina again relied on the state of necessity as precluding liability, arguing that:

[the] state of necessity is consolidated under international law as a concept precluding wrongfulness of the measures adopted in its context and exempting the State from international responsibility.⁸¹⁵

In this regard, Argentina again made reference, inter alia, to Article 25 of the Articles. As in *CMS*, the claimant likewise relied on Article 25 as representing customary international law, although disputing that the conditions contained therein had been made out.⁸¹⁶

The Tribunal concluded that Argentina had violated its obligations under the fair and equitable treatment standard and the umbrella clause contained in the applicable BIT. It then went on to address the State of necessity, in terms which at time echo those of the Tribunal in *CMS*.⁸¹⁷ At the outset of its analysis of the parties' arguments in relation to necessity, the Tribunal stated that its:

[...] understanding of Article 25 of the Articles on State Responsibility to the effect that it reflects the state of customary international law on the matter, is not different from the view of the parties in this respect. This is not to say that the Articles are a treaty or even a part of customary law themselves; it is simply the learned and systematic expression of the development of the law on state of necessity by decisions of courts and tribunals and other sources along a long period of time.⁸¹⁸

The Tribunal then proceeded to set out Article 25 in full, before commenting:

[t]here is no disagreement either about the fact that state of necessity is a most exceptional remedy subject to very strict conditions because otherwise it would open the door to elude any international obligation. Article 25 accordingly begins by cautioning that the state of necessity 'may not be invoked' unless such conditions are met. Whether in fact the invocation of state of necessity in the Respondent's case meets those conditions is the difficult task the Tribunal must now undertake.⁸¹⁹

The Tribunal then turned to examine each of the conditions contained in Article 25 for the operation of a state of necessity as a circumstance precluding wrongfulness; in this regard, the influence of the decision of the Tribunal in *CMS* is again clear:

[t]he first condition Article 25 sets out is that the act in question must be the only way for the State to safeguard an essential interest against a grave and imminent peril. The Tribunal must accordingly establish whether the Argentine crisis qualified as affecting an essential interest of the State. The opinions of experts are sharply divided on this issue, ranging from those that consider the crisis had gargantuan and catastrophic proportions to those that believe that it was not different from many other contemporary situations of crisis around the world.

⁸¹⁴ *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Award of 22 May 2007.

⁸¹⁵ *Ibid.*, para. 294.

⁸¹⁶ *Ibid.*, para. 299.

⁸¹⁷ It may be noted that, in common with the Tribunal in *LG&E*, the *Enron and Ponderosa* tribunal consisted of a member who had also been a member of the *CMS* tribunal, albeit that the common member was different in the two cases. A different member of the *Enron* tribunal had also sat on the *LG&E* tribunal.

⁸¹⁸ *Ibid.*, para. 303.

⁸¹⁹ *Ibid.*, para. 304.

The Tribunal has no doubt that there was a severe crisis and that in such context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing. Questions of public order and social unrest could be handled as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.

This issue is in turn connected with the existence of a grave and imminent peril that could threaten that essential interest. While the government had the duty to prevent the worsening of the situation and could not simply leave events to follow their own course, there is no convincing evidence that the events were out of control or had become unmanageable.

It is thus quite evident that measures had to be adopted to offset the unfolding crisis. Whether the measures taken under the Emergency Law were the 'only way' to achieve this result and no other alternative was available, is also a question on which the parties and their experts are profoundly divided, as noted above. A rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.

While one or other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute for the governmental determination of economic choices, only to determine whether the choice made was the only way available, and this does not appear to be the case.

Article 25 next requires that the measures in question do not seriously impair the interest of State or States toward which the obligations exists, or of the international community as a whole. The interest of the international community does not appear to be in any way impaired in this context as it is rather an interest of a general kind. That of other States will be discussed below in connection with the Treaty obligations. At that point it will also be discussed whether the Treaty excludes necessity, which is another condition peremptorily laid down under the Article in comment.⁸²⁰

As to the first of those two questions, the Tribunal later noted, in the context of its discussion of the 'emergency' clause contained in Article XI of the applicable BIT, that:

[t]he Tribunal explained above that it would consider the requirement of Article 25 of the Articles on State Responsibility as to the act not seriously impairing an essential interest of the State towards which the obligation exists in the context of the Treaty obligations. In light of the discussion above about changing interpretations, it does not appear that the invocation by Argentina of Article XI, or state of necessity generally, would be taken by the other party to mean that such impairment does arise.

Be that as it may, in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations [...] The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case.⁸²¹

⁸²⁰ Ibid., paras. 305–310.

⁸²¹ Ibid., para. 341–342.

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The Tribunal further observed that an additional condition envisaged by Article 25:

[...] is that the State cannot invoke necessity if it has contributed to the situation of necessity. This is of course the expression of a general principle of law devised to prevent a party taking legal advantage of its own fault. Although each party claims that the factors precipitating the crisis were either endogenous or exogenous, the truth seems to be somewhere in between with both kind of factors having intervened, as in the end it has been so recognized by both the Government of Argentina and international organizations and foreign governments.

This means that to an extent there has been a substantial contribution of the State to the situation of necessity and that it cannot be claimed that the burden falls entirely on exogenous factors. This has not been the making of a particular administration as it is a problem that had been compounding its effects for a decade, but still the State must answer as a whole.⁸²²

In its conclusion on the question of the state of necessity under customary international law, the Tribunal concluded:

[t]he Tribunal must note in addition that as held in the *Gabcikovo-Nagymaros* decision, with reference to the work of the International Law Commission, the various conditions discussed above must be cumulatively met, which brings the standard governing the invocation of state of necessity to a still higher echelon. In light of the various elements that have been examined, the Tribunal concludes that the requirements of the state of necessity under customary international law have not been fully met in this case.⁸²³

Reference was also made to Article 25 of the Articles in the Tribunal's discussion of reliance on the 'emergency' clause contained in Article XI of the applicable BIT. In interpreting the provision in question, the Tribunal observed that:

[...] the object and purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that require the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.⁸²⁴

Having rejected an argument that ascertainment of fulfilment of the conditions contained in Article XI was self-judging, and having concluded that it was therefore required to examine whether the conditions were in fact met,⁸²⁵ the Tribunal observed that:

[...] the Treaty does not define what is to be understood by essential security interest, just as it does not contain either a definition concerning the maintenance of international peace and security. The specific meaning of these concepts and the conditions for their application must be searched for elsewhere. In respect of international peace and security this task is rendered easier by the fact that the parties themselves agreed that its meaning is to be found in the context of the obligations under the Charter of the United Nations, as provided in Article 6 of

⁸²² Ibid., para. 311–312.

⁸²³ Ibid., para. 313.

⁸²⁴ Ibid., para. 331.

⁸²⁵ Ibid., para. 332.

the Protocol to the Treaty. The situation is more complex in respect of security interests because there is no specific guidance to this effect under the Treaty. This is what makes necessary to rely on the requirements of state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, so as to evaluate whether such requirements have been met in this case.⁸²⁶

The Tribunal further rejected an argument that the emergency provision contained in Article XI of the BIT constituted a *lex specialis* in relation to customary international law; in this regard, the Tribunal observed:

[t]his is no doubt correct in terms that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. Had this been the case here the Tribunal would have started out its considerations on the basis of the Treaty provision and would have resorted to the Articles on State Responsibility only as a supplementary means. But the problem is that the Treaty itself did not deal with these elements. The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned. As concluded above, such requirements and conditions have not been fully met in the instant case.⁸²⁷

In conclusion, in rejecting Argentina's reliance on Article XI of the BIT, the Tribunal stated:

[a]s the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, thus concluding that necessity or emergency are not conducive to the preclusion of wrongfulness, there is no need to undertake a further judicial review under Article XI as this Article does not set out conditions different from customary law in this respect.⁸²⁸

The Tribunal however stressed that:

[j]udicial determination of the compliance with the requirements of international law in this matter should not be understood as if arbitral tribunals might be wishing to substitute for the functions of the sovereign State, but simply responds to the duty that in applying international law they cannot fail to give effect to legal commitments that are binding on the parties and interpret the rules accordingly, unless this derogation is expressly agreed to.⁸²⁹

In the subsequent case of *Sempra Energy International and Argentine Republic*,⁸³⁰ the Tribunal was again faced with a plea of necessity by Argentina. The Tribunal's discussion of that issue is similar to that in *Enron*, with some paragraphs of its discussion being near identical, although there are some differences.⁸³¹ As in *Enron*, the Tribunal commenced its discussion of the state of necessity, prior to setting out the text of Article 25, by stating that

[i]t shares the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law

⁸²⁶ Ibid., para. 333.

⁸²⁷ Ibid., para. 334.

⁸²⁸ Ibid., para. 339.

⁸²⁹ Ibid., para. 340.

⁸³⁰ *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007.

⁸³¹ Two members of the Tribunal in *Sempra Energy* had also been members of the Tribunal in *CMS*, one of whom them had also been a member of the Tribunal in *Enron*.

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on state of necessity developed by courts, tribunals and other sources over a long period of time.

[...]

There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity 'may not be invoked' unless such conditions are met. Whether in fact the Respondent's invocation of a state of necessity meets those conditions is the difficult task that the Tribunal must now undertake.⁸³²

The Tribunal then commented upon the decisions in *LG&E*, *CMS* and *Enron*:

[t]he Tribunal has examined with particular attention the recent decision on Liability and subsequent award on damages in the *LG&E* case as they have dealt with mostly identical questions concerning emergency and state of necessity. The decision on liability has been contrasted with the finding of the Tribunal in *CMS*. While two arbitrators sitting in the present case were also members of the tribunal in the *CMS* case the matter has been examined anew. This Tribunal must note, first, that in addition to differences in the legal interpretation of the Treaty in this context, an important question that distinguishes the *LG&E* decision on liability from *CMS*, and for that matter also from the recent award in *Enron*, lies in the assessment of the facts. While the *CMS* and *Enron* tribunals have not been persuaded by the severity of the Argentine crisis as a factor capable of triggering the state of necessity, *LG&E* has considered the situation in a different light and justified the invocation of emergency and necessity, albeit for a limited period of time. This Tribunal, however, is not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity, although it also readily accepts that the changed economic conditions have an influence on the questions of valuation and compensation, as will be examined further below.⁸³³

The Tribunal then proceeded to discuss the various conditions contained in Article 25, again in terms similar to those used in its decision by the Tribunal in *Enron*, itself similar in some regards to the discussion in *CMS*:

[t]he first condition which Article 25 sets out is that the act in question must be the only way for the State to safeguard an essential interest against a grave and imminent peril. The Tribunal must accordingly establish whether the Argentine crisis qualified as one affecting an essential interest of the State. The opinions of experts are sharply divided on this issue. They range from those that consider the crisis as having had gargantuan and catastrophic proportions, to those that believe that it was no different from many other contemporary crisis situations around the world.⁸³⁴

The Tribunal has no doubt that there was a severe crisis, and that in such a context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing. Questions of public order and social unrest could have

⁸³² Ibid., paras. 344–345.

⁸³³ Ibid., para. 346.

⁸³⁴ Ibid., paras. 347–351.

been handled, as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.

This issue is in turn connected with the alleged existence of a grave and imminent peril that could threaten the essential interest. While the Government had a duty to prevent a worsening of the situation, and could not simply leave events to follow their own course, there is no convincing evidence that events were actually out of control or had become unmanageable.

It is thus quite evident that measures had to be adopted to offset the unfolding crisis, but whether the measures taken under the Emergency Law were the ‘only way’ to achieve this result, and whether no other alternative was available, are questions on which the parties and their experts are profoundly divided, as noted above. A rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events. It is therefore difficult to justify the position that only one of them was available in the Argentine case.

While one or the other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute its view for the Government’s choice between economic options. It is instead the Tribunal’s duty only to determine whether the choice made was the only one available, and this does not appear to have been the case.

Article 25 next requires that the measures in question do not seriously impair the interests of a State or States toward which the obligations exist, or of the international community as a whole. The interest of the international community does not appear to be in any way impaired in this context, as it is an interest of a general kind. That of other States will be discussed below in connection with the Treaty obligations. At that point, it will also be discussed whether the Treaty excludes necessity, this being another condition peremptorily laid down by the Article.⁸³⁵

Following the approach of the Tribunals in *CMS* and *Enron*, those questions were dealt with at a later stage in the decision in the context of discussion of Argentina’s reliance on the ‘emergency’ clause contained in Article XI of the BIT. The Tribunal’s findings in relation to the first of the questions, namely whether the invocation of necessity impaired the interests of other States, are again very similar to those of the Tribunal in *Enron*. The Tribunal observed:

[t]he Tribunal explained above that it would consider the requirement of Article 25 of the Articles on State Responsibility, to the effect that the act in question not seriously impair an essential interest of the State towards which the obligation exists in the context of the Treaty obligations. In the light of the discussion above about changing interpretations, it does not appear that the Government’s invocation of Article XI or of a state of necessity generally would be taken by the other party to mean that such impairment arises.

Be that as it may, in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations [...]. The essential interest of the Claimant would certainly be seriously impaired by the operation of Article XI or a state of necessity in this case.⁸³⁶

⁸³⁵ Ibid., para. 352.

⁸³⁶ Ibid., paras. 390–391 cf. *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Award of 22 May 2007, para. 341–342.

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In relation to the question of contribution of Argentina to the state of necessity, discussing that question in terms similar although slightly different to those used by the Tribunal in *Enron*, the Tribunal observed:

[a] further condition that Article 25 imposes is that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity. This is of course the expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault. In spite of the parties' respective claims that the factors precipitating the crisis were either endogenous or exogenous, the truth seems to be somewhere in the middle, with both kinds of factors having intervened. This mix has in fact come to be generally recognized by experts, officials and international agencies.

This means that there has to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore cannot be claimed that the burden falls entirely on exogenous factors. This state of affairs has not been the making of a particular administration, given that it was a problem which had been compounding its effects for a decade. Still, the State must answer for it as a whole.

The Tribunal must note in addition that, as held in the *Gabcikovo-Nagymaros* decision with reference to the work of the International Law Commission, the various conditions discussed above must be cumulatively met. This brings the standard governing the invocation of necessity to a still higher echelon. In the light of the various elements examined above, the Tribunal concludes that the requirements for a state of necessity under customary international law have not been fully met in this case.⁸³⁷

As in *Enron*, the Tribunal also dealt with Argentina's reliance on the 'emergency' clause contained in Article XI of the BIT; the Tribunal's discussion in this regard has certain points of similarity to that of the Tribunal in the *Enron* case, but there are also significant differences.

Having considered, as the Tribunal in *Enron* had done, that a restrictive interpretation of Article XI of the BIT was necessary in light of the object and purpose of the BIT, the Tribunal observed that:

[t]here is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI. Essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law. However, to conclude that such a determination is self-judging would definitely be inconsistent with the object and purpose noted. In fact, the Treaty would be deprived of any substantive meaning.

In addition, in view of the fact that the Treaty does not define what is to be understood by an 'essential security interest,' the requirements for a state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case.

⁸³⁷ *Sempra Energy International and Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007, paras. 311–313.

The Tribunal notes that in the view of Dean Slaughter and Professor Burke-White, which the Respondent shares, the *CMS* award was mistaken in that it discussed Article XI in connection with necessity under customary law. This Tribunal believes, however, that the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined. Similarly, the Treaty does not contain a definition concerning either the maintenance of international peace and security, or the conditions for its operation. Reference is instead made to the Charter of the United Nations in Article 6 of the Protocol to the Treaty.⁸³⁸

As to the argument that Article XI constituted *lex specialis* and was separate and different from the customary international law relating to necessity, the Tribunal observed:

[i]t is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case. Moreover, the view of the Respondent's legal expert, as expressed at the hearing, contradicts the Respondent's argument that the Treaty standards are not more favorable than those of customary law, and at the most should be equated with the international minimum standard. The Tribunal does not believe that the intention of the parties can be described in the terms which the expert has used, as there is no indication that such was the case. Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.⁸³⁹

In conclusion, the Tribunal rejected Argentina's reliance on Article XI on the basis that the conditions for necessity under customary international law had not been made out:

[i]n the light of this discussion, the Tribunal concludes that Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were taken in good faith. The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.

A judicial determination as to compliance with the requirements of international law in this matter should not be understood as suggesting that arbitral tribunals wish to substitute their views for the functions of sovereign States. Such a ruling instead simply responds to the Tribunal's duty that, in applying international law, it cannot fail to give effect to legal commitments that are binding on the parties,

⁸³⁸ Ibid., paras. 374–376.

⁸³⁹ Ibid., para. 378.

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and must interpret the rules accordingly unless a derogation of those commitments has been expressly agreed to.⁸⁴⁰

A matter of days before the decision in *Sempra Energy* was made public, the ad hoc Committee formed to hear Argentina's application for annulment of the decision of the Tribunal in *CMS Gas Transmission Company v Argentine Republic* rendered its decision.⁸⁴¹ That decision refers extensively to Article 25 of the Articles, and adopts a very different line to that taken by the various tribunals as to the relationship between the state of necessity under customary international law, as reflected in Article 25 of the Articles, and the 'emergency' clause contained in Article XI of the BIT.

Argentina sought the annulment of the Award of the Tribunal in *CMS* in relation to necessity on the basis that the Tribunal had manifestly exceeded its powers, and had failed to state reasons.

The ad hoc Committee examined the Tribunal's findings in detail. Dealing first with the alleged failure by the Tribunal to state reasons for its rejection of Argentina's defence based on Article XI of the Treaty, the ad hoc Committee observed:

[t]he Tribunal considered that Article 25 of the ILC's Articles on State Responsibility reflects customary international law in that field and examined one by one the conditions enumerated in that Article. It took a decision on each of them giving detailed reasons. It arrived to the conclusion that two of those conditions were not fulfilled, recalled that all conditions must be cumulatively satisfied and concluded that the requirement of necessity under customary international law had not been fully met. In that part of the Award, the Tribunal clearly stated its reasons and the Committee has no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law.

With respect to the defense based on Article XI of the BIT, the Tribunal examined the Parties' arguments and concluded first that 'there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI.' Then it addressed the debate which the parties had chosen to engage in as to whether Article XI is self-judging. The Tribunal concluded that under Article XI it had the authority to proceed to a substantive review and that 'it must examine whether the state of necessity or emergency meet the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness.'

The problem is, however, that the Tribunal stopped there and did not provide any further reasoning at all in respect of its decision under Article XI. To some extent this can be understood in the light of the arguments developed at the time both by Argentina and CMS. [...] CMS submitted that 'Article XI is not self-judging and... its invocation is subject to satisfaction of the test of necessity under international law'. Argentina took the same approach, conflating 'state of emergency' and 'state of necessity' and adding that state of necessity is included in Article XI.

Along those lines, the Tribunal evidently considered that Article XI was to be interpreted in the light of the customary international law concerning the state of necessity and that, if the conditions fixed under that law were not met, Argentina's defense under Article XI was likewise to be rejected. Accordingly, having considered the arguments eventually developed by the Parties with

⁸⁴⁰ Ibid., paras. 388–389.

⁸⁴¹ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007.

respect to Article XI, it did not find it necessary to revert to its previous assessment concerning the application of customary international law and to repeat the conclusions it had arrived at during the course of examination of Argentina's first defense.

The motivation of the Award on this point is inadequate. The Tribunal should certainly have been more explicit in specifying, for instance, that the very same reasons which disqualified Argentina from relying on the general law of necessity meant that the measures it took could not be considered 'necessary' for the purpose of Article XI either.⁸⁴²

Despite its view that the reasoning of the Tribunal in this regard was inadequate, the ad hoc Committee was of the view that the Award was not annulable on that basis:

[b]oth Parties however understood the Award in that sense and, before the Committee, CMS noted that the Tribunal incorporated into its interpretation of the approach it had adopted to the law of state responsibility. Argentina did not contest that point and only complained that the Tribunal did not 'proceed to carry out the substantive examination' which it rightly held was required.

In the Committee's view, although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal [...]. On this point, therefore, the submission of Argentina cannot be upheld.⁸⁴³

Argentina's second complaint in relation to the Tribunal's reasoning as to necessity was that the Tribunal had assimilated the customary international rules relating to necessity with the question of the applicability of the emergency clause contained in Article XI of the BIT. In this regard, the ad hoc Committee observed that:

[t]he Tribunal, as likewise the parties, assimilated the conditions necessary for the implementation of Article XI of the BIT to those concerning the existence of the state of necessity under customary international law. Moreover, following Argentina's presentation, the Tribunal dealt with the defense based on customary law before dealing with the defense drawn from Article XI.⁸⁴⁴

In discussing Argentina's argument that, in doing so, the Tribunal had manifestly exceeded its powers, the ad hoc Committee first observed that there was:

[...] some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC's Articles on State Responsibility. The first text mentions 'necessary' measures and the second relates to the 'state of necessity'.⁸⁴⁵

However, in the view of the Committee, any similarity between the customary law of responsibility as embodied in Article 25 of the Articles and Article XI of the BIT ended there:

[...] Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse

⁸⁴² Ibid., para. 123.

⁸⁴³ Ibid., paras. 124–125.

⁸⁴⁴ Ibid., para. 128.

⁸⁴⁵ Ibid., para. 129.

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which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.

Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken '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', a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25 [...] On that point, the Tribunal made a manifest error of law.

Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

In doing so the Tribunal made another error of law. One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI.⁸⁴⁶

The ad hoc Committee then distinguished the field of operation of the two rules, using the concepts of primary and secondary rules elaborated by the ILC in the course of its work on State responsibility:

[i]f state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. In other terms, [...] if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been 'no breach' of the BIT. Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25.

If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law – and this was the position taken by the ILC. In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.⁸⁴⁷

In referring to the position adopted by the International Law Commission, the ad hoc Committee made reference to a number of passages from the Introductory Commentary to Chapter V of Part One of the Articles.⁸⁴⁸

Despite the errors of law into which it found that the Tribunal had fallen, the Committee held that it did not have power to annul the Award of the Tribunal on that basis:

⁸⁴⁶ Ibid., para. 129–132.

⁸⁴⁷ Ibid., paras. 133–134.

⁸⁴⁸ Ibid., note 155, citing Introductory Commentary to Part One, Chapter V, paragraphs (2)–(4) and (7).

[t]hese two errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by CMS, the Tribunal gave an erroneous interpretation to Article XI. In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even *prima facie*, a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.

The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.⁸⁴⁹

Questions relating to the state of necessity as a circumstance precluding the wrongfulness of an internationally wrongful act have also arisen before national courts on a number of occasions.

In a decision of 27 June 2006,⁸⁵⁰ the Frankfurt am Main *Oberlandesgericht* had occasion to refer to Article 25 of the Articles in the context of an action brought against Argentina by private individuals who were the holders of Argentine bearer bonds. As a result of the economic crisis, Argentina failed to make payments due in accordance with the terms of those bonds – in this regard, it attempted to justify its non-payment *inter alia* on the existence of a state of necessity under international law.

The court observed:

[Argentina] can no longer invoke a state of emergency based on insolvency as a defence to the plaintiff's claims [...] because the facts underlying the dishonouring of the debts no longer apply and because the respondent has not submitted that repaying all its debts would result in a state of emergency.

It is undisputed that a state of emergency can only suspend the debtor State's obligations to pay. The obligations revive when the prerequisites for the state of emergency are no longer given. This is now the case, since the reasons that the respondent originally cited to justify the state of emergency and the debt moratorium no longer exist:

(a) Necessity under international law is described in article 25 (1) (a) of the International Law Commission draft articles as being subject *inter alia* to the following conditions:

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....

⁸⁴⁹ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007, paras. 135–136.

⁸⁵⁰ *Oberlandesgericht, Frankfurt am Main*, decision of 27 June 2006 (Case No. 2/21 O 122/03); partial English translation in *Responsibility of States for internationally wrongful acts: Comments and information received from Governments, Report of the Secretary General*, 9 March 2007, UN doc. A/62/63, at para. 31.

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Since article 25 of the International Law Commission draft contains an exception to the obligation to comply with international law, the general threshold for necessity was set very high.

The Court then made reference to the work of the Committee on International Monetary Law of the International Law Association (ILA) in relation to the scope of the term ‘essential interest’ in the context of financial crises of debtor States. In that regard, the Court noted that the ILA Committee

[...] concluded that in the event of insolvency of a debtor nation, a temporary suspension of payments for the purpose of debt restructuring was permissible if the State would otherwise no longer be able to guarantee the provision of vital services, internal peace, the survival of part of the population and ultimately the environmentally sound preservation of its national territory.

This is in line with the submissions made by the respondent and with the international literature it has referred to. These sources do not consider a national emergency to exist simply when it is economically impossible for the State to pay the debts. Additional special circumstances must also be present, which make it evident that meeting the financial obligations would be self-destructive, e.g. because servicing the debt would mean that basic State functions (health care, the administration of justice, basic education) could no longer be fulfilled.⁸⁵¹

Given that the facts on which the state of necessity might have been held to have existed were in any case no longer present, the Court found that Argentina was not able to rely on the state of necessity under international law in order to resist payment to the bond-holders.

Another case concerning similar facts was decided by the German *Bundesverfassungsgericht* on 8 May 2007.⁸⁵² The Court was asked to decide, in response to a request for a preliminary ruling by the lower court, whether there existed any rule of customary international law permitting a State to disregard its contractual obligations to private individuals on the basis of the existence of a state of necessity.

In this regard, the court discussed the state of necessity as a matter of general international law, and referred to Article 25 of the Articles, the accompanying Commentary, as well as relevant international jurisprudence.⁸⁵³ On this basis, the Court recognised that the state of necessity, as reflected in Article 25 of the Articles, was accepted as a rule of customary international law and was capable of precluding wrongfulness in the context of inter-State obligations.⁸⁵⁴ However, it went on to find that there was an insufficient basis on which to conclude that there existed any such rule which could be invoked as against private individuals, rather than against States, so as to escape contractual liability of payment under a private law relationship.⁸⁵⁵

⁸⁵¹ Ibid.

⁸⁵² *Bundesverfassungsgericht*, decision of 8 May 2007 (Cases 2 BvM 1/03–5/03 and 2 BvM 1/06 and 2/06).

⁸⁵³ Ibid., paras. 35–47.

⁸⁵⁴ Ibid., paras. 45–47.

⁸⁵⁵ Ibid., para. 64.

ARTICLE 26

Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 26 of the Articles is a saving clause, providing that the various circumstances precluding wrongfulness enumerated in the preceding articles in Chapter V of Part One do not preclude the wrongfulness of an act insofar as it breaches an obligation arising under a peremptory norm of general international law.

In *CMS Gas Transmission Company v Argentina*,⁸⁵⁶ the Tribunal made passing reference to Article 26 in the context of its discussion of whether the conditions for reliance on a state of necessity, in particular the requirement contained in Article 25(1)(a) that the measure in question should not seriously impair an essential interest of the State or States to which the obligation is owed, or of the international community as a whole. In this regard, the Tribunal concluded that the measures in question, taken in response to the financial crisis in Argentina, did not involve any non-compliance with a peremptory norm:

[a] different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles.⁸⁵⁷

The British case of *R (on the application of Al-Jedda) v Secretary of State for Defence*,⁸⁵⁸ concerned the question of whether the United Kingdom's obligations under the European Convention on Human Rights (and the Human Rights Act 1998 implementing it) applied to detention by UK forces of individuals in Iraq, in particular in light of the relevant Security Council resolution (SC Res. 1546 (2004)) authorizing detention by the multi-national force. The Court of Appeal made reference to the ILC's Commentary to Article 26 of the Articles in discussing the notion of *jus cogens*:

[r]everting to the question of *jus cogens*, the International Law Commission has said that the criteria for identifying peremptory norms of general international law are stringent [...]. They suggested that those that were clearly accepted and recognized included the prohibitions of aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination.⁸⁵⁹

⁸⁵⁶ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005.

⁸⁵⁷ *Ibid.*, para. 325.

⁸⁵⁸ *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, judgment of 29 March 2006; [2006] 3 WLR 954

⁸⁵⁹ [2006] 3 WLR 954 at p. 976, para. 66, referring to Commentary to Article 26, paragraph (5).

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.

Article 27 is a further saving clause applicable to the preceding articles contained in Chapter V of Part One setting out circumstances precluding the wrongfulness of conduct otherwise in breach of a State's international obligation. Article 27(a) makes clear that a circumstance precluding wrongfulness only operates to preclude wrongfulness for so long as the relevant circumstance persists, and therefore a State is obliged to comply with the obligation in relation to which wrongfulness was precluded once the circumstance no longer exists. Article 27(b) makes clear that the invocation of a circumstance precluding wrongfulness is without prejudice to the obligation to provide compensation for any material damage caused.

The spate of cases arising from the Argentine financial crisis, discussed above in relation to Article 25, have also resulted in a number of references to Article 27 of the Articles.

In *CMS Gas Transmission Company v Argentina*,⁸⁶⁰ the Tribunal, having concluded that the state of necessity was not made out in the circumstances of the case and that reliance on the 'emergency' provision of the BIT was precluded, stated that it was 'also mindful' of Article 27(a) of the Articles, which it then proceeded to set out.⁸⁶¹ The Tribunal continued:

[t]he temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the *Rainbow Warrior* and *Gabčíkovo-Nagymaros* cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'.⁸⁶²

In that regard, having noted that it had not been disputed that the crisis had 'been evolving towards normalcy over a period over a period of time',⁸⁶³ the Tribunal observed that:

[e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.⁸⁶⁴

The Tribunal also made reference to Article 27(b) of the Articles, observing that the rule contained in that provision that reliance on a state of necessity was without prejudice to the question of compensation of any material loss suffered found support in the judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project*.⁸⁶⁵

⁸⁶⁰ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005.

⁸⁶¹ *Ibid.*, para. 379.

⁸⁶² *Ibid.*, para. 380, quoting *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Reports 1997*, p. 7, at p. 63, para. 101 and referring to Commentary to Article 27, paragraph (3).

⁸⁶³ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 381.

⁸⁶⁴ *Ibid.*, para. 382.

⁸⁶⁵ *Ibid.*, para. 383, quoting *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Reports 1997*, p. 7, at p. 39, para. 48.

Having referred to other relevant international jurisprudence on the issue, the Tribunal observed, in a passage echoing a comment by the ILC in that regard contained in the Commentary to Article 27, that, in those cases, 'the concept of damages appears to have been broader than that of material loss in article 27.'⁸⁶⁶

The Respondent had argued that if a state of necessity was made out, no compensation would have been due. In that regard, the Tribunal concluded that it was satisfied that Article 27(b)

[...] establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.⁸⁶⁷

The Tribunal further noted that its conclusion in this regard was:

[...] further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of [...] the plea of necessity.

The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.⁸⁶⁸

Finally, the Tribunal again made reference to the ILC Commentary on Article 27, observing that:

[...] the International Law Commission's commentary to article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.

It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.⁸⁶⁹

The tribunal in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentine Republic*⁸⁷⁰ also made reference to Article 27; as discussed above, the Tribunal concluded that the Argentina's liability was excused from 1 December 2001 to 26 April 2003, the period in which it found that there had existed a state of emergency for the purposes of Article XI of the BIT. The claimants relied on Article 27 of the Articles to argue that:

⁸⁶⁶ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 384; cf. Commentary to Article 27, paragraph (4).

⁸⁶⁷ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 390.

⁸⁶⁸ *Ibid.*, paras. 391–392.

⁸⁶⁹ *Ibid.*, paras. 393–394; the reference is to Commentary to Article 27, paragraph (6) (referring to agreement of compensation due in a State-to-State claim).

⁸⁷⁰ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006.

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[...] even if the state of necessity defense is available to Argentina under the circumstances of this case, Article 27 of the Draft Articles makes clear that Argentina's obligations to Claimants are not extinguished and Argentina must compensate Claimants for losses incurred as a result of the Government's actions.⁸⁷¹

The Tribunal in this regard observed, referring to a passage from the Commentary to Article 27, that Article XI of the BIT:

[...] does not specifically refer to the compensation for one or all the losses incurred by an investor as a result of the measures adopted by a State during a state of necessity. The commentary introduced by the Special Rapporteur establishes that Article 27 'does not attempt to specify in what circumstances compensation would be payable'. The rule does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations. In this case, this Tribunal's interpretation of Article XI of the Treaty provides the answer.

Following this interpretation the Tribunal considers that Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately.⁸⁷²

Later on in its decision, the Tribunal further referred to Article 27, in the context of its discussion of the consequences of the 'state of necessity' it had found to exist. In this regard, the Tribunal observed:

[t]he second issue related to the effects of the state of necessity is to determine the subject upon which the consequences of the measures adopted by the host State during the state of necessity shall fall. As established in the Tribunal's Analysis, Article 27 of ILC's Draft Articles, as well as Article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, and in accordance with that expressed [above], this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.⁸⁷³

In *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic*,⁸⁷⁴ the Tribunal, after concluding that the conditions for reliance on the state of necessity as a circumstances precluding wrongfulness under Article 25 of the Articles had not been fulfilled, went on to consider the effect of the rules contained in Article 27; in this regard, it referred to the Commission's formulation:

[t]here are still two other aspects of state of necessity the Tribunal needs to discuss. There is first the question that necessity is a temporal condition and, as expressed in Article 27 of the Articles on State Responsibility, its invocation is without prejudice to '(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists'.

⁸⁷¹ Ibid., para. 225.

⁸⁷² Ibid., paras. 260–261 (footnote omitted); the quote is from Commentary to Article 27, paragraph (6).

⁸⁷³ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006, para. 264.

⁸⁷⁴ *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Award of 22 May 2007.

Confirmed by international decisions, this premise does not seem to be disputed by the parties, although the Respondent's argument to the effect that one thing is the temporal nature of the emergency and another the permanent effects of its measures [...] does not seem to be easily reconciled with the requirement of temporality. This in turn results in uncertainty as to what will be the legal consequences of the end of the Emergency Law.

The second question is that Article 27 also provides that necessity is without prejudice to '(b) the question of compensation for any material loss caused by the act in question'. Again confirmed by international decisions, this other premise has been much debated by the parties as noted above. The Respondent does not share this premise because, as was also noted above, the record shows that eventually there would be no compensation for past losses or adverse effects originating in the emergency measures in the context of renegotiations undertaken.

The Respondent's view appears to be based on the understanding that Article 27 would only require compensation for the damage that arises after the emergency is over and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range of possible situations, it has also been considered that this is a matter to be agreed with the affected party, thereby not excluding the possibility of an eventual compensation for past events. In the absence of a negotiated settlement between the parties, this determination is to be made by the Tribunal to which the dispute has been submitted.⁸⁷⁵

Similarly, in *Sempra Energy International and Argentine Republic*,⁸⁷⁶ the Tribunal made reference to Article 27 in near identical terms.⁸⁷⁷

The ad hoc Committee formed to hear Argentina's application for annulment of the decision of the Tribunal in *CMS Gas Transmission Company v Argentine Republic*⁸⁷⁸ was also faced with issues relating to Article 27.

In the annulment proceedings Argentina argued that Article 27 does not require the payment of compensation for measures subject to the defence of necessity, only contemplates compensation in certain cases and does not attempt to specify in which circumstances compensation could be payable. It further added that the question was covered by the 'emergency clause' contained in the BIT, and that that provision excluded compensation.⁸⁷⁹ In addition, Argentina challenged the view of the Tribunal that the period of necessity was temporary, and argued that the Tribunal had failed to consider whether the continuing stability following the crisis depended upon the continuation of the measures at issue; finally, it argued that the Tribunal's view that any period of necessity was temporary could not be reconciled with the fact that its award of damages covered damages suffered during the period of necessity.⁸⁸⁰ On this basis, Argentina sought annulment of the decision of the Tribunal for manifest excess of power.

The ad hoc Committee noted that the Tribunal had:

⁸⁷⁵ Ibid., paras. 343–345.

⁸⁷⁶ *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007.

⁸⁷⁷ Ibid., paras. 392–394, although cf. paragraph 395 *in fine* and the subsequent discussion at paras. 396–397.

⁸⁷⁸ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007.

⁸⁷⁹ Ibid., para. 139.

⁸⁸⁰ Ibid., para. 140.

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[...] analyzed Article 27 of the ILC's Articles on State Responsibility concerning the temporary nature of necessity and the conditions under which compensation might be due even if necessity is established.

[...] Article 27 covers cases in which the state of necessity precludes wrongfulness under customary international law. In the present case, the Tribunal rejected Argentina's defense based on state of necessity. Thus Article 27 was not applicable and the paragraphs relating to that Article were *obiter dicta* which could not have any bearing on the operative part of the Award.⁸⁸¹

The ad hoc Committee went on to discuss and criticize the reasoning of the Tribunal in *CMS* in relation to Article 27, although concluding that the error of law committed by the Tribunal did not constitute a basis for annulling the Award:

[...] here again the Tribunal made a manifest error of law. Article 27 concerns, inter alia, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.

Moreover the Committee notes that Article 27 itself is a 'without prejudice' clause, not a stipulation. It refers to 'the question of compensation' and does not attempt to specify in which circumstances compensation could be due, notwithstanding the state of necessity.

[The relevant paragraphs] of the Award being *obiter dicta*, it remains to be seen on which basis the Tribunal decided that compensation was due by Argentina to CMS for the damage suffered by it from 2000 to 2027.

The Tribunal had already decided that Argentina had breached its international obligations under Article II(2)(a) and Article II(2)(c) of the BIT. It also decided that in the present case there was no state of necessity and did so in terms which, by necessary inference, excluded also the application of Article XI. Thus, under the well-known principle of international law recalled in Article 1 of the ILC Articles, Argentina was responsible for the wrongful measures it had taken.

The Committee concludes that, whatever may have been the errors made in this respect by the Tribunal, there is no manifest excess of powers or lack of reasoning in the part of the Award concerning Article XI of the BIT and state of necessity under customary international law.⁸⁸²

The ad hoc Committee constituted to hear the application for annulment of the award in *Mitchell v Democratic Republic of the Congo*⁸⁸³ also made reference to Article 27 of the Articles. It noted that, even if the wrongfulness of the measures in question had been precluded under a provision of the applicable BIT as a result of the existence of a state of war in the DRC (an argument which had not been invoked by the Respondent before the Tribunal), this would not necessarily have

⁸⁸¹ Ibid., paras. 144–145

⁸⁸² Ibid., paras. 146–150.

⁸⁸³ *Mitchell v Democratic Republic of the Congo*, (ICSID Case No. ARB/99/7), Decision on Annulment of 1 November 2006.

affected the Tribunal's conclusion that compensation was payable in relation to the breaches it had found of the applicable BIT. In this respect the ad hoc Committee observed:

[...] even if the Arbitral Tribunal had examined Article X(1) of the Treaty, if it had checked the need for the measures – regardless of the degree of such a check – and if it had concluded that they were not wrongful, this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation.⁸⁸⁴

In support of that statement, the ad hoc Committee referred in a footnote to the ILC's work on State responsibility, and in particular Article 27 of the Articles, noting that that provision 'bears witness to the existence of a principle of international law in this regard'.⁸⁸⁵ As a result, the ad hoc Committee concluded that the Tribunal could not be held to have manifestly exceeded its powers in this regard.

⁸⁸⁴ Ibid., para. 57.

⁸⁸⁵ Ibid., note 30.

PART TWO

**CONTENT OF THE INTERNATIONAL
RESPONSIBILITY OF A STATE**

CHAPTER I

GENERAL PRINCIPLES

Chapter I of Part Two defines the content of the international responsibility arising from an internationally wrongful act identified in accordance with Part One of the Articles. Article 28 plays a linking role, specifying that the international responsibility of a State arising as the consequence of an internationally wrongful act in accordance with Part One entails the consequences (i.e. the 'secondary' obligations) set out in Part Two of the Articles. Article 29 makes clear that the breach of an obligation does not affect the continued duty of the State on which that obligation is binding to perform it. Article 30 provides that a State which breaches an international obligation is under an obligation to put an end to the act if it is continuing, and may be required to offer appropriate guarantees and assurances of non-repetition. Article 31 sets out the principle that a State which breaches an international obligation is under an obligation to make full reparation for the injury caused thereby, and specifies that the notion of injury includes any damage, whether material or moral. Article 32 makes clear that a State may not rely on its internal law in order to attempt to justify non-compliance with its secondary obligations under Part Two. Finally, Article 33 provides that the secondary obligations forming the content of the international responsibility of a State contained in Part Two may be owed to one or more States or to the international community as a whole, dependent on the character and content of the international obligation in question and the nature of the breach; it also makes clear that the Articles are without prejudice to the possibility that rights may accrue to a person or entity other than a State.

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 28 serves as the link between the rules relating to determination of the existence of an internationally wrongful act contained in Part One, and the legal consequences deriving therefrom, as set out in the rest of Part Two. It therefore acts as the implementation of the principle contained in Article 1 of the Articles that every internationally wrongful act of a State entails its international responsibility.

Given the more or less formal role played by Article 28 in linking the provisions of Part One to those of Part Two, it is not surprising that there appears to have been no express reference to Article 28 in international practice since the adoption of the Articles in 2001.

However, reference may be made in this regard to the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁸⁸⁶ The Court, having concluded that the construction of the wall by Israel was not in conformity with its international obligations,⁸⁸⁷ and that Israel's actions could not be justified on the basis of either self-defence of the existence of a state of necessity,⁸⁸⁸ stated, albeit without express reference to Article 28:

[t]he Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it [...], it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.⁸⁸⁹

Having set out the arguments as to the various consequences which derived from Israel's violations of its international obligations, the Court stated:

[s]ince the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.⁸⁹⁰

As discussed further below in relation to a number of the Articles contained in Part Two, the Court went on to set out the content of the responsibility of Israel, as well as setting out the consequences which flowed from certain of the breaches for third States and the United Nations:

[t]he Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.⁸⁹¹

⁸⁸⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

⁸⁸⁷ Ibid., p. 194, para. 138.

⁸⁸⁸ Ibid., p. 195, para. 142.

⁸⁸⁹ Ibid., at p. 196, para. 143.

⁸⁹⁰ Ibid., at p. 197, para. 147.

⁸⁹¹ Ibid., at p. 197, para. 148.

Later on in this decision, the Court turned to examine:

the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.⁸⁹²

Finally, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.⁸⁹³ the International Court of Justice stated:

The Court, having established that Uganda committed internationally wrongful acts entailing its international responsibility [...], turns now to the determination of the legal consequences which such responsibility involves.⁸⁹⁴

In *Avena and Other Mexican Nationals (Mexico v United States of America)*,⁸⁹⁵ the International Court of Justice stated:

Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 (b), of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.⁸⁹⁶

⁸⁹² Ibid., at p. 199, para. 154. See the discussion below in relation to Chapter III of Part Two.

⁸⁹³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

⁸⁹⁴ Ibid., , para. 251.

⁸⁹⁵ *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Reports 2002, p. 12.

⁸⁹⁶ Ibid., at p. 58, para. 115.

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 29 sets out the proposition that the fact that a State has breached one of its international obligations, and is therefore subject to the legal consequences contained in Part Two, does not affect the continuing obligation of the State to perform the obligation breached. In other words, the fact of the breach of a State of one of its obligations, without more, does not entail that the obligation in question does not remain binding upon it. The proposition contained in Article 29 is hardly a controversial one.

Again reference may be made to the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁸⁹⁷ In that case, having concluded that the actions of Israel in constructing the wall was not in conformity with its international obligations,⁸⁹⁸ that its actions could not be justified on the basis of either self-defence or the existence of a state of necessity,⁸⁹⁹ and that its international responsibility was therefore engaged,⁹⁰⁰ the Court went on to hold:

[...] Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory [...]. Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War.⁹⁰¹

In *Avena and Other Mexican Nationals (Mexico v United States of America)*,⁹⁰² Judge ad hoc Sepúlveda in his Separate Opinion⁹⁰³ referred to Article 29 in the context of his discussion of cessation and assurances and guarantees of non-repetition. Having invoked the notion of continuing wrongful acts contained in Article 14(2) of the Articles, and referred to the Commentary thereto,⁹⁰⁴ Judge ad hoc Sepúlveda referred to the fact that the Court had ordered cessation in a number of previous cases,⁹⁰⁵ and continued:

[t]he legal reasoning that compels the need for the cessation and non-repetition of a breach of an international obligation is the continued duty of performance. To extend in time the performance of an illegal act would frustrate the very nature and foundations of the rule of law. As the ILC in Article 29 of its Draft Articles on State Responsibility indicates, 'The legal consequences of an international wrongful act [...] do not affect the continued duty of the responsible

⁸⁹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

⁸⁹⁸ Ibid., p. 194, para. 138.

⁸⁹⁹ Ibid., p. 195, para. 142.

⁹⁰⁰ Ibid., p. 197, para. 147.

⁹⁰¹ Ibid., p. 197, para. 149.

⁹⁰² *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Reports 2002, p. 12.

⁹⁰³ *Avena and Other Mexican Nationals (Mexico v United States of America)*, Separate Opinion of Judge ad hoc Sepúlveda, ICJ Reports 2002, p. 99.

⁹⁰⁴ Ibid., at p. 126, para. 77, quoting Commentary to Article 14, paragraph (3).

⁹⁰⁵ *Avena and Other Mexican Nationals (Mexico v United States of America)*, Separate Opinion of Judge ad hoc Sepúlveda, ICJ Reports 2002, p. 99, at p. 126–127, para. 78.

Part Two – Content of the International Responsibility

State to perform the obligation breached' In the Commentary to this Article, the ILC states

'Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act [...] and the obligation of cessation [...].'⁹⁰⁶

⁹⁰⁶

Ibid., at p. 127, para. 79, quoting Commentary to Article 29, paragraph (2).

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 30 sets out the proposition that a State which has committed an internationally wrongful act by breaching one or more of its international obligations is under obligations both to put an end to the breach, if it is of a continuing nature, as well as to provide assurances and guarantees of non-repetition, if appropriate.

The obligation embodied in Article 30(a) of cessation of a continuing wrongful act is the corollary of the proposition contained in Article 29 that a State which is responsible for an internationally wrongful act remains obliged to perform the obligation breached. By contrast, the proposition contained in Article 30(b) is prospective, and looks to the future.

Both aspects of Article 30 were before the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v United States of America)*,⁹⁰⁷ albeit that the Court disposed of the issue without reference to Article 30. The Court was faced with a request by Mexico that it order that the United States of America cease its violations of Article 36 of the Vienna Convention on Consular Relations in relation to Mexico and the 52 Mexican nationals, and ‘provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36(1) and to ensure compliance with Article 36(2).’⁹⁰⁸

As to the request for an order relating to cessation, the Court stated:

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. The Court would moreover point out that, inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of *pendente lite*; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.⁹⁰⁹

With regard to the request for assurances and guarantees of non-repetition, the Court did not deny that assurances and guarantees of non-repetition might be required in certain circumstances; rather, it held that the efforts which the United States of America had undertaken had to be considered to be sufficient so as to negate the need for any such order from the Court:

[t]he Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a ‘regular and continuing’ pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a

⁹⁰⁷ *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Reports 2004, p. 12.

⁹⁰⁸ Ibid., at p. 67, para. 144.

⁹⁰⁹ Ibid., at pp. 68, para. 148.

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 enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in 1998, including the dissemination to federal, state and local authorities of the State Department booklet [...]

The Court would further note in this regard that in the *LaGrand* case Germany sought, inter alia, 'a straightforward assurance that the United States will not repeat its unlawful acts' [...]. With regard to this general demand for an assurance of non-repetition, the Court stated:

'If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. 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.'

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the *LaGrand* Judgment remains applicable, and therefore meets that request.⁹¹⁰

By contrast, Judge ad hoc Sepúlveda in his Separate Opinion⁹¹¹ made express reference to Article 30 of the Articles, and the Commentary thereto, in relation to the question of cessation and guarantees and assurances of non-repetition. After referring to the notion of continuing wrongful acts contained in Article 14(2) of the Articles, and quoted from the Commentary to Article 14,⁹¹² and having noted that the Court had ordered cessation in a number of previous cases,⁹¹³ Judge ad hoc Sepúlveda continued:

[t]he legal reasoning that compels the need for the cessation and non-repetition of a breach of an international obligation is the continued duty of performance. To extend in time the performance of an illegal act would frustrate the very nature and foundations of the rule of law. As the ILC in Article 29 of its Draft Articles on State Responsibility indicates, 'The legal consequences of an international wrongful act [...] do not affect the continued duty of the responsible

⁹¹⁰ Ibid., 68–69, paras. 149–150, quoting *LaGrand* (*Germany v United States of America*), *ICJ Reports* 2001, p. 466, at p. 512–513, para. 124.

⁹¹¹ *Avena and Other Mexican Nationals* (*Mexico v United States of America*), Separate Opinion, of Judge ad hoc Sepúlveda, *ICJ Reports* 2002, p. 99.

⁹¹² Ibid., at p. 126, para. 77, quoting Commentary to Article 14, paragraph (3).

⁹¹³ Ibid., at p. 126–127, para. 78.

State to perform the obligation breached' In the Commentary to this Article, the ILC states

'Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act [...] and the obligation of cessation [...]'

To cease an illegal act and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, is not a discretionary matter[;] the State responsible for an internationally wrongful act is under an obligation to do precisely that, according to Article 30 of the ILC Draft Articles on State Responsibility. In its Commentary to this Article, the ILC provides a useful consideration

'Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past' [...] ⁹¹⁴

In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judges Higgins, Kooijmans and Buergenthal in their joint Separate Opinion⁹¹⁵ made reference to Article 30 of the Articles in doubting the conclusion of the majority of the Court that Belgium was under an obligation to cancel the arrest warrant at issue in that case. The Court had referred to the principle of full reparation enunciated by the Permanent Court of International Justice in *Factory at Chorzów*,⁹¹⁶ and concluded that that principle required the withdrawal of the arrest warrant:

[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. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. 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.⁹¹⁷

The three judges observed in this regard that:

[...] the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility [...]). However, the Court's finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal

⁹¹⁴ Ibid., at p. 127, paras. 79–80, quoting Commentary to Article 29, paragraph (2) and Commentary to Article 30, paragraph (11).

⁹¹⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *ICJ Reports* 2002, p. 64.

⁹¹⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *ICJ Reports* 2002, p. 3, at p. 33, para. 76, referring to *Factory at Chorzów, Merits*, 1928, *P.C.I.J. Series A, No. 17*, p. 47.

⁹¹⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *ICJ Reports* 2002, p. 3, at p. 33, para. 76; for the *dispositif*, see *ibid.*, p. 34, para. 78(3).

consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law [...]⁹¹⁸

In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*,⁹¹⁹ Cameroon requested that the Court require Nigeria to give assurances and guarantees of non-repetition in relation its occupation of areas which the Court had held appertained to Cameroon. The Court observed that such a request was 'undoubtedly admissible'.⁹²⁰ However, it declined to grant the relief sought, noting that:

[...] the 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. Hence Cameroon's submissions on this point cannot be upheld.⁹²¹

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,⁹²² the DRC had requested that the Court order that Uganda cease 'providing support for irregular forces operating in the DRC and cease from exploiting Congolese wealth and natural resources'.⁹²³

Albeit again without making express reference to Article 30, the Court's approach to the question is consistent with Article 30. The Court did not deny that an order requiring cessation might be made in an appropriate case, but rather held that there was no proof of continuing wrongful acts, and on that basis refused to grant the relief sought. In that regard, the Court observed:

[...] there is no evidence in the case file which can corroborate the DRC's allegation that at present Uganda supports irregular forces operating in the DRC and continues to be involved in the exploitation of Congolese natural resources. Thus, the Court does not find it established that Uganda, following the withdrawal of its troops from the territory of the DRC in June 2003, continues to commit the internationally wrongful acts specified by the DRC. The Court thus concludes that the DRC's request that Uganda be called upon to cease the acts [...] cannot be upheld.⁹²⁴

The DRC had likewise requested that the Court require Uganda to give assurances and guarantees of non-repetition.⁹²⁵ Again, the Court dealt with that question without reference to Article 30 of the Articles, although its approach is once more fully in accordance with Article 30(b).

In this regard, the Court took note of the Tripartite Agreement on Regional Security in the Great Lakes between the DRC, Rwanda and Uganda, in which the parties had, inter alia, affirmed their

⁹¹⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *ICJ Reports 2002*, p. 64, at p. 90, para. 89. Cf. the similar conclusion of Judge ad hoc Van den Wyngaert, who concluded with reference to Article 14 of the Articles, that there was no continuing internationally wrongful act: Dissenting Opinion of Judge ad hoc Van den Wyngaert, *ICJ Reports 2002*, p. 137 at p. 183, para. 83.

⁹¹⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Merits, *ICJ Reports 2002*, p. 303.

⁹²⁰ *Ibid.*, p. 452, para. 318, referring to *Lagrand (Germany v United States of America)*, *ICJ Reports 2001*, p. 466, paras. 117 et seq.

⁹²¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Merits, *ICJ Reports 2002*, p. 303. at p. 452 para. 318.

⁹²² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, *ICJ Reports 2005*, p. 168.

⁹²³ See, *ibid.*, para. 253.

⁹²⁴ *Ibid.*, para. 254.

⁹²⁵ *Ibid.*, para. 255.

respect for the principles of good neighbourliness, sovereignty, territorial integrity, and non-interference in the internal affairs of sovereign states; one of the objectives of the Tripartite Agreement was the ‘cessation of any support for armed groups or militias’.⁹²⁶ The Court then observed:

[...] if 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 co-operate 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.⁹²⁷

In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁹²⁸ the International Court of Justice, having found that ‘the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel’,⁹²⁹ that Israel could not rely on self-defence or a state of necessity,⁹³⁰ and that therefore ‘the construction of the wall, and its associated régime, are contrary to international law’,⁹³¹ found that Israel’s responsibility under international law was thereby engaged.⁹³²

The Court then went on to address the legal consequences of Israel’s breaches of its international obligations.⁹³³ As discussed above in relation to Article 29, the first such consequence identified by the Court was that Israel remained obliged to comply with the international obligations it had breached.⁹³⁴ The Court next affirmed, albeit without reference to Article 30, the obligation of cessation of continuing wrongful acts embodied in Article 30(a) of the Articles:

[...] Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation [...]⁹³⁵

The Court went on to specify particular breaches, cessation of which was necessary:

Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court’s finding [...] that Israel’s violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the

⁹²⁶ Ibid., para. 256.

⁹²⁷ Ibid., para. 257.

⁹²⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

⁹²⁹ Ibid., at p. 194, para. 138.

⁹³⁰ Ibid., at p. 195, para. 142.

⁹³¹ Ibid.

⁹³² Ibid., at p. 197, para. 147.

⁹³³ Ibid., at p. 197, para. 148.

⁹³⁴ Ibid., at p. 197, para. 149.

⁹³⁵ Ibid., at p. 197, para. 150; in this regard, the Court made reference to its decisions in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 6 at p. 149, para. 292(12); *United States Diplomatic and Consular Staff in Tehran*, Merits, ICJ Reports 1980, p. 3, at p. 44, para. 95; *Haya de la Torre*, Judgment, ICJ Reports 1951, p. 71, at p. 82), all of which are likewise referred to in the Commentary to Article 30.

dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to [...] below.⁹³⁶

⁹³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p. 136, at p. 197–198, para. 151

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 31 provides that a State which is responsible for an internationally wrongful act falls under an obligation to make full reparation for the injury caused thereby, as well as making clear that injury includes any damage caused by the internationally wrongful act in question, whether material or moral.

Paragraph 1 embodies the basic proposition of the law of international responsibility enunciated by the Permanent Court of International Justice in its decision on jurisdiction in *Factory at Chorzów* that 'the breach of an engagement involves an obligation to make reparation in an adequate form',⁹³⁷ and the Permanent's Court subsequent explanation of the principle of 'full reparation' at the merits stage of the same case:

The essential principle contained in the actual notion of an illegal act [...] is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.⁹³⁸

Further elucidation of the notion of full reparation is provided in Articles 34 to 38 constituting Chapter II of Part Two of the Articles.

Article of the Articles 31 has been referred to on a number of occasions, often in conjunction with citation of the judgments of the Permanent Court in *Factory at Chorzów*, and often together with one or more of the provisions contained in Chapter Two of Part Two of the Articles.

In its Report and Recommendations in relation to part three of the third instalment of 'F3' claims⁹³⁹ (i.e. claims by Kuwait against Iraq for losses arising from the invasion of Kuwait (excluding environmental claims)), the Panel of Commissioners of the United Nations Compensation Commission (UNCC) referred to Articles 31 and 35 of the Articles, as well as to the decisions of the Permanent Court in *Factory at Chorzów*. That reference occurred in support of the holding by the Panel of Commissioners that 'direct financing losses' (i.e. losses occasioned by the use or diversion of Kuwaiti resources in order to finance the remediation of loss and damage resulting from the invasion and occupation) were compensable within the scheme of the UNCC.

The Panel of Commissioners held that such 'direct financing losses' fell

[...] squarely within the types of loss contemplated by articles 31 and 35 of the International Law Commission articles, and the principles established in the *Chorzów* case, and so are compensable.⁹⁴⁰

⁹³⁷ *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.*

⁹³⁸ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.*

⁹³⁹ *Report and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Installment of 'F3' Claims*, 18 December 2002 (UN doc. S/AC.26/2003/15); the Panel of Commissioner's Report and Recommendations were approved by the Governing Council of the United Nations Compensation Commission in *Governing Council Decision No. 194*, 26 June 2003, UN doc. S/AC.26/Dec.194 (2003)

⁹⁴⁰ *Report and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Installment of 'F3' Claims*, 18 December 2002 (UN doc. S/AC.26/2003/15), para. 220(c).

Similarly, in its decision on the fifth instalment of 'F4' claims (i.e. claims concerning environmental damage resulting from the invasion and occupation of Kuwait by Iraq),⁹⁴¹ the Panel of Commissioners of the UNCC referred implicitly to Article 31, in relation to the claimants' claims for compensation for loss of use of natural resources.

The claimants had asked for compensation from the time of the occurrence of the damage in question until full restoration of the natural resources. Iraq had countered that there was no basis or justification for providing compensation in relation to natural resources which had no commercial value. The Panel of Commissioners noted that the claimants:

[...] argue that, under general international law, it would be an absurd and unreasonable result to deny compensation for temporary loss of resources resulting from a deliberate internationally wrongful act of aggression. They assert that entitlement to compensation for such damage under international law is mandated by the fundamental principle articulated by the Permanent Court of International Justice in the *Factory at Chorzów* case that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'. They point out that this principle, which predates 1991 and Security Council resolution 687 (1991), has been accepted by the International Law Commission of the United Nations and many other international authorities.⁹⁴²

The Panel of Commissioners considered that:

[...] although both the Claimants and Iraq have framed their arguments in terms of whether claims for interim loss are compensable in principle, the Panel considers that the fundamental issue to be resolved is whether, pursuant to Security Council resolution 687 (1991), claimants who suffer damage to natural resources that have no commercial value are entitled to compensation beyond reimbursement of expenses incurred or to be incurred to remediate or restore the damaged resources. In other words, the question is whether the term 'environmental damage', as used in Security Council resolution 687 (1991), includes what is referred to as 'pure environmental damage'; i.e., damage to environmental resources that have no commercial value.⁹⁴³

Having referred to previous decisions, and interpreted the relevant provisions of Resolution 687 (1991), the Panel of Commissioners concluded that such loss was included within the term 'environmental damage', and was in principle compensable:

The Panel does not consider that there is anything in the language or context of Security Council resolution 687 (1991) or Governing Council decision 7 that mandates or suggests an interpretation that would restrict the term 'environmental damage' to damage to natural resources which have commercial value.

Furthermore, the Panel does not consider that the fact that the effects of the loss of or damage to natural resources might be for a temporary duration should have any relevance to the issue of the compensability of the damage or loss, although it

⁹⁴¹ *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Installment of 'F4' Claims*, 1 April 2005, (UN doc. S/AC.26/2005/10); the Panel of Commissioners' Report and Recommendations were approved by the Governing Council of the United Nations Compensation Commission in *Governing Council Decision No. 248*, 30 June 2005, UN doc. S/AC.26/Dec.248 (2005)

⁹⁴² *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Installment of 'F4' Claims*, UN doc. S/AC.26/2005/10, 30 June 2005, para. 49

⁹⁴³ *Ibid.*, para. 51.

might affect the nature and quantum of compensation that may be appropriate. In the view of the Panel, it is not reasonable to suggest that a loss that is documented to have occurred, and is shown to have resulted from the invasion and occupation of Kuwait, should nevertheless be denied compensation solely on the grounds that the effects of the loss were not permanent. As the Panel sees it, the critical issue to be determined in each claim is whether the evidence provided is sufficient to show that there has been a loss of or damage to natural resources as alleged and, if so, whether such loss or damage resulted directly from Iraq's invasion and occupation of Kuwait.

The Panel, therefore, finds that a loss due to depletion of or damage to natural resources, including resources that may not have a commercial value is, in principle, compensable in accordance with Security Council resolution 687 (1991) and Governing Council decision 7 if such loss was a direct result of Iraq's invasion and occupation of Kuwait. It follows, therefore, that temporary loss of the use of such resources is compensable if it is proved that the loss resulted directly from Iraq's invasion and occupation of Kuwait.⁹⁴⁴

Having reached that conclusion as a matter of construction of the relevant provisions of Resolution 687, the Panel of Commissioners observed:

The Panel does not consider that this finding is inconsistent with any principle or rule of general international law. In the view of the Panel, there is no justification for the contention that general international law precludes compensation for pure environmental damage. In particular, the Panel does not consider that the exclusion of compensation for pure environmental damage in some international conventions on civil liability and compensation is a valid basis for asserting that international law, in general, prohibits compensation for such damage in all cases, even where the damage results from an internationally wrongful act.⁹⁴⁵

In *Petrobart Limited v Kyrgyz Republic*,⁹⁴⁶ the Tribunal, having found that the Kyrgyz Republic had violated the applicable BIT, made implicit reference to Articles 31 and 35 in setting out the argument of the claimant as to the applicable standard for reparation. The claimant, as recorded by the Tribunal earlier in its Award, had relied extensively on Articles 31, 35 and 36 in support of its claim for compensation.⁹⁴⁷ In its decision, the Tribunal endorsed the claimant's submissions in that regard:

Petrobart refers to the judgment of the Permanent Court of International Justice in the *Factory at Chorzów* case and to the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts in order to show that the Kyrgyz Republic is obliged to compensate Petrobart for all damage resulting from its breach of the Treaty. The Arbitral Tribunal agrees that, in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.⁹⁴⁸

⁹⁴⁴ Ibid., paras. 55–57.

⁹⁴⁵ *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Installment of 'F4' Claims*, UN doc. S/AC.26/2005/10, 30 June 2005, para. 58.

⁹⁴⁶ *Petrobart Limited v Kyrgyz Republic*, (Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003), Award of 29 March 2005

⁹⁴⁷ Ibid., pp. 30–31, 35–36.

⁹⁴⁸ Ibid., pp. 77–78.

Reference was also made to Article 31 by the Tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*⁹⁴⁹ in the context of its discussion of the standard under customary international law for the assessment of compensation. Having noted that the ‘customary international law standard for the assessment of damages resulting from an unlawful act’ was that set out in the decision of the Permanent Court of International Justice in *Factory at Chorzów*,⁹⁵⁰ discussed other relevant international jurisprudence (including the holding of the Tribunal in *Petrobart Limited v Kyrgyz Republic*),⁹⁵¹ and concluded that:

[t]hus there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.⁹⁵²

The Tribunal then observed:

[i]t may also be noted that the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, concluded in 2001, expressly rely on and closely follow *Chorzów Factory*.⁹⁵³

The Tribunal then set out the text of Article 31(1) of the Articles, before referring to the Commentary to that provision:

[t]he Commission's Commentary [...] on this Article states that ‘The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the *Factory at Chorzów* case’ and then quotes the identical passage quoted by the International Court of Justice in all of the cases cited above [...]. The Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded.⁹⁵⁴

It continued:

[t]he remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, ‘payment of a sum corresponding to the value which a restitution in kind would bear’, which is the matter to be decided.⁹⁵⁵

In *CME Czech Republic B.V. v Czech Republic*,⁹⁵⁶ the Tribunal made reference to the ILC's Commentary to Article 31 in the context of its discussion of an argument that the participation of a private individual had been the cause of the claimant's loss:

[t]he Respondent further argued that no harm would have come to CME's investment without the actions of Dr. Železný; hence, the Media Council and the Czech State are absolved of responsibility for the fate of CME's investment. This

⁹⁴⁹ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006.

⁹⁵⁰ *Ibid.*, para. 484.

⁹⁵¹ *Ibid.*, paras. 486–493; the reference to *Petrobart Limited v Kyrgyz Republic* is at para. 490.

⁹⁵² *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, para. 493.

⁹⁵³ *Ibid.*, para. 493.

⁹⁵⁴ *Ibid.*, para. 494, quoting Commentary to Article 31, paragraph (1) and referring to paragraph (2).

⁹⁵⁵ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, paras. 495.

⁹⁵⁶ *CME Czech Republic B.V. v Czech Republic*, Partial Award of 13 September 2001.

argument fails under the accepted standards of international law. As the United Nations International Law Commission in its Commentary on State responsibility recognizes, a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury.⁹⁵⁷

The Tribunal continued, referring to the Commentary to Article 31:

[t]he U.N. International Law Commission observed that sometimes several factors combine to cause damage. The Commission in its Commentary referred to various cases, in which the injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible State. International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault. The U.N. International Law Commission referred in particular to the Corfu Channel case, according to which the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of mines at the Albanian Coast, even though Albania had not itself laid the mines [...]. 'Such a result should follow a fortiori in cases, where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals' [...]. The U.N. International Law Commission further stated:

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

Various terms are used for such allocation of injury under international law.

'The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised.'

'In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule [...]'⁹⁵⁸

The Tribunal further made reference to the Commentary to Article 31 in commenting upon the reparation due to the Claimant:

[t]he Respondent, as a consequence of the breach of the Treaty, is under an obligation to make full reparation for the injury caused by the Media Council's wrongful acts and omissions as described above. A causal link between the Media Council's wrongful acts and omissions and the injury the Claimant suffered as a

⁹⁵⁷ Ibid., para. 580, referring to Commentary to Article 31, paragraphs (9)–(10) and (12)–(13).

⁹⁵⁸ *CME Czech Republic B.V. v. Czech Republic*, Partial Award of 13 September 2001, paras. 583–584, quoting (in order) from Commentary to Article 31, paragraphs (12), (13), and (10)

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result thereof, is established, as already stated above. The Respondent's obligation to remedy the injury the Claimant suffered as a result of Respondent's violations of the Treaty derives from Article 5 of the Treaty and from the rules of international law. According to Article 5 subpara. c of the Treaty, any measures depriving directly or indirectly an investor of its investments must be accompanied 'by a provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments effected.' *A fortiori* unlawful measures of deprivation must be remedied by just compensation.

In respect to the Claimant's remaining claims, this principle derives also from the generally accepted rules of international law. The obligation to make full reparation is the general obligation of the responsible State consequent upon the commission of an internationally wrongful act (see the Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the U.N. International Law Commission as cited above).⁹⁵⁹

Having referred to the observations of the Permanent Court of International Justice in *Factory at Chorzów*,⁹⁶⁰ the Tribunal continued:

[t]his view has been accepted and applied by numerous arbitral awards (Commentary of the Articles on the Responsibility of States for International Wrongful Acts with further citations). The Respondent is obligated to 'wipe out all the consequences' of the Media Council's unlawful acts and omissions, which caused the destruction of the Claimant's investment. Restitution in kind is not requested by the Claimant (as restitution in kind is obviously not possible, ÉNTS' broadcasting operations having been shut down for two years). Therefore, the Respondent is obligated to compensate the Claimant by payment of a sum corresponding to the value which a restitution in kind would bear. This is the fair market value of Claimant's investment as it was before consummation of the Respondent's breach of the Treaty in August 1999.⁹⁶¹

In its award on damages in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina*,⁹⁶² the Tribunal likewise made reference to Article 31 in its discussion of the standard for reparation under international law:

[t]he Tribunal agrees with the Claimants that the appropriate standard for reparation under international law is 'full' reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts [...]. In accordance with the PCIJ, reparation: '[...] must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [...].'⁹⁶³

⁹⁵⁹ *CME Czech Republic B.V. v Czech Republic*, Partial Award of 13 September 2001, para. 616.

⁹⁶⁰ *Ibid.*, para. 616–617, citing *Factory at Chorzów*, *Jurisdiction*, 1927, *P.C.I.J., Series A, No. 9*, p. 21 and *Merits*, 1928, *P.C.I.J., Series A, No. 17*, p. 47.

⁹⁶¹ *CME Czech Republic B.V. v Czech Republic*, Partial Award of 13 September 2001, para. 618.

⁹⁶² *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina* (ICSID Case No. ARB/02/1), Award on Damages of 25 July 2007.

⁹⁶³ *Ibid.*, para. 31, quoting *Factory at Chorzów*, *Merits*, 1928, *P.C.I.J., Series A, No. 17*, p. 47.

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*⁹⁶⁴, having found that the respondent had failed to comply with its obligation to prevent and punish genocide under the Genocide Convention, the International Court of Justice turned to the question of reparation, and, in that regard, referred to the decision of the Permanent Court in *Factory at Chorzów*, as well as Article 31 of the Articles:

[t]he principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed' ([...] see also Article 31 of the ILC's Articles on State Responsibility).⁹⁶⁵

It also bears noting that in a number of other cases, the International Court of Justice has referred to the passages taken from the judgments of the Permanent Court in *Factory at Chorzów*, upon which Article 31 is premised, in discussing the question of reparation, albeit without discussion of the Article itself.⁹⁶⁶

In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*,⁹⁶⁷ the Court, having noted that it had already concluded that the issue and circulation of the arrest warrant by the Belgian authorities 'failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law', observed that those findings 'constitute a form of satisfaction which will make good the moral injury complained of by the Congo'.⁹⁶⁸ The Court then referred to the judgment of the Permanent Court in *Factory at Chorzów*, before noting:

[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. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. 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.⁹⁶⁹

In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁹⁷⁰ the Court also made reference to the judgement of the Permanent Court in *Factory at Chorzów* when discussing the content of Israel's responsibility as a breach of its various obligations, and affirmed the principle of full reparation, albeit again it did not make reference to Article 31 in this context. In its discussion of the legal consequences deriving from the violations of international law which it found to have occurred as a result of Israel's construction of the wall, the Court observed:

[m]oreover, given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the

⁹⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

⁹⁶⁵ *Ibid.*, para. 460.

⁹⁶⁶ In addition to the cases cited, see also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *ICJ Reports 2002*, p. 3, at p. 31–32, para. 76.

⁹⁶⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *ICJ Reports 2002*, p. 3, at p. 31–32, para. 76.

⁹⁶⁸ *Ibid.*, at p. 31–32, para. 76.

⁹⁶⁹ *Ibid.* at p. 32, para. 77.

⁹⁷⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ICJ Reports 2004*, p. 136.

obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice [...]⁹⁷¹

The Court then set out the passage from the decision of the Permanent Court on the merits in *Factory at Chorzów*, upon which, as already noted, Article 31 is premised.⁹⁷²

In *Avena and Other Mexican Nationals (Mexico v United States of America)*,⁹⁷³ the Court again made reference to the passages from the judgments in *Factory at Chorzów* referred to above in discussing the notion of reparation.

[t]he general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.' [...] What constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.⁹⁷⁴

Finally, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,⁹⁷⁵ the Court affirmed the principle of full reparation embodied in Article 31, again without reference to the Articles:

[...] it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act [...] Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having

⁹⁷¹ Ibid., p. 136, at p. 198, para. 152.

⁹⁷² Ibid., quoting *Factory at Chorzów, Merits*, 1928, P.C.I.J. Series A, No. 17, p. 47.

⁹⁷³ *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Reports 2002, p. 12.

⁹⁷⁴ Ibid., p. 59, para. 119, quoting *Factory at Chorzów: Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; and *Merits*, 1928, P.C.I.J. Series A, No. 17, p. 47.

⁹⁷⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly.⁹⁷⁶

⁹⁷⁶ Ibid., para. 259, referring to *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at p. 59, para. 119

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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 32 provides that a State may not rely upon its internal law in order to justify a failure to comply with its obligations arising as a result of its international responsibility as set out in Part Two.

No reference appears to have been made to Article 32 since the adoption of the Articles.

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.

Article 33 serves two functions. The first paragraph of the Article makes clear that, depending on the character of the obligation and the circumstances of the breach, the secondary obligations contained in Part Two may be owed either to a single State, a plurality of States or to the international community as a whole. The second paragraph of the provision is a saving clause, providing that Part Two is without prejudice to the possibility that rights may accrue to a person or entity other than a State as a result of its international responsibility.

In *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*,⁹⁷⁷ the Tribunal observed in the context of its discussion of the effect of a contractual dispute resolution clause on its jurisdiction, that:

[i]t is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest.⁹⁷⁸

In support of the proposition that treaties may confer rights on individuals, the Tribunal made reference, inter alia, to Article 33(2).⁹⁷⁹

⁹⁷⁷ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, 29 January 2004.

⁹⁷⁸ *Ibid.*, para. 154.

⁹⁷⁹ *Ibid.*, note 83; the Tribunal also referred in this regard to the decision of the International Court of Justice *Lagrand (Germany v United States of America)*, *ICJ Reports 2001*, p. 466, at p. 494, paras. 77-78.

CHAPTER II

REPARATION FOR INJURY

Chapter II of Part Two is concerned with further elucidation of the notion of full reparation, referred to in Article 31 of the Articles. Article 34 states that full reparation in accordance with Article 31 may take the form of restitution, compensation and satisfaction, either singly or in combination. Article 35 deals with the primary form of reparation, restitution, while Article 36 relates to compensation and Article 37 is concerned with satisfaction. Article 38 covers questions of interest and makes clear that the award of interest may be necessary in order to achieve full reparation.

Given that reparation may take the form of a combination of either restitution, compensation or satisfaction, in a number of cases reference to the Articles has consisted of the invocation of more than one of the provisions contained in Part Two, Chapter II, often together with Article 31. In relation to these cases, at the expense of some repetition, the relevant portion of the decision is included under each provision in the discussion of the individual articles which follows.

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 34 explains that full reparation for the injury caused by an internationally wrongful act may take the form of restitution, compensation or satisfaction, either singly or in combination. The provision thus acts as a link between the principle that a State which commits an internationally wrongful act is under an obligation to make full reparation, contained in Article 31, and the provisions relating to the various specific forms which such reparation may take, and their interaction, set out in the remaining provisions of Chapter II of Part Two.

In *CMS Gas Transmission Company v Argentine Republic*,⁹⁸⁰ the Tribunal, having determined that Argentina had breached its obligations under the applicable BIT, observed at the outset of its discussion of ‘The Standards of Reparation Under International Law’ that:

[i]t is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.⁹⁸¹

In an accompanying footnote,⁹⁸² it referred to Article 34 of the Articles.

In *Nykomb Synergetics Technology Holding AB v Republic of Latvia*,⁹⁸³ having found that the respondent had breached the applicable BIT, and that a clause in the BIT relating to the standard of compensation was limited to compensation for lawful expropriation and therefore did not cover compensation for breaches of the BIT, the Tribunal made reference to the Articles, including Article 34, in order to ascertain the ‘established principles of customary international law’ relating to remedies for the respondent’s breach of its obligations under the treaty:

[t]he Arbitral Tribunal holds, and it seems to be agreed between the parties, that the question of remedies to compensate for losses or damages caused by the Respondent’s violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission’s Draft Articles on State Responsibility adopted in November 2001 [...]).

According to Articles 34 and 35 [...], restitution is considered to be the primary remedy for reparation.⁹⁸⁴

In its award on damages in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina*,⁹⁸⁵ the Tribunal, having referred to the decision of the Permanent Court in *Factory at Chorzów* in support of the proposition that the appropriate standard for reparation was ‘full’ reparation, and noted that that standard was codified in Article 31 of the Articles,⁹⁸⁶ the Tribunal went on to observe, that:

⁹⁸⁰ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005.

⁹⁸¹ *Ibid.*, para. 399.

⁹⁸² *Ibid.*, note 211.

⁹⁸³ *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, Award of 16 December 2003.

⁹⁸⁴ *Ibid.*, p. 38–39; section 5.1

⁹⁸⁵ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina* (ICSID Case No. ARB/02/1), Award on Damages of 25 July 2007.

⁹⁸⁶ *Ibid.*, para. 31.

[r]eparation can thus take the form of restitution or compensation. Claimants have requested compensation measured by the fair market value of their loss.⁹⁸⁷

In an accompanying footnote, the Tribunal noted:

Article 34 of the [Articles] also includes satisfaction as a third form of reparation. Satisfaction is, however, irrelevant for the purposes of this case and will not be considered by the Tribunal.⁹⁸⁸

⁹⁸⁷ Ibid., para. 32.

⁹⁸⁸ Ibid., note 6.

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 35 deals with the question of restitution. It provides that the responsible State is under an obligation to re-establish the situation which existed before the wrongful act was committed, insofar as such restitution is either not materially impossible or does not involve a burden which is disproportionate to the benefit of restitution as compared to payment of compensation.

Article 35 is designed to give effect to the principle of full reparation enunciated by the Permanent Court of International Justice in its judgment on the merits in *Factory at Chorzów*,⁹⁸⁹ where the Permanent Court stated:

[...] reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which determine the amount of compensation due for an act contrary to international law.⁹⁹⁰

In decisions since the adoption of the Articles, reference to that statement has frequently been made together with reference to Article 35; further, reference has also often been made to Article 35 in conjunction with Articles 31 and 34.

As noted above in relation to Article 31, in its Report and Recommendations in relation to part three of the third instalment of 'F3' claims (claims by Kuwait against Iraq for losses arising from the invasion of Kuwait excluding environmental claims),⁹⁹¹ the Panel of Commissioners of the United Nations Compensation Commission (UNCC) made reference to both Articles 31 and 35, as well as to the decisions of the Permanent Court in *Factory at Chorzów*, in support of its holding that 'direct financing losses' (i.e. losses occasioned by the use or diversion of resources by Kuwait in order to finance the remediation of loss and damage resulting from the invasion and occupation by Iraq) were compensable. The Panel of Commissioners observed:

- (a) The use or diversion of Kuwait's resources to fund the costs of putting right loss and damage arising directly from Iraq's invasion and occupation of Kuwait is to be regarded as a 'normal and natural' consequence of the invasion and occupation;

⁹⁸⁹ *Factory at Chorzów, Merits, 1928, PCIJ, Series A No. 17.*

⁹⁹⁰ *Ibid.*, at 47.

⁹⁹¹ *Report and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Installment of 'F3' Claims*, 18 December 2002 (UN doc. S/AC.26/2003/15); the Panel of Commissioners' Report and Recommendations were approved by the Governing Council of the United Nations Compensation Commission in *Governing Council Decision No. 194*, 26 June 2003, UN doc. S/AC.26/Dec.194 (2003)

(b) That such use must be demonstrated by reference to expenditure on such loss and damage;

(c) Losses that are shown to have arisen as a consequence of such expenditure are themselves direct losses, falling squarely within the types of loss contemplated by Articles 31 and 35 of the ILC Articles, and the principles established in the *Chorzów* case, and so are compensable, subject to verification and valuation. The Panel recalls that it has termed such losses ‘direct financing losses’; and

(d) Conversely, the use of the Funds Raised beyond funding losses that are themselves direct losses has not been shown to be a loss in fact, and such use in any event is not to be regarded as a ‘normal and natural’ consequence of the invasion and occupation. Accordingly, any losses that flow from such use are not themselves direct losses.⁹⁹²

Given the Panel of Commissioner’s conclusion that such losses were ‘compensable’, some doubts must be expressed as to whether the Panel really intended to refer to Article 35 of the Articles dealing with restitution, rather than Article 36, which deals with compensation and would appear to be of more relevance.

In *Nykomb Synergetics Technology Holding AB v Republic of Latvia*,⁹⁹³ as a result of conduct which was held to be attributable to the respondent, payments due to the claimant’s subsidiary (‘Windau’) were made at a level lower than that foreseen in a contract entered into by Windau contract and under the applicable domestic law. The Tribunal held that the actions attributable to Latvia in making such lower payments were in breach of the applicable BIT, and made reference to the Articles in assessing the ‘established principles of customary international law’ in relation to the reparation due in that regard:

[t]he Arbitral Tribunal holds, and it seems to be agreed between the parties, that the question of remedies to compensate for losses or damages caused by the Respondent’s violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in [the Articles]

According to Articles 34 and 35 [of the Articles] restitution is considered to be the primary remedy for reparation.⁹⁹⁴

Having set out the text of Article 35, the Tribunal continued:

Restitution in the present case is conceivable, either through a juridical restitution of provisions of Latvian law ensuring Windau’s right to the double tariff as it was ensured under the Entrepreneurial Law, or through a monetary restitution to Windau of the missing payments of the difference between the contractually established double tariff and 0.75 of the tariff actually paid. But even if damage or losses to an investment may be inflicted indirectly through loss-creating actions towards a subsidiary in the country of a Contracting State, restitution must primarily be seen as an appropriate remedy in a situation where the Contracting State has instituted actions directly against the investor. An award obliging the Republic to make payments to Windau in accordance with the Contract would also in effect be equivalent to ordering payment under Contract No. 16/07 in the present Treaty arbitration. The Arbitral Tribunal therefore finds the appropriate

⁹⁹² *Report and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Installment of ‘F3’ Claims*, 18 December 2002 (UN doc. S/AC.26/2003/15), para. 220.

⁹⁹³ *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, Award of 16 December 2003.

⁹⁹⁴ *Ibid.*, p. 38–39, section 5.1

approach, for the time up to the time of this award, to be an assessment of compensation for the losses or damages inflicted on the Claimant's investments.⁹⁹⁵

In *CMS Gas Transmission Company v Argentine Republic*,⁹⁹⁶ having determined that Argentina had breached its obligations in respect of the claimant's investment, the Tribunal observed, with reference in a footnote to Article 34 of the Articles, that:

It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.⁹⁹⁷

The Tribunal went on to note, referring in this regard in a footnote to Article 35 of the Articles, that:

[r]estitution is the standard used to reestablish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation.⁹⁹⁸

It then quoted the well-known passage from the decision of the Permanent Court of International Justice in *Factory at Chorzów*,⁹⁹⁹ before observing, quoting Article 36 of the Articles, that:

[c]ompensation is designed to cover any 'financially assessable damage including loss of profits insofar as it is established.' Quite naturally compensation is only called for when the damage is not made good by restitution.¹⁰⁰⁰

Having discussed the basis on which compensation was to be assessed, in a section entitled 'Restitution by negotiation', the Tribunal observed:

[r]estitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act. In a situation such as that characterizing this dispute and the complex issues associated with the crisis in Argentina, it would be utterly unrealistic for the Tribunal to order the Respondent to turn back to the existing regulatory framework existing before the emergency measures were adopted, nor has this been requested. However, as the Tribunal has repeatedly stated in this Award, the crisis cannot be ignored and it has specific consequences on the question of reparation.

Just as an acceptable rebalancing of the contracts has been achieved by means of negotiation between the interested parties in other sectors of the Argentine economy, the parties are free to further pursue the possibility of reaching an agreement in the context of this dispute. As long as the parties were to agree to new terms governing their relations, this would be considered as a form of restitution as both sides to the equation would have accepted that a rebalancing had been achieved.¹⁰⁰¹

However, the Tribunal subsequently noted that it could not:

⁹⁹⁵ Ibid., p. 39, section 5.1.

⁹⁹⁶ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005

⁹⁹⁷ Ibid., para. 399 and note 211.

⁹⁹⁸ Ibid., para. 400 and note 212.

⁹⁹⁹ Ibid., para. 400, citing *Factory at Chorzów, Merits, 1928, PCIJ, Series A No. 17*, at 47.

¹⁰⁰⁰ Ibid., para. 401

¹⁰⁰¹ Ibid., paras. 406–407.

[...] leave matters pending until an agreed settlement is reached; this is a matter strictly in the hands of the parties and its outcome is uncertain. In the absence of such agreed form of restitution, the Tribunal must accordingly determine the amount of compensation due.¹⁰⁰²

In *Enron and Ponderosa Assets L.P. v Argentine Republic*,¹⁰⁰³ the Tribunal observed:

[a]bsent an agreed form of restitution by means of renegotiation of contracts or otherwise, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party, as was established by the Permanent Court of International Justice in the *Chorzów Case* [...]¹⁰⁰⁴

Similarly, in *Sempra Energy International v Argentine Republic*,¹⁰⁰⁵ the Tribunal noted (referring to Article 36 of the Articles) that:

[i]n the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party.¹⁰⁰⁶

In *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina*,¹⁰⁰⁷ in its award on damages the Tribunal observed that the appropriate standard was ‘full’ reparation, referring to Article 31 of the Articles and the decision of the Permanent Court in *Factory at Chorzów*.¹⁰⁰⁸ It then noted that

[r]eparation can thus take the form of restitution or compensation. Claimants have requested compensation measured by the fair market value of their loss.¹⁰⁰⁹

In *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*,¹⁰¹⁰ the Tribunal, as noted above, referred to Articles 31, 35 and 36 of the Articles in the context of its discussion of the standard of compensation to be applied. As already mentioned in relation to Article 31, having referred to the judgment of the Permanent Court in *Factory at Chorzów*, and other relevant jurisprudence on the subject, the Tribunal noted that the standard of ‘full reparation’ was also reflected in Article 31 of the Articles, and referred to the ILC’s Commentary to that provision.¹⁰¹¹ The Tribunal then continued:

[t]he Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded.

The remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory*

¹⁰⁰² Ibid., para. 408.

¹⁰⁰³ *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Award of 22 May 2007.

¹⁰⁰⁴ Ibid., para. 359, citing *Factory at Chorzów, Merits, 1928, PCIJ, Series A No. 17*, at 47.

¹⁰⁰⁵ *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007.

¹⁰⁰⁶ Ibid., para. 401.

¹⁰⁰⁷ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina* (ICSID Case No. ARB/02/1), Award on Damages of 25 July 2007.

¹⁰⁰⁸ Ibid., para. 31.

¹⁰⁰⁹ Ibid., para. 32 and note 6 referring to Article 34 of the Articles

¹⁰¹⁰ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006.

¹⁰¹¹ Ibid., para. 487–493.

decision, ‘payment of a sum corresponding to the value which a restitution in kind would bear’, which is the matter to be decided.¹⁰¹²

The notion of restitution embodied in Article 35 has also been referred to in domestic decisions; in *R v Lyons*,¹⁰¹³ the appellants had been convicted in a manner which the European Court of Human Rights subsequently found was in breach of their right to a fair trial under Article 6 of the European Convention. Before the domestic courts, they attempted to rely on the obligation of restitution as a matter of general international law in order to argue that as a result, their convictions should be quashed. In the House of Lords, Lord Hoffmann summarised the appellants’ argument as follows:

[Counsel for the appellants] accepted that the Convention, as such, formed no part of English law. But he submitted that an English court should give effect to the judgments of the ECtHR in relation to these particular appellants. The United Kingdom was bound by Article 46 [of the European Convention] to abide by the judgment. Customary international law, which did form part of the English common law, required a state responsible for an internationally wrongful act to make restitution by restoring the *status quo ante*. (See Chapter II of Part Two of the draft articles on *Responsibility of States for internationally wrongful acts*, annexed to Resolution 56/83 adopted by the General Assembly on 12 December 2001.) Restitution would in this case require that the appellants’ convictions be set aside and their criminal records expunged.¹⁰¹⁴

However, Lord Hoffmann rejected that argument on the basis that it was inconsistent with the rule of English law that an unincorporated international treaty has no direct domestic effect:

[t]he obligation to make restitution may, as [Counsel for the appellants] says, be a developing or even established feature of customary international law. But it is in the present case ancillary to a treaty obligation. It is infringement of the treaty obligation to secure Convention rights to everyone within the jurisdiction that is said to give rise to the obligation to make restitution. [Counsel for the appellants] himself described it as a secondary obligation [...]. But if there is no enforceable primary obligation, how can its breach give rise to an enforceable secondary obligation?¹⁰¹⁵

As noted above in relation to Article 31, the International Court of Justice has on a number of occasions referred to the principle of full reparation enunciated in the judgment of the Permanent Court in *Factory at Chorzów*, and has also made reference to the role of restitution in that regard. However, in doing so, the Court has not referred to Article 35

In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*,¹⁰¹⁶ having recalled that it had found that the issue and circulation of the arrest warrant in question had ‘failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law’, and that those findings ‘constitute a form of satisfaction which will make good the moral injury complained of by the Congo’,¹⁰¹⁷ the Court referred to the judgment of the Permanent Court in *Factory at Chorzów*. It then noted:

¹⁰¹² Ibid., para. 494–495.

¹⁰¹³ *R v Lyons* [2002] 1 AC 976 (House of Lords).

¹⁰¹⁴ [2003] 1 AC 976 at 994, para. 36.

¹⁰¹⁵ [2003] 1 AC 976 at 995, para. 39.

¹⁰¹⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Reports 2002, p. 3, at p. 31–32, para. 76.

¹⁰¹⁷ Ibid., at p. 31–32, para. 76.

[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. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. 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.¹⁰¹⁸

In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹⁰¹⁹ in its discussion of the legal consequences deriving from the violations of international law which it found to have occurred as a result of Israel’s construction of the wall, the Court again made reference to the judgement of the Permanent Court in *Factory at Chorzów* when discussing the content of Israel’s responsibility arising therefrom. The Court observed:

[m]oreover, given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice [...]¹⁰²⁰

The Court continued:

Israel is accordingly under an obligation 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. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.¹⁰²¹

Finally, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹⁰²² as noted above, the International Court of Justice referred to the decision of the Permanent Court in *Factory at Chorzów* (and Article 31 of the Articles) in relation to the principle of full reparation.¹⁰²³ The Court continued:

In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ‘[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it’ ([...] see also Article 36 of the ILC’s Articles on State Responsibility).¹⁰²⁴

¹⁰¹⁸ Ibid. at p. 32, para. 77.

¹⁰¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

¹⁰²⁰ Ibid., at p. 198, para. 152, quoting *Factory at Chorzów, Merits, 1928, PCIJ, Series A No. 17*, p. 47.

¹⁰²¹ Ibid., at p. 198, para. 153.

¹⁰²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

¹⁰²³ Ibid., para. 460

¹⁰²⁴ Ibid., para. 460, quoting *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p. 7 at p. 81, para. 152; the Court also made reference to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at p. 198, paras. 152–153.

Reference was also made to Article 35 of the Articles in a slightly different context in the decision on provisional measures in *Occidental Petroleum Corporation and Occidental Petroleum and Exploration Company v Republic of Ecuador*.¹⁰²⁵ The claimants sought provisional measures in relation to Ecuador's termination of a Participation Contract for the exploitation of hydrocarbon reserves, which was alleged to be in breach of both the Participation Contract and the applicable BIT; the provisional measures were sought in order to preserve their asserted right to restitution (i.e. the eventual resoration of their rights under the Participation Contract as a result of an order for specific performance of the Participation Contract). Following a lengthy discussion of the various uses made of the term 'restitution' in public international law, including the distinction between the notions of *restitutio in integrum*, restitution in kind and specific performance,¹⁰²⁶ the Tribunal discussed whether the claimants had established a strong arguable right to specific performance. Having noted that specific performance was only available as a remedy in circumstances where it was not impossible, the Tribunal noted that it was 'well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible'.¹⁰²⁷ The Tribunal later observed, making reference to and setting out Article 35 of the Articles:

[...] specific performance must not only be possible in order to be granted to a claimant. Specific performance, even if possible, will nevertheless be refused if it imposes too heavy a burden on the party against whom it is directed. Article 35 of the ILC Articles on State Responsibility is worthy of mention in this regard [...]¹⁰²⁸

¹⁰²⁵ *Occidental Petroleum Corporation and Occidental Petroleum and Exploration Company v Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of 17 August 2007

¹⁰²⁶ *Ibid.*, paras. 69–74.

¹⁰²⁷ *Ibid.*, para. 79.

¹⁰²⁸ *Ibid.*, para. 82.

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 36 deals with the subject of compensation, the second of the forms of reparation identified in Article 34 of the Articles. Paragraph 1 makes clear that, insofar as full reparation for the damage caused by an internationally wrongful act is not achieved by restitution, the responsible State is obliged to pay compensation. Paragraph 2 makes clear that compensation may cover any damage which is capable of financial assessment, including any loss of profits to the extent that this is proven.

Article 36 has been referred to in a number of cases since the adoption of the Articles.¹⁰²⁹

In its final Award in *CME Czech Republic B.V. v Czech Republic*,¹⁰³⁰ the Tribunal made reference to Article 36 of the Articles in a section entitled ‘Just Compensation under International Law Standards’. It observed:

[i]nternational Law requires that compensation eliminates the consequences of the wrongful act. The Articles adopted by the United Nations International Law Commission on the Responsibility of States for Internationally Wrongful Act provide for the ‘obligation to compensate for the damage caused’, and specify that that compensation ‘shall cover any financially assessable damage including loss of profits...’ (Art. 36). Paragraph 22 of the Commission’s Commentary on its Articles states that: ‘Compensation reflecting the capital value of property taken or destroyed as the result [of] an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost’ [...]¹⁰³¹

In *CMS Gas Transmission Company v Argentine Republic*, having determined that Argentina had breached its obligations under the applicable BIT, the Tribunal devoted a section of its Award to discussion of ‘The Standards of Reparation Under International Law’. It observed, with reference to Article 34 of the Articles that:

[i]t is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.¹⁰³²

The Tribunal went on to note, referring in a footnote to Article 35 of the Articles, that:

[r]estitution is the standard used to reestablish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation.¹⁰³³

¹⁰²⁹ Detailed discussion of the actual method and basis on which compensation has been calculated in cases since the adoption of the Articles is beyond the scope of the present study, despite the fact that it is a subject dealt with in some detail in the Commentary to Article 36. The following discussion concentrates on examples of references to the broad principles relating to compensation, and does not attempt to set out the reasoning of each court or tribunal in relation to the actual calculation of compensation.

¹⁰³⁰ *CME Czech Republic B.V. v Czech Republic*, Final Award of 14 March 2003.

¹⁰³¹ *Ibid.*, para. 501, quoting Commentary to Article 36, paragraph (22).

¹⁰³² *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 399.

The Tribunal then quoted the passage from the judgment of the Permanent Court of International Justice in *Factory at Chorzów*,¹⁰³⁴ before observing, quoting the two paragraphs of Article 36 of the Articles in accompanying footnotes, that:

[c]ompensation is designed to cover any ‘financially assessable damage including loss of profits insofar as it is established.’ Quite naturally compensation is only called for when the damage is not made good by restitution. The decision in *Lusitania*, another landmark case, held that ‘the fundamental concept of ‘damages’ is...reparation for a loss suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.’¹⁰³⁵

In relation to the quotation from *The Lusitania*, the accompanying footnote also made reference to the Commission’s Commentary, in which the Commission had itself referred to the same passage.¹⁰³⁶ The Tribunal went on to observe, again referring to the Commentary to Article 36 in a footnote, that:

The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses.¹⁰³⁷

In its award on damages in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina*,¹⁰³⁸ the Tribunal referred to Article 31 of the Articles and the decision of the Permanent Court in *Factory at Chorzów* in support of the proposition that the appropriate standard for reparation was ‘full’ reparation¹⁰³⁹ and went on to note that:

[r]eparation can thus take the form of restitution or compensation. Claimants have requested compensation measured by the fair market value of their loss.¹⁰⁴⁰

The Tribunal rejected assessment of the loss on the basis of fair market value, as claimed by the claimants,¹⁰⁴¹ and then turned to determine the applicable measure of compensation. In this regard, the Tribunal referred to Article 36 of the Articles and the accompanying Commentary in support of its conclusion that the appropriate measure of compensation was ‘the ‘*actual loss*’ suffered by the investor ‘*as a result*’ of Argentina’s conduct’.¹⁰⁴² The Tribunal observed:

[p]ursuant to Article 36 of the [Articles] ‘[t]he State is under an obligation to compensate for the damage caused thereby’ and compensation ‘shall cover all financially assessable damage including loss of profits in so far as it is established.’ The determination of compensation depends on the identification of the damage caused by Respondent’s wrongful acts and the establishment of lost profits.

¹⁰³³ Ibid., para. 400.

¹⁰³⁴ Ibid., quoting *Factory at Chorzów, Merits, 1928, PCIJ, Series A No. 17*, at 47.

¹⁰³⁵ Ibid., para. 401, quoting *The Lusitania*, (1923) RIAA, Vol. VII, p. 32, at 39 (emphasis in original).

¹⁰³⁶ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, Fn. 216, referring to Commentary to Article 36, paragraphs (1) to (34); the Commission’s reference to *The Lusitania* occurs in paragraph (3). The Tribunal’s footnote in fact refers to the Commentary to Article 25, although this appears to be an error, and it would appear to have intended to refer to the Commentary to Article 36.

¹⁰³⁷ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 402 and fn. 217, referring to Commentary to Article 36, paragraph (21).

¹⁰³⁸ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina* (ICSID Case No. ARB/02/1), Award on Damages of 25 July 2007.

¹⁰³⁹ Ibid., para. 31.

¹⁰⁴⁰ Ibid., para. 32 and note 6, referring to Article 34 of the Articles.

¹⁰⁴¹ Ibid., paras. 33–40

¹⁰⁴² Ibid., paras. 45 (emphasis in original)

As to the damage caused, it is useful to recall the definition of this concept made in the *Lusitania* case: ‘The fundamental concept of ‘damage’ is [...] reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.’

After considering this definition and again the dictum of the *Factory at Chorzów* case, the ILC Commentary concludes that the function of compensation is ‘to address the actual losses incurred as a result of the internationally wrongful act.’¹⁰⁴³

Later on in the Award, the Tribunal again referred to the formulation of Article 36(2), and a passage from the accompanying Commentary, in relation to the claims for loss of profits:

[t]he Claimants raise the claim for loss of profits, in response to the method proposed by the Tribunal in Procedural Order No. 6. This claim will be addressed in the context of the analysis of the Tribunal’s method. However, as a matter of principle, it is necessary to outline at this point the distinction between accrued losses and lost future profits. Whereas the former have commonly been awarded by tribunals, the latter have only been awarded when ‘an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable.’ Or, in the words of the Draft Articles, ‘in so far as it is established’. The question is one of ‘certainty’. ‘Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.’¹⁰⁴⁴

In its decision in *PSEG Global Inc. and Konya İlgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*¹⁰⁴⁵ the Tribunal recorded the Claimants’ submission that its:

[...] claim for compensation, [...] should cover all financially assessable damage, including loss of profits arising from either contract arrangements or from a well-established history of dealings, just as the International Law Commission concluded in its comments on Article 36 of the Articles on State Responsibility.¹⁰⁴⁶

However, in the subsequent discussion of the Claimants’ claim for compensation, the Tribunal did not refer to the Articles.

In *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*,¹⁰⁴⁷ the Tribunal, as noted above, referred to Articles 31, 35 and 36 of the Articles in the context of its discussion of the standard of compensation to be applied in relation to the violations of the BIT which it had found to have occurred. Having concluded that a provision of the BIT did not constitute a *lex specialis* in this regard (given that it related only to compensation for a lawful expropriation), the Tribunal concluded that it was therefore ‘required to apply the default standard contained in customary international law in the present case.’¹⁰⁴⁸

As noted above, in relation to Article 31, having referred to the judgment of the Permanent Court in *Factory at Chorzów*, and other relevant jurisprudence on the subject, the Tribunal noted that

¹⁰⁴³ Ibid., paras. 41–43 (footnotes omitted; emphasis in original), referring to Commentary to Article 36, paragraph (3) and quoting paragraph (4).

¹⁰⁴⁴ Ibid., para. 51 (footnotes omitted), quoting Commentary to Article 36, paragraph (27).

¹⁰⁴⁵ *PSEG Global Inc. and Konya İlgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, (ICSID Case No. ARB/02/5), Award of 19 January 2007.

¹⁰⁴⁶ Ibid., para. 282.

¹⁰⁴⁷ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006.

¹⁰⁴⁸ Ibid., para. 483.

the standard of ‘full reparation’ was also reflected in Article 31 of the Articles, and referred to the Commentary to that provision. The Tribunal then continued:

[t]he Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded.

The remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, ‘payment of a sum corresponding to the value which a restitution in kind would bear’, which is the matter to be decided. 1049

The Tribunal then observed:

The present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably while other arbitrations that apply the *Chorzów Factory* standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages.

However, in the present, *sui generis*, type of case the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed [...] ¹⁰⁵⁰

Having further discussed the decision in *Factory at Chorzów* and other jurisprudence, the Tribunal concluded that it was necessary to:

[...] assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award, which the Tribunal takes as of September 30, 2006. ¹⁰⁵¹

In *Siemens A.G. v Argentine Republic* ¹⁰⁵² the Tribunal referred to the Articles, and Article 36 in particular, in setting out the principles which it would apply to the assessment of compensation for breach of the relevant BIT. Argentina had argued that the standard of compensation was governed by the terms of the applicable BIT. The Tribunal rejected that submission, in the process affirming the customary nature of Article 36 of the Articles:

[t]he law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.

The Draft Articles are currently considered to reflect most accurately customary international law on State responsibility. ¹⁰⁵³

¹⁰⁴⁹ Ibid., para. 494–495.

¹⁰⁵⁰ Ibid., paras. 496–497.

¹⁰⁵¹ Ibid., para. 499.

¹⁰⁵² *Siemens A.G. v Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007.

¹⁰⁵³ Ibid., paras. 349–350.

The Tribunal then set out the text of Article 36 and continued:

[t]his Article relies on the statement of the PCIJ in the *Factory at Chorzów* case on reparation [...]

The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account ‘all financially assessable damage’ or ‘wipe out all the consequences of the illegal act’ as opposed to compensation ‘equivalent to the value of the expropriated investment’ under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.¹⁰⁵⁴

In *Sempra Energy International and Argentine Republic*,¹⁰⁵⁵ the Tribunal made reference to Article 36 of the Articles in the context of its discussion of reparation. Having quoted the familiar passage from the judgment of the Permanent Court of International Justice in *Factory at Chorzów* that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’,¹⁰⁵⁶ the Tribunal observed, referring in an accompanying footnote to Article 36(2):

[i]n the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party. The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts adopted by the United Nations General Assembly in 2002, also state in this respect that compensation is meant to cover any ‘financially assessable damage including loss of profits insofar as it is established.’¹⁰⁵⁷

In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹⁰⁵⁸ the International Court of Justice, having referred to the dictum of the Permanent Court in *Factory at Chorzów*,¹⁰⁵⁹ emphasised (again without reference to the Articles) that, to the extent restitution was materially impossible, Israel was obliged to pay compensation, as well as being under a separate obligation to compensation for any material damage caused by the construction of the wall:

Israel is accordingly under an obligation 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. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.¹⁰⁶⁰

¹⁰⁵⁴ Ibid., paras. 351–352, quoting *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 47.

¹⁰⁵⁵ *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007.

¹⁰⁵⁶ Ibid., para. 400, quoting *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 47.

¹⁰⁵⁷ Ibid., para. 401 and note 158

¹⁰⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p. 136.

¹⁰⁵⁹ Ibid., at p. 198, para. 152, quoting *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 47.

¹⁰⁶⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p. 136, at p. 198, para. 153.

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹⁰⁶¹ the International Court of Justice, as noted above, referred to the decision of the Permanent Court in *Factory at Chorzów* and Article 31 of the Articles for the proposition that ‘reparation must, so 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’.¹⁰⁶² In relation to the question of compensation, the International Court of Justice made reference to its previous jurisprudence, as well as to Article 36 of the Articles:

In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ‘[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it’ ([...] see also Article 36 of the ILC’s Articles on State Responsibility).¹⁰⁶³

The Court went on to consider ‘what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby’.¹⁰⁶⁴ The Court opined that, since no ‘sufficiently direct and causal link’ had been established between the breach of the obligation to prevent and punish genocide and the massacres at Srebrenica, financial compensation was not the appropriate form of reparation:

[s]ince [the Court] now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, 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. 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. Since the Court cannot therefore regard as proven a causal nexus between the

¹⁰⁶¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

¹⁰⁶² *Ibid.*, para. 460.

¹⁰⁶³ *Ibid.*, para. 460, quoting *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p. 7 at p. 81, para. 152; the Court also made reference to its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, p. 198, paras. 152–153.

¹⁰⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, para. 460.

Part Two – Content of the International Responsibility

Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.¹⁰⁶⁵

As discussed below in relation to Article 37, the Court went on to find however that the applicant was entitled to satisfaction, and that a declaration of the violation of the obligation to prevent genocide would constitute appropriate satisfaction in that regard.¹⁰⁶⁶

¹⁰⁶⁵ Ibid., para. 462.

¹⁰⁶⁶ Ibid., para. 463, quoting *Corfu Channel (United Kingdom v Albania), Merits, ICJ Reports 1949*, p. 4, pp. 35, 36

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 37 deals with satisfaction, the third form of reparation referred to in Article 34. Paragraph 1 makes clear that a responsible State is under an obligation to provide satisfaction for the injury caused by its internationally wrongful act, to the extent that that injury cannot be made good by either restitution or compensation. Paragraph 2 gives examples of the forms which satisfaction may take, listing acknowledgment of the breach, expressions of regret and formal apologies as potentially appropriate modes of providing satisfaction. Paragraph provides that satisfaction must not be out of proportion to the injury it is aimed at making good, and makes clear that satisfaction may not take a form which is humiliating.

As noted above in relation to Article 34, in *CMS Gas Transmission Company v Argentine Republic*, the Tribunal, having determined that Argentina had breached its obligations in respect of the claimant's investment, observed with reference to Article 34 of the Articles that:

It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.¹⁰⁶⁷

It continued:

[a]s this is not a case of reparation due to an injured State, satisfaction can be ruled out at the outset.¹⁰⁶⁸

The International Court of Justice has made reference to the notion of satisfaction on a number of occasions since the adoption of the Articles, although without reference to Article 36 of the Articles.

In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*,¹⁰⁶⁹ the Court stated:

[t]he 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 and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it

¹⁰⁶⁷ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 399.

¹⁰⁶⁸ *Ibid.*, para. 399.

¹⁰⁶⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Reports 2002, p. 3.

constitute a form of satisfaction which will make good the moral injury complained of by the Congo.¹⁰⁷⁰

In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*,¹⁰⁷¹ Cameroon asked the International Court of Justice to require Nigeria to give assurances of non-repetition, and sought reparation in relation to the Nigeria's occupation of territory which the Court ruled appertained to Cameroon. The Court, having, as discussed in relation to Article 30, rejected Cameroon's request for an order requiring guarantees of non-repetition,¹⁰⁷² considered:

In the circumstances of the case [...] 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. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.¹⁰⁷³

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹⁰⁷⁴ having found that restitution was not possible, and that financial compensation was not appropriate given the lack of the necessary 'sufficiently direct and causal link' between the breach by the FRY of the obligation to prevent genocide and the massacre at Srebrenica, the International Court of Justice went on to find (albeit without reference to Article 37) that the applicant was entitled to satisfaction and that a declaration of the violation of the obligation to prevent genocide would constitute 'appropriate satisfaction' in this regard:

[i]t is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide. [...] the Court considers that a declaration of this kind is 'in itself appropriate satisfaction'.¹⁰⁷⁵

The approach of the International Court of Justice in *Land and Maritime Boundary between Cameroon and Nigeria*, discussed above, was relied upon by Suriname in the *Guyana/Suriname* arbitration,¹⁰⁷⁶ in order to attempt to avoid a finding of its responsibility.

The arbitration related principally to delimitation of the maritime boundary between the two States; however, Guyana in addition put forward a claim invoking the responsibility of Suriname in relation to actions by members of the Surinamese armed forces alleged to amount to a threat of use of force in a portion of the disputed maritime area which the Tribunal ruled appertained to Guyana. The Tribunal affirmed its jurisdiction over the claim of State responsibility and dismissed various objections to the admissibility of Guyana's claims; as discussed below in the context of Article 50, it also dismissed an argument made by Suriname the actions of its armed forces could be qualified as a lawful countermeasure.

Guyana had requested that the Tribunal order the payment of compensation and order that Suriname should refrain from further threats of force. In response, Suriname had referred to the

¹⁰⁷⁰ Ibid. p. 31, para. 75.

¹⁰⁷¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Merits, ICJ Reports 2002, p. 303.

¹⁰⁷² Ibid., at p. 452, para. 318.

¹⁰⁷³ Ibid., at p. 452, para. 319.

¹⁰⁷⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

¹⁰⁷⁵ Ibid., para. 463, quoting *Corfu Channel (United Kingdom v Albania)*, Merits, ICJ Reports 1949, p. 4, at pp. 35 and 36.

¹⁰⁷⁶ *Guyana/Suriname*, Award of 17 September 2007.

passage from the judgment of the International Court of Justice in *Land and Maritime Boundary between Cameroon and Nigeria* quoted above, in which the Court had dismissed Cameroon's claims of State responsibility in relation to the occupation by Nigerian forces of areas which had been found to appertain to Cameroon, holding that the finding of Cameroon's sovereignty over the territory in question 'sufficiently addressed' Cameroon's injury in that regard, and that as a result, it was not necessary to 'seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.'¹⁰⁷⁷ Relying on that passage, Suriname sought to argue that the Tribunal should similarly 'decline to pass upon Guyana's claim for the allegedly unlawful activities of Suriname.'¹⁰⁷⁸ Guyana argued in response that Suriname's reliance on that passage was misplaced, and the International Court of Justice had not enunciated 'a general principle that State responsibility is irrelevant to boundary disputes but limited itself solely to the relief sought by Cameroon.'¹⁰⁷⁹

The Tribunal stated that it agreed with Guyana's characterization of the approach of the International Court of Justice in *Land and Maritime Boundary between Cameroon and Nigeria*.¹⁰⁸⁰ However, it nevertheless followed the approach adopted by the Court in that case:

[i]n a like manner, [the Tribunal] will not seek to ascertain whether and to what extent Suriname's responsibility to Guyana has been engaged [...]. This dictum of the ICJ is all the more relevant in that as a result of this Award, Guyana now has undisputed title to the area where the incident occurred – the injury done to Guyana has thus been 'sufficiently addressed'.¹⁰⁸¹

As to Guyana's claim for compensation, the Tribunal concluded that the situation in *Land and Maritime Boundary between Cameroon and Nigeria*, in relation to which the Court had concluded that Cameroon's claims were adequately satisfied by a declaratory judgment, 'was not entirely congruent' with the situation in the case before it. However, the Tribunal held that the damage claimed had not been proved, and on that basis dismissed that part of Guyana's claim for relief.¹⁰⁸²

The Tribunal later observed that:

[b]oth Parties have requested the Tribunal to declare that violations of the Convention have taken place. The Tribunal notes that in certain circumstances, 'reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right' or an obligation.¹⁰⁸³

¹⁰⁷⁷ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Merits, ICJ Reports 2002, p. 303, at p. 452, para. 319.

¹⁰⁷⁸ *Guyana/Suriname*, Award of 17 September 2007, para. 448, quoting Suriname Rejoinder, para. 4.3.

¹⁰⁷⁹ *Guyana/Suriname*, Award of 17 September 2007, para. 449.

¹⁰⁸⁰ *Ibid.*, para. 450.

¹⁰⁸¹ *Ibid.*, para. 451.

¹⁰⁸² *Ibid.*, para. 452.

¹⁰⁸³ *Ibid.*, para. 485, quoting the judgment of the International Tribunal for the Law of the Sea in *The M/V 'Saiga'*, (No. 2) (*Saint Vincent and the Grenadines v Guinea*), judgement of 1 July 1999, para. 171.

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 38 is concerned with interest. The first paragraph of the provision makes clear that the aim of an award of interest is to ensure full reparation, and that the rate of interest and mode of calculation (i.e. whether interest is simple or compound with rests) should be fixed in order to ensure that result. Paragraph 2 specifies the period for which interest is to run, making clear that interest runs from the date the principal sum should have been paid until the date of payment.

In its Report and Recommendations in relation to part three of the third instalment of 'F3' claims (claims by Kuwait against Iraq for losses arising from the invasion of Kuwait excluding environmental claims),¹⁰⁸⁴ the Panel of Commissioners of the United Nations Compensation Commission, in addition to referring to Articles 31 and 35 also made reference to Article 38 in relation to the question of whether interest was to be awarded on the sums claimed.

In this regard, the Panel of Commissioners held that Governing Council decision 16 governed the award of interest in relation to delay of payment of compensation; that decision provided that interest will be awarded 'from the date the loss occurred until the date of payment'.¹⁰⁸⁵ In that regard, the Panel of Commissioners noted in a footnote that:

Similarly, article 38(2) of the [Articles] provides that '[i]nterest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled'.¹⁰⁸⁶

In *CMS Gas Transmission Company v Argentine Republic*,¹⁰⁸⁷ the Tribunal made reference to Article 38 in the context of its general discussion of the principles governing the award of reparation as a result of the breaches it had found to exist of the applicable BIT. It observed, referring in a footnote to Article 38 of the Articles, that:

[d]ecisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends.¹⁰⁸⁸

That statement reflects the position adopted by the ILC in the Commentary to Article 38, which emphasises that the award of interest is aimed at achieving full reparation.¹⁰⁸⁹

¹⁰⁸⁴ *Report and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Installment of 'F3' Claims*, 18 December 2002 (UN doc. S/AC.26/2003/15); the Panel of Commissioners' Report and Recommendations were approved by the Governing Council of the United Nations Compensation Commission in *Governing Council Decision No. 194*, 26 June 2003, UN doc. S/AC.26/Dec.194 (2003).

¹⁰⁸⁵ *Report and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Installment of 'F3' Claims*, 18 December 2002 (UN doc. S/AC.26/2003/15), para. 172, quoting 'Awards of Interest' (*Governing Council Decision No. 16*), 18 December 1992, UN doc. S/AC.26/1992/16, para. 1.

¹⁰⁸⁶ *Ibid.*, fn. 59. Governing Council decision No. 16 was itself referred to by the ILC in the Commentary to Article 38, paragraph (4).

¹⁰⁸⁷ *CMS Transmission Company v Republic of Argentina* (ICSID Case No. ARB/01/08), Decision on Objections to Jurisdiction, 17 July 2003.

¹⁰⁸⁸ *Ibid.*, paragraph 404 and note 220.

Similarly, in *Siemens A.G. v Argentine Republic*,¹⁰⁹⁰ in discussing the rate of interest which was payable in order to achieve compensation for the loss suffered as a result of the breaches of the applicable BIT, and whether the interest was to be simple or compound, the Tribunal referred to Article 38 of the Articles ‘as an expression of customary international law’, as well as quoting from the Commentary to that provision:

[t]he Tribunal will address first the applicable rate of interest, then turn to the questions of the date as from which interest should accrue and whether interest should be simple or compounded.

As an expression of customary international law, Article 38 of the Draft Articles 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.’

Thus, in determining the applicable interest rate, the guiding principle is to ensure ‘full reparation for the injury suffered as a result of the internationally wrongful act.’¹⁰⁹¹

As to the date from which interest should accrue, the Tribunal held that:

[f]or purposes of erasing the effects of the expropriation, interest should accrue from the date the Tribunal has found that expropriation occurred, namely May 18, 2001, in respect of the book value of the investments made for the Project up to that date. Compensation for post-expropriation costs incurred after May 18, 2001 should accrue interest as from the date on which they were incurred. [...] As for interest on unpaid Government bills, interest should accrue from January 1, 2000 since they relate to services rendered in 1999.¹⁰⁹²

The Tribunal went on to hold that compound interest should be awarded,¹⁰⁹³ observing that, contrary to the position taken by Argentina, the question in this regard was not:

[...] whether Siemens had paid compound interest on borrowed funds during the relevant period but whether, had compensation been paid following the expropriation, Siemens would have earned interest on interest paid on the amount of compensation.¹⁰⁹⁴

In its award on damages in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina*,¹⁰⁹⁵ the Tribunal discussed the question of interest in terms consistent with the approach adopted by the Commission, albeit that, in contrast to its reference to Articles 34 and 35 earlier on in the Award, it did not make express reference to Article 38. The claimants had requested the award of compound interest; in this regard, the Tribunal observed:

¹⁰⁸⁹ Cf. Commentary to Article 38, paragraphs (1), (7) and (9).

¹⁰⁹⁰ *Siemens A.G. v Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007.

¹⁰⁹¹ *Ibid.*, para. 394–396, quoting Commentary to Article 38, paragraph (10).

¹⁰⁹² *Siemens A.G. v Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007, para. 397.

¹⁰⁹³ *Ibid.*, para. 401.

¹⁰⁹⁴ *Ibid.*, para. 399.

¹⁰⁹⁵ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Argentina* (ICSID Case No. ARB/02/1), Award on Damages of 25 July 2007.

[i]nterest is part of the ‘full’ reparation to which the Claimants are entitled to assure that they are made whole. In fact, interest recognizes the fact that, between the date of the illegal act and the date of actual payment, the injured party cannot use or invest the amounts of money due. It is therefore decisive to identify the available investment alternatives to the investor in order to establish ‘full’ reparation.’

It has been acknowledged that in ‘modern economic conditions’, funds would be invested to earn compound interest [...]

Based on these considerations, the Tribunal will decide in the section on quantification and after assessing the parties’ position on the Tribunal’s method, the type of interest due, the applicable rate and the period covered.¹⁰⁹⁶

The Tribunal went on to award compound interest.¹⁰⁹⁷

By contrast, in its final award in *CME Czech Republic B.V. v Czech Republic*,¹⁰⁹⁸ the Tribunal observed in relation to the claim by the claimant for compound interest that:

[t]he Tribunal does not find particular circumstances in this case justifying the award of compound interest. The calculation of the compensation itself already fully compensates Claimant for the damage suffered. Awarding simple interest compensates the loss of use of the principal amount of the award in the period of delay.¹⁰⁹⁹

In this regard, the Tribunal made reference to Article 38 of the Articles, and the Commentary thereto.¹¹⁰⁰

¹⁰⁹⁶ Ibid., paras. 55–57, footnotes omitted.

¹⁰⁹⁷ Ibid., para. 103.

¹⁰⁹⁸ *CME Czech Republic B.V. v Czech Republic*, Partial Award of 13 September 2001.

¹⁰⁹⁹ Ibid., para. 647.

¹¹⁰⁰ Ibid., referring to Commentary to Article 38, paragraph (4).

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.

Article 39 covers the question of the relevance of contribution to the injury in the determination of reparation; it provides that account should be taken of any wilful or negligent action or omission of either the injured State or of any person or entity in relation to which reparation is sought which contributes to the injury.

On its face, Article 39 applies only to the assessment of reparation in inter-State cases, although as its formulation itself makes clear, in relation to claims brought by a State on behalf of one of its nationals, account may be taken of any action by the national which has contributed to the injury. Nevertheless, the principle embodied in the Article is undoubtedly of wider application.

In *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*,¹¹⁰¹ the Tribunal, in assessing the reparation due to the claimants as a consequence of breaches of the applicable bilateral investment treaty, reduced the damages as a result of the business risk inherent in the transaction; the Tribunal found that the claimants:

[...] at the time of their contract [...], had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits.

The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment calculated on the basis of the following considerations.¹¹⁰²

The Tribunal's award, albeit not referring explicitly to the Articles, may be seen as an instance of application by analogy of Article 39, in circumstances where the negligence of the investor in entering into a contract without appropriate protections was a direct cause of at least part of its loss.

The Award in *MTD* was the subject of an application for annulment by the Respondent, albeit not in relation to the quantification of the claimant's contribution to the damage suffered by it. Nevertheless, the ad hoc Committee took the opportunity to emphasise that the result reached by the Tribunal in its Award was one which it was entitled to reach, noting that:

[...] the Respondent does not challenge the decision on contribution as a manifest excess of powers, and rightly not. In the words of Article 39 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts of 2001:

'Contribution to the injury

¹¹⁰¹ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No. ARB/01/17), Award of 25 May 2004.

¹¹⁰² *Ibid.*, paras. 242–243.

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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.’

Part II of the ILC Articles, in which Article 39 is located, is concerned with claims between States, though it includes claims brought on behalf of individuals, e.g., within the framework of diplomatic protection. There is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals.¹¹⁰³

¹¹⁰³ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No. ARB/01/17), Decision on Annulment of 21 March 2007, para. 99.

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.

It is convenient to deal with Articles 40 and 41, forming Chapter III of Part Two, together, given the close inter-relation of the two provisions.

Article 40 provides for additional consequences forming part of the international responsibility of the State in the case of serious breaches by a State of an obligation arising under a peremptory norm of general international law (i.e. *jus cogens*). A 'serious breach' of an obligation arising under a peremptory norm is one described as involving a gross or systematic failure to fulfil the obligation in question.

Article 41 provides for three consequences for States other than the responsible State as the result of such a serious breach; first, as specified in the first paragraph of the Article, other States should cooperate to bring the serious breach to an end by lawful means; second, under the second paragraph of the provision, other States are required not to recognize as lawful the situation created by such a serious breach; and third, again under paragraph 2, other States are required not to provide any aid or assistance in maintaining the unlawful situation created by such a breach. The last paragraph of the provision makes clear that the additional consequences specified in Article 41 are without prejudice to the normal content of responsibility contained in the preceding chapters of Part Two, or to any other consequences arising under international law.

No decision on the international level has explicitly referred to Articles 40 and 41, although one decision of the International Court of Justice appears to refer to the consequences of serious

breaches enumerated in Article 41. By contrast Articles 40 and 41 have been referred to in the opinions of individual judges of the International Court of Justice, and they have also been referred to by domestic courts.

In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹¹⁰⁴ the International Court of Justice, having considered that Israel had acted inconsistently with various of its international obligations, that the wrongfulness of Israel's conduct was not precluded on the basis of self-defence or of the existence of a state of necessity, and that, accordingly, 'the responsibility of [Israel] was engaged under international law', the Court stated that it would

[...] examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations.¹¹⁰⁵

Having considered the content of the international responsibility of Israel for the breaches of international law, the Court turned to consider 'the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.'¹¹⁰⁶

In this regard, the Court observed that:

[...] the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.' [...] 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.¹¹⁰⁷

Having discussed the *erga omnes* character of the right to self-determination and certain obligations of international humanitarian law in more detail,¹¹⁰⁸ the Court continued:

[g]iven the character and the 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 in the Occupied Palestinian Territory, including in and around East Jerusalem. 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 [...].¹¹⁰⁹

The Court added that:

¹¹⁰⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136.

¹¹⁰⁵ Ibid., at p. 197, para. 148.

¹¹⁰⁶ Ibid., at p. 199, para. 154.

¹¹⁰⁷ Ibid., at p. 199, para. 155, quoting *Barcelona Traction, Light and Power Company, Limited, Second Phase*, ICJ Reports 1970, p. 3, at p. 32, para. 33.

¹¹⁰⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at pp. 199–200, paras. 156 and 158.

¹¹⁰⁹ Ibid., at p. 200, para. 159; the Court also added that 'In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 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.' (ibid.)

[...] 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 régime, taking due account of the present Advisory Opinion.¹¹¹⁰

The Court's identification of the consequences for third States as a result of Israel's breaches of certain its obligations, albeit made without reference to Articles 40 and 41, clearly parallels the consequences for States other than the responsible State identified by the International Law Commission in Article 41, namely an obligation of non-recognition of the illegal situation, an obligation not to render aid or assistance in maintaining the situation, and an obligation to bring to cooperate to bring to an end the unlawful situation through lawful means.

However, the Court's apparent emphasis on the *erga omnes* nature of the obligations in question breached and the apparent linkage of that characteristic of the obligations to the fact that obligations for third States arise from their breach, would seem to be at odds with the approach adopted by the ILC in Articles 40 and 41 that the consequences for third States derive from the fact of a 'serious breach' of an 'obligation arising under a peremptory norm of general international law'.

It is, however, possible to reconcile the Court's approach with that of the International Law Commission on the basis that, although the Court emphasised the *erga omnes* character of the obligations in question, by its reference to 'the character and the importance of the rights and obligations involved' it was implicitly referring to the fact that the obligations in question, in addition to being owed *erga omnes*, were also to be characterised as obligations arising under peremptory norms of international law. That approach would certainly be consistent with the Court's reluctance, at least until relatively recently, to explicitly acknowledge the existence of the concept of peremptory norms/*jus cogens* in international law.¹¹¹¹

Judge Higgins in her separate Opinion¹¹¹² criticized the reasoning of the Court in this regard, emphasizing that the characterization of a particular obligation as *erga omnes* was irrelevant for the question of whether obligations arose in relation to third States; in this regard, she made reference to the ILC's Introductory Commentary to Chapter III of Part Two:

[...] unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* [...]. The Court's celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase*, is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion [...]. That dictum was directed to a very specific issue of jurisdictional *locus standi*. As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts [...], there are certain rights in which, by reason of their importance 'all states have a legal interest in their protection'. It has nothing to do with imposing substantive obligations on third parties to a case.¹¹¹³

Judge Higgins continued:

[t]hat an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of '*erga omnes*'. It

¹¹¹⁰ Ibid., at p. 200, para. 160.

¹¹¹¹ Although see now *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, *Jurisdiction of the Court and Admissibility of the Application*, judgment of 3 February 2006, paras. 64, 78 and 125.

¹¹¹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Higgins, *ICJ Reports 2004*, p. 207.

¹¹¹³ Ibid., at p. 216, para. 37, quoting Introductory Commentary to Part Two, Chapter III, paragraph (2).

follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails 'decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out' [...] The obligation upon United Nations Members not to recognize South Africa's illegal presence in Namibia, and not to lend support or assistance, relied in no way whatever on '*erga omnes*'. Rather, the Court emphasized that 'A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.' [...] The Court had already found in a contentious case that its determination of an illegal act 'entails a legal consequence, namely that of putting an end to an illegal situation'. Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*.¹¹¹⁴

Similarly, in relation specifically to international humanitarian law, Judge Higgins questioned the relevance of the invocation by the Court of the *erga omnes* nature of such violations, observing that '[t]hese intransgressible principles are generally binding because they are customary international law, no more and no less.'¹¹¹⁵

Similarly, Judge Kooijmans, who had voted against the operative paragraph of the Court's judgment relating to legal consequences for third States, expressed doubts in his Separate Opinion¹¹¹⁶ as to whether the Court was required by the request for an Advisory Opinion to express an opinion on the legal consequences for third States (as opposed to the consequences for the General Assembly or Israel itself), and further expressed doubts as to the Court's apparent justification for doing so on the basis of the *erga omnes* character of the obligations breached. In doing so, he quoted Article 41 of the Articles and made reference to the Commentary to Chapter III of Part Two:

[i]n the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the Namibia case is insufficient.

That reason as indicated in [...] the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility.

[...]

I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general

¹¹¹⁴ Ibid., at pp. 216–217, para. 38, quoting the Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, p. 12, at p. 53, paras. 115 and 117 and *Haya de la Torre*, ICJ Reports 1951, p. 71 at p. 82. The reference to the ILC's Commentary is to Introductory Commentary to Part Two, Chapter III, paragraph (2).

¹¹¹⁵ Ibid., at p. 217, para. 39. Similarly, Judge Higgins observed that while the Court appeared to take the view that Article 1 of the Fourth Geneva Convention was in some way relevant to 'the *erga omnes* principle', it 'is simply a provision in an almost universally ratified multilateral Convention' (ibid.).

¹¹¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, ICJ Reports 2003, p. 219.

international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument's sake I start from the assumption that the consequences of the violation of such obligations are identical.¹¹¹⁷

Judge Kooijmans continued, analysing the Court's formulation of the operative paragraph in terms of Article 41 of the Articles:

[...] Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states 'What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches.' And paragraph 2 refers to 'co-operation ... in the framework of a competent international organization, in particular the United Nations'. Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. [...]

Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach [...] In its commentary the ILC refers to unlawful situations which – virtually without exception – take the form of a legal claim, usually to territory. It gives as examples 'an attempted acquisition of sovereignty over territory through denial of the right of self-determination', the annexation of Manchuria by Japan and of Kuwait by Iraq, South-Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees [...] supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of [the operative paragraph]. Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. [...]¹¹¹⁸

In the case related to the *Juridical Condition and Rights of the Undocumented Migrants*,¹¹¹⁹ Mexico sought an advisory opinion from the Inter-American Court of Human Rights on a number of questions, including the following:

¹¹¹⁷ Ibid., at p. 231, paras. 39–41, referring to Introductory Commentary to Part Two, Chapter III.

¹¹¹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, *ICJ Reports 2003*, p. 219, at p. 232, paras. 42–45, referring to Commentary to Article 41, paragraphs (5) to (8); the quotation is from paragraph (5).

¹¹¹⁹ *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion OC–18/03), *I-A.C.H.R., Series A, No. 18*, 17 September 2003

In view of the progressive development of international human rights law and its Codification [...]

[w]hat is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms of *ius cogens*? [...]'¹¹²⁰

As recorded by the Inter-American Court, in its submissions in relation to that question, Mexico referred to the Commentary of the International Law Commission on Articles 40 and 41 of the then draft articles on State responsibility, observing:

[a]s in the case of obligations *erga omnes*, 'case law has acted cautiously and even lagged behind the *opinio iuris communis* (the latter as a manifestation of the principle of universal morality) to establish the norms of *jus cogens* concerning the protection of the fundamental human rights definitively and to clarify the applicable legal norms'.¹¹²¹

The Inter-American Court concluded that the principles of equality before the law and non-discrimination formed part of *jus cogens*,¹¹²² although it did not refer to the Articles or their Commentaries in this regard. Similarly, it concluded that the general obligation to respect and ensure the exercise of human rights has an *erga omnes* character.¹¹²³

Judge Cançado Trindade in a scholarly separate opinion also made reference to the Articles, observing that:

[t]he concept of *jus cogens* in fact is not limited to the law of treaties, and is likewise proper to the law of the international responsibility of the States. The Articles on the Responsibility of the States, adopted by the International Law Commission of the United Nations in 2001, bear witness of this fact. Among the passages of such Articles and their comments which refer expressly to *jus cogens*, there is one in which it is affirmed that 'various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties'.¹¹²⁴

In an accompanying footnote, Judge Cançado Trindade also made reference to the Commentary to Article 40, and the Commentary to Article 12.¹¹²⁵ He continued:

[i]n my understanding, it is in this central chapter of International Law, that of the international responsibility (perhaps more than in the chapter on the law of treaties), that the *jus cogens* reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence (including beyond the domain of State responsibility) on the very foundations of an international law truly universal.¹¹²⁶

¹¹²⁰ Ibid., para. 4.

¹¹²¹ Ibid., para. 47.

¹¹²² Ibid., para. 101.

¹¹²³ Ibid., para. 109.

¹¹²⁴ *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion OC-18/03), I-A.C.H.R., *Series A, No. 18*, Separate Opinion of Judge Cançado Trindade, para. 70 (emphasis in original). The quotation is from the Commentary to Article 26, paragraph (5).

¹¹²⁵ *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion OC-18/03), I-A.C.H.R., *Series A, No. 18*, Separate Opinion of Judge Cançado Trindade, note 118. The references would appear to be to Commentary to Article 40, paragraph (4) and Commentary to Article 12, paragraph (7).

¹¹²⁶ *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion OC-18/03), I-A.C.H.R., *Series A, No. 18*, Separate Opinion of Judge Cançado Trindade, para. 70.

As discussed further below in the context of Article 48, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,¹¹²⁷ Judge Simma in his Separate Opinion¹¹²⁸ made reference to the Introductory Commentary to Part Two, Chapter III in the concluding remarks on his discussion of whether Uganda would have been able to bring a claim on behalf of non-nationals in relation to violations of their human rights and international humanitarian law by the DRC:

[a]s the Court indicated in the Barcelona Traction case, obligations *erga omnes* are by their very nature ‘the concern of all States’ and, ‘[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection’. In the same vein, the International Law Commission has stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts, that there are certain rights in the protection of which, by reason of their importance, ‘all States have a legal interest ...’.¹¹²⁹

Articles 40 and 41 of the Articles have received some attention in domestic cases; in the case of *A and others v Secretary of State for the Home Department (No. 2)*,¹¹³⁰ before the United Kingdom House of Lords, a case concerning whether evidence alleged to have been obtained by torture abroad was admissible, Lord Bingham made reference to Article 41 in relation to the consequences of the status as *jus cogens* and the *erga omnes* nature of the prohibition of torture:

The *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture. [...]

Article 41 of the International Law Commission’s draft articles on Responsibility of States for internationally wrongful acts (November 2001) requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law.¹¹³¹

Having referred to the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and in particular the Court’s observation that ‘[g]iven the character and the 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...’,¹¹³² Lord Bingham opined:

There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law.¹¹³³

Reference was also made to Articles 40 and 41 of the Articles by the Italian *Corte di Cassazione* in the decision in *Ferrini v Federal Republic of Germany*.¹¹³⁴ The case concerned the question whether the Italian courts had jurisdiction to hear a civil claim against Germany brought by Mr

¹¹²⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

¹¹²⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Simma.

¹¹²⁹ Ibid., para. 40, citing *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 3, at p. 32, para. 33; the reference to the Commentaries in the penultimate paragraph of the passage is to the Introductory Commentary to Part Two, Chapter III, paragraph (2).

¹¹³⁰ *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, 8 December 2005; [2006] 2 AC 221.

¹¹³¹ [2006] 2 AC 221 at 262–263, para. 34.

¹¹³² [2006] 2 AC 221 at 263, para. 34, quoting *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at p. 200, para. 159.

¹¹³³ [2006] 2 AC 221 at 263, para. 34.

¹¹³⁴ *Ferrini v Repubblica Federale di Germania*, United Civil Sections, decision n. 5044/04, 11 March 2004; English translation available in *International Law Reports*, vol. 128, p. 658.

Ferrini who had been arrested, deported to Germany, and made to perform forced labour during the Second World War by Nazi troops, or whether, on the contrary, Germany was entitled to immunity, and the Italian courts therefore did not have jurisdiction. The court of first instance ruled that the actions in question had been performed by Germany in the exercise of its sovereignty, and it was therefore entitled to immunity, a holding upheld by the Court of Appeal. The *Corte di Cassazione*, having referred to the normal rule of sovereign immunity observed that:

[t]hat the acts carried out in the past by Germany, which constitute the basis of Mr Ferrini's claim, were carried out in the exercise of its sovereign power could not be questioned, particularly given that those actions were carried out in the context of war-time operations. The problem that is posed, then, is to ascertain if immunity from jurisdiction can also operate in the case of types of conduct which, [...] due to their extreme gravity, have to be regarded, by virtue of norms of customary international law, to constitute international crimes, given that they infringe universal values which go beyond the interests of individual States.¹¹³⁵

Having discussed the notion of international crimes, and found that forced labour alleged by the claimant undoubtedly fell within that category,¹¹³⁶ the Court referred to the decision of the Greek Areios Pagos (Supreme Court) in the *Prefecture of Voiotia* case, which had denied immunity in relation to actions constituting serious breaches of human rights. In that regard, the Court observed that the reasoning of the Greek court in that case was 'not entirely persuasive', but that the conclusion reached by it was to be endorsed.¹¹³⁷ The Court went on to reason, referring to Articles 40 and 41 of the Articles, that:

[i]t has been often been recognized that international crimes 'threaten mankind as a whole and undermine the very foundations of international co-existence' [...]. Indeed, those crimes result in violations, particularly serious by reason of their gross or systematic nature (see, e.g., Article 40(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in August 2001 by the International Law Commission of the United Nations), of the fundamental rights of the human person, which are protected by inderogable rules that occupy a position at the apex of the international legal order, prevailing over all other norms, whether customary or treaty based [...] and, therefore, also over those norms relating to matters of immunity. For this reason, such crimes are not subject to any statute of limitations (UN Convention, 26 November 1968; Council of Europe Convention, 25 January 1974) and it is accepted that, by virtue of the principle of universal jurisdiction, every State is entitled to prosecute and punish those crimes, regardless of the place in which they were committed [...]: in some cases their repression has been made mandatory (as, in particular, by Article 146 of IV Geneva Convention on the protection of civilians in time of war). For the same reason, there can be no doubt that the principle of universal jurisdiction is valid also for civil proceedings which find their origin in such crimes. Further, there is a growing consensus that these egregious violations call for a reaction against the wrongdoing State which needs to be qualitatively different (and more severe) than those envisaged for other wrongful acts. In line with such a tendency, the above-mentioned judgment recognizes that third States are under an obligation not to recognize the situation brought about by the wrongful act [...]. Similarly, in this perspective, the Articles on Responsibility of States for Internationally Wrongful Acts 'prohibit' States from rendering any aid or assistance in maintaining situations which originate in the violation, and 'oblige'

¹¹³⁵ Ibid., para. 7

¹¹³⁶ Ibid., paras. 7.2–7.4.

¹¹³⁷ Ibid., para. 8.2.

them to cooperate, through lawful means, to bring to an end the unlawful activity (Article 41).¹¹³⁸

The Court continued:

The granting of immunity to a State responsible for such international crimes would run counter to the normative developments outlined above; in those situations, the grant of immunity, not only would not enhance, but would indeed hamper the protection of values which are of such essential importance for the international community as a whole that in the most serious cases their breach justifies and indeed requires some form of obligatory response.¹¹³⁹

The British case of *R. (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*,¹¹⁴⁰ concerned the question of whether the British government was under any obligation, as a matter of English law, to make diplomatic representations on behalf of non-nationals, who had resident status in the UK, detained by the United States of America at the naval base at Guantánamo Bay, Cuba.

At first instance before a Divisional Court of the Queen's Bench Division, reliance was placed on Articles 40 and 41 of the Articles by the Government in arguing that the obligations of States in international law extended no further than the specific obligations contained in Article 41.

That argument was made in order to counter the argument on behalf of the applicants that the first defendant was under a duty to make representations on behalf of the detainees because they had either been tortured, or were at risk of being tortured. In this regard, it was suggested that those circumstances imposed 'a positive obligation on the UK Government to take such steps as it can to forestall the risk of torture, and the appropriate step is to make a formal request for the claimants' return.'¹¹⁴¹ The applicant's relied on the decision of the ICTY in *Furundzija*, and in particular its comments on the *erga omnes* and *jus cogens* nature of the prohibition of torture.¹¹⁴² The applicants argued that the special nature of the prohibition of torture in international law, as reflected in that decision, supported their submission that 'it is the obligation of States to take steps to forestall or prevent torture wherever it occurs'.¹¹⁴³

The Court observed:

[t]he claimants have not, however, been able to point to any material which supports this wide obligation save in relation to the prevention of torture in a State's own territory. The material clearly establishes a State's right to take appropriate steps, by way of diplomatic intervention or otherwise where another State is practising or threatening to practise torture, and that right clearly exists even if no nationals of the intervening State are involved. That is not contentious; and has always been accepted by the first defendant. But it is submitted by him that the only obligation, where torture or a risk of torture is established, is

¹¹³⁸ Ibid., para. 9 (references omitted); the Court relied upon inter alia, the judgments of the ICTY in *Furundzija*, 10 December 1998 and *Kupreskic*, 14 January 2000, and the decision of the European Court of Human Rights in *Al-Adsani v United Kingdom*, 21 November 2001.

¹¹³⁹ *Ferrini v Repubblica Federale di Germania*, United Civil Sections, decision n. 5044/04, 11 March 2004, para. 9.1.

¹¹⁴⁰ *R. (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2006] EWHC 972 (Admin), 4 May 2006; [2007] 2 WLR 1219

¹¹⁴¹ Ibid., para. 67.

¹¹⁴² Ibid., para. 68, citing *Furundzija*, paras. 151–154; those paragraphs were among those endorsed by Lord Bingham in the House of Lords in *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, 8 December 2005; [2006] 2 AC 221 at 259–262, at para. 33.

¹¹⁴³ *R. (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2006] EWHC 972 (Admin), 4 May 2006, para. 69.

contained in the International Law Commission's Articles on State Responsibility [...].¹¹⁴⁴

Having set out the text of Articles 40 and 41 of the Articles, the Court expressed the view that the Government's submission was correct:

[e]ven if, therefore, torture or a real risk of torture were established on the evidence, that would impose no duty on the United Kingdom Government to do other than cooperate with other States to bring to an end through lawful means the circumstances giving rise to that situation. International law imposes no further duty on an individual State to intervene [...].¹¹⁴⁵

The German *Bundesverfassungsgericht* also made reference to Articles 40 and 41 in the context of a discussion of the notion of *jus cogens* in a case concerning claims for compensation as the result of expropriation without compensation in the Soviet zone of occupation during the period 1945-1949.¹¹⁴⁶ The Court observed:

[t]he concept of peremptory rules of public international law has recently been affirmed and further developed in the articles of the International Law Commission on the law of State responsibility [...]. This field of law is a core area of general international law that governs the (secondary) legal consequences of a State's violation of its (primary) obligations under international law. Article 40 (2) of the International Law Commission articles on the responsibility of States contains the definition of a serious violation of *ius cogens* and obliges the community of States to cooperate in order to terminate the violation using the means of international law. In addition, a duty is imposed on States not to recognize a situation created in violation of *ius cogens*.¹¹⁴⁷

Also worthy of note in the context of discussion of judicial practice referring to Articles 40 and 41 are a number of Separate Opinions by Judge Cançado Trindade in cases before the Inter-American Court of Human Rights, in which he has argued for the continued validity of the notion of State crimes, and has criticized the decision taken in 2000 to exclude the notion of State crimes from the Articles, in favour of the differentiated regime of additional consequences contained in Articles 40 and 41, and the provisions as to 'injured' States and 'States other than injured States' contained in Articles 42 and 48 of the Articles.

In his Separate Opinion in *Myrna Mack Chang v Guatemala*,¹¹⁴⁸ having traced the development of the notion of State crimes, including in the work of the ILC leading to the adoption of Article 19 of the Articles on first reading in 1996,¹¹⁴⁹ Judge Cançado Trindade observed, with reference to the Introductory Commentary to Chapter III of Part Two and the Commentaries to Articles 40 and 41, that:

[h]owever, progress in this area has not been linear but rather – as often happens – pendulous. It does not seem to me that the final Draft Articles of the ILC, adopted in 2001, have done justice enough to the advanced conceptual vision of R. Ago and to the concerns of G. Arangio-Ruiz. The fact that in its Articles on Responsibility of States (2001) the ILC addressed details regarding the 'countermeasures,' as they are called (reflecting the most primitive aspect of

¹¹⁴⁴ Ibid., para. 69.

¹¹⁴⁵ Ibid., para. 70.

¹¹⁴⁶ *Bundesverfassungsgericht*, decision of 26 October 2004 (Cases No. 2 BvR 955/00, 1038/01); partial English translation in 'Responsibility of States for internationally wrongful acts; Comments and information received from Governments, Report of the Secretary General', 9 March 2007, UN doc. A/62/63, paras. 33–38.

¹¹⁴⁷ Ibid., para. 98.

¹¹⁴⁸ *Myrna Mack Chang v Guatemala, Merits, Reparations and Costs, I-A.C.H.R., Series C, No. 101*, judgment of 25 November 2003, Separate Opinion of Judge Cançado Trindade.

¹¹⁴⁹ Ibid., paras. 5–7.

international law, that is, a new version of resort to reprisals), and that it set aside and shelved, rather lightly, the concept of international crime or ‘State crime,’ reflects the world in which we live. Ubi societas, ibi jus. The relatively succinct treatment of grave violations – and their consequences – of obligations under mandatory norms of general International Law (Articles 40–41) in the ILC’s Articles on the Responsibility of the States (2001) reveals the insufficient conceptual development of the matter up to our days, in an international community that is still seeking a greater degree of cohesion and solidarity.¹¹⁵⁰

Similarly, in his Separate Opinion in *Penal Miguel Castro Castro*,¹¹⁵¹ having recalled his previous observations on the subject of international crimes of State as well as recalling the academic debate on the topic,¹¹⁵² Judge Cançado Trindade observed:

[i]n my opinion, those responsible for the exclusion in 2000 of the conception of ‘crime of State’ from the Articles on the State’s Responsibility of the Commission on International Law of the United Nations (adopted in 2001) failed International Law. They did not realize – or they did not worry about the fact – that said notion leads to the ‘progressive development’ itself of International Law. It supposes the existence of rights both previous and superior to the State, whose violation, in detriment of human beings, is especially gross and damaging to the international legal system itself. It provides the latter with universal values, by inhibiting said gross and damaging violations, and seeking to ensure the international ordre juridique.¹¹⁵³

¹¹⁵⁰ Ibid., para. 8 (footnotes omitted).

¹¹⁵¹ *Miguel Castro Castro Prison (Peru)*, *Merits, Reparations and Costs*, I-A.C.H.R., Series C, No. 160, judgment of 25 November 2006, Separate Opinion of Judge Cançado Trindade.

¹¹⁵² Ibid., paras. 41–51.

¹¹⁵³ Ibid., para. 52.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Chapter I of Part Three deals with questions of the invocation of the international responsibility of a State as the result of an internationally wrongful act. Article 42 defines the notion of the 'injured State'; Article 43 deals with the mechanics of provision of notice of claim by the injured State. Article 44 relates to rules governing the admissibility of claims, including the requirement of exhaustion of local remedies. Article 45 concerns the circumstances in which a State, otherwise entitled to invoke responsibility, is to be treated as having lost that right. Articles 46 and 47 deal with questions of plurality of injured and responsible States, respectively. Finally, Article 48 covers questions of invocation of responsibility by States 'other than an injured State'.

The German *Bundesgerichtshof* made reference to the Articles contained in Chapter I of Part Three in a case concerning claims for compensation brought by the victims and relatives of victims of an air strike by NATO forces on a bridge in Serbia in May 1999.¹¹⁵⁴ The claimants brought their claims inter alia, on the basis of violations of international humanitarian law. The Court ruled that the victims were unable to bring a claim on the basis of the alleged breaches of international humanitarian law, finding that violations of international humanitarian law only gave rise to a claim by the national state of the victims, and no claim could be brought by the victims individually; in this regard, it made reference to the provisions contained in Chapter I of Part Three of the Articles:

[t]he fact that the Geneva Additional Protocols, in line with the principles of State responsibility, relate only to claims between States and not to direct reparation claims by individuals, is confirmed for instance by the fact that the draft articles on the responsibility of States for internationally wrongful acts submitted by the International Law Commission (ILC) in 2001 [...], in particular articles 42 ff. thereof, envisage only the invocation of responsibility by the injured State, and not by injured individuals. It is true that these draft articles only constitute binding international law insofar as they codify customary international law [...]. Nonetheless, they do indicate that the contrary view has yet to emerge. Rather, international tort claims are still to be considered as giving rise to State-to-State (compensation) payments [...]. In particular, the mere fact that rules exist which in specific cases permit persons whose human rights have been violated to bring individual applications (e.g. article 34 of the [European Convention on Human Rights] [...]) is not capable of supporting any alternative interpretation of article 91 of the First Additional Protocol to the Geneva Conventions of 1949, because of the special nature of international humanitarian law compared with general human rights law.¹¹⁵⁵

¹¹⁵⁴ Bundesgerichtshof, *decision of 2 November 2006 (Case No. III ZR 190/05)*; partial English translation in 'Responsibility of States for internationally wrongful acts; Comments and information received from Governments, Report of the Secretary General', 9 March 2007, UN doc. A/62/63, paras. 15–16.

¹¹⁵⁵ Ibid., para. 13

ARTICLE 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) specially affects that State; or
 - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 42 delineates the circumstances in which a State may invoke the responsibility of another State arising from the breach of an international obligation as an 'injured' State.

Paragraph (a) permits invocation of responsibility as an 'injured' state if the obligation breached is owed to that State individually. Paragraph (b) provides that a State is also entitled to invoke the responsibility of the responsible State as an injured State if the obligation breached is owed either to a group of States of which that State is a member, or to the international community as a whole, and the breach either 'specially affects' that State (sub-paragraph (i)), or is of such a character as to radically change the position of all other States to which the obligation is owed with respect to performance of the obligation (sub-paragraph (ii)).

Article 42 appears to have received no international judicial mention since the adoption of the Articles in 2001.

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 43 deals with the formalities with which an injured State must comply in order to be able to invoke the responsibility of another State. Paragraph 1 provides that the injured State must give notice of claim to the State whose responsibility is invoked. The second paragraph makes clear that the notice may specify the action which should be taken in order to cease the wrongful act if it is continuing (i.e. in compliance with the obligation contained in Article 30(a)), and the form which reparation for the breach should take under Chapter II of Part Two.

Notwithstanding the fact that the provision in question deals with the mechanics of invoking the responsibility of another State, a matter which one might expect not to be the subject of litigation, some judicial reference has nevertheless been made to Article 43.

In *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*,¹¹⁵⁶ the Republic of Guinea sought to bring claims by way of diplomatic protection in relation to the arrest, detention and expulsion of one of its nationals, who it was alleged had been deprived of his rights in two companies incorporated in the DRC, which themselves were alleged not to have received substantial sums due to them. The DRC raised preliminary objections based upon the fact that the essential object of the dispute was the rights of the companies incorporated in the DRC, and that the Republic of Guinea therefore did not have standing to present those claims, and that local remedies had not been exhausted. The International Court of Justice rejected the first preliminary objection insofar as the claims related to the individual rights of Mr Diallo and his direct rights in the two companies, but upheld it in so far as the claim concerned violations of the rights of the two companies. The Court also rejected the objection on the basis of non-exhaustion of local remedies. As a consequence, the application was declared admissible only insofar as it related to the individual rights of Mr Diallo and his direct rights in the two companies.¹¹⁵⁷

In relation to the first preliminary objection, Judge ad hoc Mampuya, in his Separate Opinion,¹¹⁵⁸ made reference to Article 43 of the Articles and the accompanying Commentary in the context of his analysis of the nature of the dispute between the parties and as to whether any dispute between the Parties in fact existed.

In this regard, Judge ad hoc Mampuya expressed concern as to the manner in which the case had been presented before the Court, and in particular as to whether the real 'heart' of the dispute was not in fact the non-payment of the debts allegedly owed to the two companies.¹¹⁵⁹ In that regard, he postulated that a first question which could and should have been examined by the Court was whether, in a case concerning the rights of private individuals, a possible dispute between the

¹¹⁵⁶ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, judgment of 24 May 2007.

¹¹⁵⁷ See in particular the dispositif, *ibid.*, para. 98.

¹¹⁵⁸ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Separate Opinion of Judge ad hoc Mampuya. The original was delivered in French; the quotations below are unofficial free translations by the author.

¹¹⁵⁹ *Ibid.*, p. 9.

States concerned could arise directly in the internal legal system of the State to which the alleged violations were attributed, or only on the international plane. In this regard, he observed:

[i]t is not necessarily a question of the debate as to the conditions under which a dispute which may be submitted to the Court arises, but it seems to me logical to ask whether the dispute of which the Court is seised existed at the time of the alleged violations of the rights of Mr Diallo in the internal legal system, or whether, as a result of the fact that his national State, having without success taken up the claim of its national with the competent authorities of the State allegedly at fault, an inter-State dispute, an inter-State dispute thereby arose.¹¹⁶⁰

Having made reference to the jurisprudence of the Court as to the requirement of a dispute opposing the parties, Judge ad hoc Mampuya noted that:

[a] legal dispute arises when it is found to exist, and is not to be presumed solely from the facts; it is necessary that those facts have given rise, as is the case in relation to private debts, to an unsatisfied claim; that is the meaning of the jurisprudence and practice since the judgment in *Mavrommatis*. Nor does a dispute arise directly from the seising of the Court; alleged violations of the rights of individuals, in the absence of an inter-State dispute, remain simple facts, and do not constitute an inter-State dispute.¹¹⁶¹

It was in this regard that he referred to Article 43 of the Articles and the accompanying Commentary as supporting his conclusion that it was necessary that there in fact exist an inter-State dispute:

[s]uch a requirement of the existence of an inter-State dispute is all the more logical and understandable given that, as stated and affirmed by the ILC in its Articles on State responsibility, it is habitually accepted that a State which invokes the responsibility of another State should notify its claim, so as to specify: (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' [Article 43 of the Articles]. Of course, the simple fact of a breach by a State of an international obligation binding upon it is sufficient to engage its responsibility as a matter of law, but as stated [in the Commentary] to that provision: 'the first step [of an injured State] should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.' In reality, it is not until such a claim has remained without a response or without a satisfactory response that a dispute arises.¹¹⁶²

In the circumstances, having noted that the Republic of Guinea had alleged in its Request that it had made 'vain attempts to peacefully settle the dispute', and that it had made 'several diplomatic *démarches*' on behalf of Mr Diallo, Judge ad hoc Mampuya opined that the Court should have verified whether this was in fact the case in order to verify the existence of a legal dispute between the Parties.¹¹⁶³

¹¹⁶⁰ Ibid., p. 9.

¹¹⁶¹ Ibid.

¹¹⁶² Ibid., p. 12, citing Commentary to Article 43, paragraph (3).

¹¹⁶³ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Preliminary Objections, Separate Opinion of Judge ad hoc Mampuya*, p. 13.

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 44 is concerned with the applicability of rules relating to the admissibility of claims; paragraph (a) makes clear that the responsibility of a State may not be invoked to the extent that the claim is not brought in accordance with any rule relating to the nationality of claims which is applicable. Similarly, paragraph (b) provides that invocation is precluded to the extent that a rule requiring the exhaustion of local remedies is applicable, and any effective local remedies have not been exhausted.

The NAFTA case of *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*¹¹⁶⁴ arose out of commercial litigation in the courts of Mississippi, as a result of which colossal punitive damages were awarded against the claimant company and another related company. Attempts to appeal that decision were frustrated by the requirement under local law that a bond for the amount of 125% of the sum awarded be posted as security, the local courts refusing to exercise a power to reduce the sum required to be posted. The claimants alleged that the award of damages and subsequent court decisions breached various of the substantive standards of protection contained in NAFTA. In response, the United States argued, inter alia, that the expression 'measures adopted or maintained by a Party' contained in Article 1101 had to be:

[...] understood in the light of the principle of customary international law that, when a claim of injury is based upon judicial action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole. This proposition is based on the notion that judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted. In other words, the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort.¹¹⁶⁵

In discussing the applicability of the local remedies rule to claims for violation of the substantive provisions of Chapter 11 of NAFTA, the Tribunal made reference to Article 44 of the Articles:

[t]he local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law [...]¹¹⁶⁶

¹¹⁶⁴ *The Loewen Group, Inc. and Raymond L. Loewen v United States of America* (ICSID Additional Facility Case No. ARB(AF)/98/3, Award of 26 June 2003).

¹¹⁶⁵ *Ibid.*, para. 143.

¹¹⁶⁶ *Ibid.*, para. 149; the Tribunal later concluded that 'The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105' (para. 156), and having concluded that there had existed remedies which were adequate and

As discussed below in the context of Article 48, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,¹¹⁶⁷ Judge Simma in his Separate Opinion¹¹⁶⁸ was of the view that the International Court of Justice should have considered that Uganda was able to bring a claim for violation of international humanitarian law and international human rights law on behalf of individuals mistreated by the DRC, even if it had not been shown that they were Ugandan nationals. He was also of the view that, in the circumstances, in relation to the human rights claims there was no requirement of exhaustion of local remedies. In that regard he made reference to Article 44 of the Articles and the accompanying Commentary:

[w]ith regard to the customary requirement of the exhaustion of local remedies, this condition only applies if effective remedies are available in the first place (cf. ILC Article 44 (b) and the commentary thereto). In view of the circumstances of the airport incident and, more generally, of the political situation prevailing in the DRC at the time of the Ugandan invasion, I tend to agree with the Ugandan argument that attempts by the victims of that incident to seek justice in the Congolese courts would have remained futile [...]. Hence, no obstacle would have stood in the way for Uganda to raise the violation of human rights of the persons maltreated at Ndjili International Airport, even if these individuals did not possess its nationality.¹¹⁶⁹

Reference has also been made to Article 44 by domestic courts; in the US case of *Sarei et al v Rio Tinto Plc and Rio Tinto Limited*,¹¹⁷⁰ a claim under the Alien Torts Claims Act by residents of Papua New Guinea, Judge Bybee, dissenting, made reference in passing to Article 44 of the Articles in discussing whether the rule of exhaustion of local remedies was substantive or procedural.¹¹⁷¹

effective, that 'Loewen failed to pursue its domestic remedies, [...] and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible' (para. 217).

¹¹⁶⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

¹¹⁶⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Simma.

¹¹⁶⁹ Ibid. para. 36.

¹¹⁷⁰ *Sarei et al v Rio Tinto Plc and Rio Tinto Limited* 487 F.3d 1193 (12 April 2007) (9th Circuit); rehearing en banc granted: 20 August 2007.

¹¹⁷¹ 487 F.3d 1193 at 1235, note 10.

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 45 deals with two distinct situations which preclude a State from relying on an otherwise valid claim to invoke the responsibility of another State in relation to an internationally wrongful act. Paragraph (a) covers the situation where the State has waived the claim; as made clear by the Commentary, a waiver must be valid in order to be effective, i.e. not vitiated by, for example, coercion, or a material mistake of fact.¹¹⁷² Paragraph (b) deals with the question of acquiescence, including by reason of unreasonable delay in putting forward a claim.¹¹⁷³

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, the International Court of Justice was faced with an argument by the DRC that Uganda had waived any claims it might have had:

[w]ith regard to the first period, before President Kabila came to power in May 1997, the DRC contends that the Ugandan counter-claim is inadmissible on the basis that Uganda renounced its right to invoke the international responsibility of the DRC (Zaire at the time) in respect of acts dating back to that period. In particular, the DRC contends that 'Uganda never expressly imputed international responsibility to Zaire' and did not 'express any intention of formally invoking such responsibility'. The DRC further states that the close collaboration between the two States after President Kabila came to power, including in the area of security, justifiably led the Congolese authorities to believe that 'Uganda had no intention of resurrecting certain allegations from the period concerned and of seeking to engage the Congo's international responsibility on that basis'.¹¹⁷⁴

In that regard, the Court noted that:

[...] the DRC has not presented any evidence showing an express renunciation by Uganda of its right to bring a counter-claim in relation to facts dating back to the Mobutu régime. Rather, it argues that Uganda's subsequent conduct amounted to an implied waiver of whatever claims it might have had against the DRC as a result of the actions or inaction of the Mobutu régime.¹¹⁷⁵

The Court in rejecting the DRC's argument, referred to its decision in *Certain Phosphate Lands in Nauru* as well as to the International Law Commission's Commentary on Article 45 of the Articles:

[...] waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru* (*Nauru v Australia*), the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting

¹¹⁷² Commentary to Article 45, paragraph (4)

¹¹⁷³ See Commentary to Article 45, paragraph (6)

¹¹⁷⁴ *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168., para. 281

¹¹⁷⁵ Ibid., para. 292.

the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru. Similarly, the International Law Commission, in its commentary on article 45 of the draft articles on responsibility of States for internationally wrongful acts, points out that '[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal'. In the Court's view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu regime.¹¹⁷⁶

The Court added that:

[t]he period of friendly relations enjoyed between the DRC and Uganda between May 1997 and July 1998 does nothing to affect this outcome. A period of good or friendly relations between two States should not, without more, be deemed to prevent one of the States from raising a pre-existing claim against the other, either when relations between the two States have again deteriorated or even while the good relations continue. The political climate between States does not alter their legal rights.¹¹⁷⁷

In relation to the question of the effect of lapse of time, the Court referred again to *Certain Phosphate Lands*:

[...] in a situation where there is a delay on the part of a State in bringing a claim, it is 'for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible' [...]. In the circumstances of the present case, the long period of time between the events at stake during the Mobutu régime and the filing of Uganda's counter-claims has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997.¹¹⁷⁸

Although the Court's ruling on this point was made without reference to Article 45(b), it may be noted that the same passage from the judgment of the Court in *Certain Phosphate Lands* is cited by the International Law Commission in its Commentary on that provision.¹¹⁷⁹

¹¹⁷⁶ Ibid., para. 293. The reference to *Certain Phosphate Lands* is to *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Preliminary Objections*, ICJ Reports 1992, p. 240, at pp. 247–250, paras. 12–21; the reference to the ILC's Commentary is to Commentary to Article 45, paragraph (5).

¹¹⁷⁷ *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168, para. 294.

¹¹⁷⁸ Ibid., para. 295, the quotation is from *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *Preliminary Objections*, ICJ Reports 1992, p. 240, at p. 254, para. 32.

¹¹⁷⁹ See Commentary to Article 45, paragraph (7).

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 46 deals with the situation where there is more than one State injured by the same internationally wrongful act. It provides that, in such a situation, each injured State may separately invoke the responsibility of the responsible State.

No reference appears to have been made to Article 46 of the Articles since their adoption in 2001.

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 47 deals with the situation in which more than one State is responsible for the same internationally wrongful act, providing that in such a situation, the responsibility of each State may be invoked; Article 47(2)(a) makes clear that the possibility of invocation of the responsibility of more than one responsible State does not permit recovery of compensation greater than the damage actually suffered. Article 47(2)(b) constitutes a saving clause making clear that the possibility of invocation of the responsibility of more than one State does not affect any right to recourse as between the responsible States which might exist.

The Tribunal in the *Eurotunnel* arbitration,¹¹⁸⁰ made reference in its partial award to Article 47 in the context of its discussion of the question of whether France and the United Kingdom were jointly and severally liable for breaches of the Concession Agreement (designed to implement the Treaty of Canterbury between France and the United Kingdom) which they had entered into with the Claimant.

In this regard, the Tribunal noted that it was ‘helpful to start’ with Article 47 of the Articles, the text of which it then set out in full,¹¹⁸¹ before referring to a passage from the Commentary in which the Commission had noted that:

[t]he general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.¹¹⁸²

The Tribunal then observed:

[t]hus it is necessary to ask whether the provisions of the Treaty of Canterbury as given effect to by the Concession Agreement and the Concession Agreement establish or imply any general principle of solidary responsibility for breaches of obligation.¹¹⁸³

¹¹⁸⁰ *The Channel Tunnel Group Limited and France-Manche SA v Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, ('Eurotunnel'), Partial Award of 30 January 2007.

¹¹⁸¹ *Ibid.*, para. 173.

¹¹⁸² *Ibid.*, para. 174, quoting Commentary to Article 47, paragraph (6).

¹¹⁸³ *Eurotunnel*, Partial Award of 30 January 2007, para. 175.

In that regard, having regard to the terms of the Concession Agreement, the Tribunal concluded that ‘when the parties to the Concession Agreement wanted to create a regime of ‘joint and several’ obligations they knew how to do it.’¹¹⁸⁴

The Tribunal noted that ‘[o]f more significance’ was the nature of the IGC, a body created under the Treaty of Canterbury, and which was expressly stipulated therein as being:

[...] established to supervise, in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link.’ The IGC is a joint organ of the two States, whose decisions require 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.¹¹⁸⁵

In an accompanying footnote, the Tribunal made reference to the Commentary to Article 47, as well as a passage in the Commentary to Article 6, noting that

[t]he ILC Articles on State Responsibility envisage the situation of ‘a single entity which is a joint organ of several States’.¹¹⁸⁶

The Tribunal continued:

[s]o much is clear. However, the Claimants complain not of actions taken by the IGC but of its failure to take action. The question is whether the failure of the IGC to take action (whether or not because the Principals were not agreed on the action to be taken) results in the joint liability of both Principals or the individual liability of each.¹¹⁸⁷

Having made reference to documents circulated as part of the process for award of the Concession Agreement, and having discussed in detail various provisions of the Treaty of Canterbury and Concession Agreement the Tribunal observed:

[t]o 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, i.e. 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.¹¹⁸⁸

In that regard, later on in the award, in relation to the claimants’ claim in relation to the failure to provide adequate security at the Coquelles terminal in France, the Tribunal concluded:

[t]he Tribunal has already held that the issue is not one of joint and several responsibility, which concerns the character of a responsibility already established

¹¹⁸⁴ Ibid., para. 176.

¹¹⁸⁵ Ibid., para. 179, referring to Art. 10 of the Treaty of Canterbury (emphasis in original).

¹¹⁸⁶ Ibid., note 124, referring to Commentary to Article 47, paragraph (2), and Commentary to Article 6, paragraph (3).

¹¹⁸⁷ *Eurotunnel*, Partial Award of 30 January 2007, para. 180.

¹¹⁸⁸ Ibid., para. 187.

against both States. It is whether the conditions for international responsibility are met in the first place. Although issues of policing outside the control zone were exclusively a matter for France, the overall responsibility for the security of the Fixed Link was shared and not divided. The United Kingdom was not responsible for the security of the Fixed Link up to the boundary fixed by Article 3(1) of the Treaty, with France responsible on the continental side. Both States shared the responsibility, and under Clause 27.7 they had to ensure that the IGC took the necessary steps to facilitate the implementation of the Agreement, including Clause 2.1, and that in doing so it gave 'due consideration to the reasonable commercial objectives of the Concessionaires, including the avoidance of unnecessary costs and delays.' 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.¹¹⁸⁹

The Tribunal went on to find that in the circumstances of the case, both States had violated their obligations under the Concession Agreement as a result of the failure of the IGC to act as was required.¹¹⁹⁰

Lord Millett entered a dissenting opinion¹¹⁹¹ in this regard, noting that, although the relevant obligations were joint obligations of both States:

[...] this is not a case where they have been guilty of the same internationally wrongful act (see Article 47 of the ILC Articles on State Responsibility [...]). France's wrongful act lay in its failure to take the steps which were necessary for the operation of the Fixed Link. The most that can be said against the United Kingdom is that it wrongly supported France's misreading of its obligations and failed to do more to induce France to discharge them. That was not something which it had undertaken to do and did not constitute a breach of the Concession Agreement. But even if it did, it would not be the same wrong but a wrong of a very different order.¹¹⁹²

He continued:

[i]t is not uncommon, where two parties are subject, either jointly or severally, to the same (or as in the present case different) obligations, for the liability of one to be a primary liability and that of the other to be secondary. In such a case justice demands that as between them the liability is the liability of the former only. This is certainly the rule of the common law, and I have no reason to suppose that the civil law is different. The most obvious example is that of debtor and guarantor, but the principle extends beyond this. It applies whenever there is a primary and a secondary obligation, so that as between the obligors the obligation is the obligation of one and not of both. Should the party secondarily liable be compelled to pay, he would be entitled to be reimbursed by the party primarily liable. As we have observed, where both are nation states which are before the Tribunal and there is no doubt of the ability and willingness of the party primarily liable to meet an award, there is no point in imposing liability on the party secondarily liable with a right of full recourse to the other.

¹¹⁸⁹ Ibid., Para. 317.

¹¹⁹⁰ Ibid., paras. 318 and 319

¹¹⁹¹ *The Channel Tunnel Group Limited and France-Manche SA v Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, Dissenting Opinion of Lord Millett.

¹¹⁹² Ibid., Para. 19.

France was alone capable of closing or securing the Sangatte Hostel and maintaining public order in the Pas de Calais. Its failure to do so was a breach of the Concession Agreement. The United Kingdom was not responsible for France's failure to discharge its obligations, nor had it guaranteed their performance by France. But even if it had done so its responsibility would be secondary to that of France, so that as between them the liability to compensate the Claimants ought to be borne wholly by France.

The present case is a fortiori. The United Kingdom cannot be in a worse position than if it had actually guaranteed the performance of those obligations by France. Its failings should not expose the United Kingdom to liability in damages, thereby reducing the amount of the compensation payable by France. This would transfer part of the liability in damages from the party actually responsible to a party which, however wrongfully, failed to do more to get the other to discharge its contractual obligations.

The key proposition on which the majority base their finding against the United Kingdom is that it did not 'do everything within its power to bring an unsatisfactory situation promptly to an end' [...]. This is, with respect, an abbreviated version of the truth, omitting as it does a crucial qualification. The true position is that the United Kingdom did not do everything within its power to bring an unsatisfactory situation promptly to an end by getting France to perform its obligations.

It is the omission of the words which I have emphasised which leads the majority to take the view that holding both Respondents liable is not inequitable vis-vis the United Kingdom. But the injustice does not lie in holding the United Kingdom liable to the Claimants, possibly in a very small amount. It lies in reducing the liability of France to any extent. Whatever the failings of the United Kingdom, ultimately the cause of the United Kingdom's supposed liability is that France failed to discharge its obligations under the Concession Agreement.

The reasoning of the majority appears to be as follows: the IGC was more than a mere conduit pipe; it was a joint organ with its own affirmative responsibilities which adopted a wrong position for the consequences of which the Respondents are both liable as members. With respect, there are two false steps in this chain of reasoning. First, it makes the elementary mistake of equating responsibility (which is a question of fact) with liability (which is a question of law). As I have observed above, the IGC was not a party to the Concession Agreement and owed no contractual obligations to the Claimants. It could not itself possibly be under any legal liability to them. This is not, therefore, a case where an international organ has committed an international wrong for which its members may be liable by virtue of their membership. It is a true case of vicarious liability, where the acts and omissions (not the liability) of the agent is attributed to his principals.

Secondly, the only consequence (if any) of the IGC's taking a false position was that France failed to discharge its obligations under the Concession Agreement. Even if it were established that France would have honoured its obligations had the United Kingdom not supported its position, this would not diminish France's liability nor establish that of the United Kingdom.¹¹⁹³

At the merits stage of *Oil Platforms (Islamic Republic of Iran v United States of America)*,¹¹⁹⁴ Judge Simma in his Separate Opinion¹¹⁹⁵ made reference to Article 47 in his discussion of the United

¹¹⁹³ Ibid., paras. 20–26.

¹¹⁹⁴ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, ICJ Reports 2003, p. 161.

States's counterclaim based on impairment of freedom of commerce and navigation under the applicable treaty. He distinguished between the 'generic counterclaim', based on creation of a situation of general overall impairment of freedom of commerce and navigation, and the 'specific' counterclaims based on individual incidents involving specific vessels.¹¹⁹⁶ He observed that there were some problems of attribution, given that some specific actions (e.g. minelaying) could not with certainty be attributed to Iran, rather than Iraq;¹¹⁹⁷ however he was of the view that insofar as the counterclaim was 'generic' in that it alleged contribution to the general impairment of freedom of commerce and navigation, there was no difficulty in finding Iran responsible. As to the potential joint responsibility of Iran and Iraq, having referred to comparative domestic law on the question of joint tortfeasors¹¹⁹⁸, he observed:

Another authoritative source addressing the issue of a plurality of responsible States can be found in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001. The ILC's solution is in conformity with the result of the comparative research I have just presented. Article 47 states : 'Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'

In the context of the specific variant of the United States counterclaim, Article 47 would apply only if both Iran and Iraq were responsible for a given action - for instance, if Iran had carried out an attack against a ship engaged in treaty-protected commerce, jointly planning and co-ordinating the operation with Iraq. However, in the present case, the reality is such that the two States never acted in concert with respect to a specific incident, and thus it always was either Iran or Iraq which was responsible for a given incident. As a result, Article 47, which requires both States to be responsible for the same internationally wrongful act, cannot be applied to the specific counter-claim.

Applied to the generic counter-claim, on the other hand, Article 47 is very helpful. In the context of the generic counter-claim, the 'internationally wrongful act' is constituted by the creation of negative economic, political and safety conditions in the Gulf rather than by a specific incident. The bringing about of this environment, taken as a whole, is attributable to both States, as it is common knowledge that they both participated in the worsening of the conditions prevailing in the Gulf at the time. The difference is clear: unlike the specific claim, where only one State is responsible for the act of violating international law, the generic claim falls within the scope of ILC Article 47 because the two States are responsible for the same act. It is the creation of dangerous conditions for shipping and doing commerce in the Gulf which constitutes the internationally wrongful act within the meaning of Article 47. By application of Article 47 to the generic counter-claim, the United States could invoke the responsibility of either State, that is, also of Iran, individually. Thus, in the principle underlying Article 47, and in the 'generic' identification of the internationally wrongful act, lies another basis on which Iran should have been held in violation of its Treaty obligations and the generic counter-claim upheld by the Court.

As a result, the problem of attributing responsibility in the face of factually 'indivisible' wrongful acts - which I presented earlier as the principal obstacle to the admission of the counter-claim - could have been overcome pursuant both to the general principle that multiple tortfeasors can be held responsible individually

¹¹⁹⁵ *Oil Platforms (United States of America v Islamic Republic of Iran)*, Separate Opinion of Judge Simma, *ICJ Reports 2003*, p. 324.

¹¹⁹⁶ *Ibid.*, at pp. 343–344, paras. 37 and 39.

¹¹⁹⁷ *Ibid.*, at p. 353, paras 61–63

¹¹⁹⁸ *Ibid.*, at pp. 354–358, paras. 66–74.

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even when the damage cannot be apportioned among them, and the principles embodied in ILC Article 47.¹¹⁹⁹

¹¹⁹⁹ Ibid., at p. 358–359, paras. 75–78

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.

Article 48 provides that States which do not qualify as injured States under Article 42 may invoke the responsibility of the responsible State in certain circumstances. Paragraph 1 permits invocation in two situations; the first is where the obligation in question is owed to a group of States including the invoking State, and is established for the protective of a collective interest; the second is where the obligation in question is owed to the international community as a whole. Paragraph 2 provides that a State which is entitled to invoke the responsibility of the responsible State in either of these circumstances may claim both cessation and assurances and guarantees of non-repetition under Article 30, and performance of the obligation of reparation in the interest of the injured State or the beneficiaries of the obligation in question. Paragraph 3 makes clear that Articles 43 to 45 are applicable in such a situation.

Article 48 has been the subject of some judicial attention since its adoption by the ILC.

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*¹²⁰⁰, part of Uganda's counterclaim related to treatment of individuals, who had been mistreated by the DRC at Ndjili while attempting to flee the country. The Court rejected the counterclaim on the basis that the claim was presented by Uganda as being brought by way of diplomatic protection, and Uganda had failed to show that individuals in question were Ugandan nationals.¹²⁰¹ Judge Simma in his Separate Opinion,¹²⁰² although agreeing with the Court's conclusion as a matter of the law of diplomatic protection,¹²⁰³ expressed the view that the Court should have gone on to find that the 'victims of the attacks at the Ndjili International Airport remained legally protected against such maltreatment irrespective of their nationality, by other

¹²⁰⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p. 168.

¹²⁰¹ *Ibid.*, para. 333

¹²⁰² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Simma.

¹²⁰³ *Ibid.*, para. 17.

branches of international law, namely international human rights and, particularly, international humanitarian law.¹²⁰⁴, and that Uganda had standing to raise such claims.¹²⁰⁵

In relation to violations of international humanitarian law, Judge Simma was of the view that Uganda would have had standing on the basis of Article 1 of the Fourth Geneva Convention, referring in this regard to the Court's decision in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹²⁰⁶ Turning to the question of standing to invoke the violations of international human rights law, he referred to Article 48 of the Articles:

[a]s 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 International Law Commission's 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State.¹²⁰⁷

Judge Simma then proceeded to set out Article 48 in full, before commenting:

[t]he obligations deriving from the human rights treaties 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.¹²⁰⁸

Also of note in this regard, are his general concluding observations:

[l]et me conclude with a more general observation on the community interest underlying international humanitarian and human rights law. I feel compelled to do so because of the notable hesitation and weakness with which such community interest is currently manifesting itself vis-à-vis the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed 'war' on international terrorism.

As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, '[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable '*erga omnes*', since they may be regarded as the codification of accepted principles'. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons the Court stated that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' ...', that they are 'to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law' [...]. Similarly, in the Wall Advisory Opinion, the Court affirmed that the rules of

¹²⁰⁴ Ibid.

¹²⁰⁵ Ibid., para. 37.

¹²⁰⁶ Ibid., paras. 33–34, quoting *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at pp. 199–200, para. 158.

¹²⁰⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Simma, para. 35

¹²⁰⁸ Ibid.

international humanitarian law ‘incorporate obligations which are essentially of an *erga omnes* character’.

As the Court indicated in the Barcelona Traction case, obligations *erga omnes* are by their very nature ‘the concern of all States’ and, ‘[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection’. In the same vein, the International Law Commission has stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts, that there are certain rights in the protection of which, by reason of their importance, ‘all States have a legal interest ...’.

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 place to 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.¹²⁰⁹

In this regard, reference may also be made to the observations of the Human Rights Committee in General Comment No. 31,¹²¹⁰ some passages of which appear to endorse the approach adopted by the Commission in Article 48 of the Articles, in particular the view that a State which does not qualify as an injured State under Article 42 nevertheless has an interest in invoking the responsibility of another State Party to the International Covenant of Civil and Political Rights, and this even if the responsible State has not accepted the jurisdiction of the Committee in relation to the inter-State complaint procedure under Article 41 of the Covenant. The Committee observed:

[w]hile article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties’ interest in each others’ discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with

¹²⁰⁹ Ibid., paras. 38–41, citing *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226, at p. 257, para. 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at p. 199, para. 157; and *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 3, at p. 32, para. 33; the reference to the Commentaries in the penultimate paragraph of the passage is to the Introductory Commentary to Part Two, Chapter III, paragraph (2).

¹²¹⁰ Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

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their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.¹²¹¹

¹²¹¹ Ibid., para. 2.

CHAPTER II COUNTERMEASURES

Chapter II of Part Three is devoted to the subject of countermeasures. Article 49 sets out the object and limits of countermeasures; Article 50 lists specific obligations which may not be affected by the adoption of countermeasures. Article 51 provides that countermeasures must be proportionate, being commensurate to the injury suffered, in the light of the gravity of the internationally wrongful act in question and the rights in question. Article 52 sets out certain procedural conditions for the taking of countermeasures. Article 53 emphasises that countermeasures must be terminated as soon as the responsible State has complied with its obligations consequent upon an internationally wrongful act contained in Part Two. Article 54 is a saving clause, leaving open the question of the extent to which a State which does not qualify as 'injured State' may adopt countermeasures.

At the merits stage of *Oil Platforms (Islamic Republic of Iran v United States of America)*,¹²¹² Judge Simma in his Separate Opinion¹²¹³ made reference to the work of the International Law Commission in relation to countermeasures, specifically referring to Articles 49-54, in the context of his discussion of the question of whether measures involving the use of armed force were permissible reactions in response to a use of armed force stopping short of an armed attack:

I am less satisfied with the argumentation used in the Judgment by which the Court arrives at the – correct – conclusion that, since the Iranian mine, gunboat or helicopter attacks on United States shipping did not amount to an 'armed attack' within the meaning of Article 51 of the Charter, the United States actions cannot be justified as recourse to self-defence under that provision. The text of paragraph 51 of the Judgment might create the impression that, if offensive military actions remain below the—considerably high—threshold of Article 51 of the Charter, the victim of such actions does not have the right to resort to—strictly proportionate—defensive measures equally of a military nature. What the present Judgment follows at this point are some of the less fortunate statements in the Court's Nicaragua Judgment of 1986. In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the Sea Isle City or the Samuel B. Roberts cannot be denied. What we see in such instances is an unlawful use of force 'short of' an armed attack ('agression armée') within the meaning of Article 51, as indeed 'the most grave form of the use of force'. Against such smaller-scale use of force, defensive action—by force also 'short of' Article 51—is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an 'armed attack' within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter.¹²¹⁴

Having referred to a passages from the judgment of the Court in *Military and Paramilitary Activities* case,¹²¹⁵ he observed that the Court there:

¹²¹² *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, ICJ Reports 2003, p. 161.

¹²¹³ *Oil Platforms (United States of America v Islamic Republic of Iran)*, Separate Opinion of Judge Simma, ICJ Reports 2003, p. 324.

¹²¹⁴ Ibid., at pp. 331–332, para. 12.

¹²¹⁵ Ibid., at p. 332, quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p. 14 at 127, para. 249.

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[...] drew a distinction between measures taken in legitimate self-defence on the basis of Article 51 of the Charter and lower-level, smaller-scale proportionate counter-measures which do not need to be based on that provision. In view of the context of the Court's above dictum, by such proportionate counter-measures the Court cannot have understood mere pacific reprisals, more recently, and also in the terminology used by the International Law Commission, called 'countermeasures'. Rather, in the circumstances of the Nicaragua case, the Court can only have meant what I have just referred to as defensive military action 'short of' full-scale self-defence.¹²¹⁶

The footnote accompanying the reference to the International Law Commission's use of the terminology of 'countermeasures' provided:

Cf. Articles 49-54 of the ILC's text on the Responsibility of States for Internationally Wrongful Acts, [...]. The Commission strictly excluded from its concept of 'counter-measures' any such measures amounting to a threat or use of force; cf. Article 50, para. 1(a).¹²¹⁷

¹²¹⁶ *Oil Platforms (United States of America v Islamic Republic of Iran)*, Separate Opinion of Judge Simma, *ICJ Reports 2003*, p. 324, at p. 332, para. 12.

¹²¹⁷ *Ibid.*, at p. 332, note 19.

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 49 deals with the object of countermeasures, and limits on their adoption. It makes clear that countermeasures may only be taken by an injured State against a responsible State with the object of inducing that State to comply with the various secondary obligations contained in Part Two. Paragraphs 2 and 3 stipulate that countermeasures may only consist of the temporary suspension of performance of international obligations owed to the responsible State, and that countermeasures should as far as possible be adopted so as to allow resumption of performance of the obligations suspended once there is compliance with the obligations contained in Part Two.

In the WTO case of *Mexico – Tax Measures on Soft Drinks and Other Beverages*,¹²¹⁸ the Panel recorded the invocation by the European Communities of the Articles in criticizing an argument put forward by Mexico in support of the measures adopted by it.

Mexico had argued that the measures adopted by it, the subject of the complaint by the United States of America, were ‘necessary to secure compliance’ by the United States with its obligations under NAFTA within the meaning of Article XX(d) GATT 1994. In this regard, it was argued that the provisions of NAFTA constituted ‘laws or regulations which are not inconsistent’ with GATT 1994, again within the meaning of Article XX(d) GATT 1994.

In summarizing Mexico’s argument, the Panel set out Mexico’s position that the measures adopted:

[...] related virtually exclusively to the United States, not to other WTO Members. Mexico appreciates that other Members have a systemic interest in the matter, but the fact is that the trade was overwhelmingly one that arose under the NAFTA and was supplied by the United States. The measures are a response to its persistent refusal to respond to Mexico's repeated efforts to resolve the dispute.¹²¹⁹

¹²¹⁸ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, 7 October 2005, WTO doc. WT/DS308/R; the Appellate Body affirmed the conclusion of the Panel in relation to the interpretation of Article XX(d) to the effect that it did not include measures adopted in order to ensure compliance’ with international agreements of the States Parties, albeit on the basis of different reasoning: *Mexico – Tax Measures on Soft Drinks and Other Beverages* (AB–2005–10) Report of the Appellate Body, WTO doc. WT/DS308/AB/R, 6 March 2006. In this regard, the Appellate Body did not make any reference to the Articles; cf. however, *ibid.*, para. 75: ‘Even if ‘international countermeasures’ could be described as intended ‘to secure compliance’, what they seek ‘to secure compliance with’—that is, the international obligations of another WTO Member—would be outside the scope of Article XX(d). This is because ‘laws or regulations’ within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member.’

¹²¹⁹ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, 7 October 2005, WTO doc. WT/DS308/R, para. 4.335

In an accompanying footnote, the Panel set out passages from the Commentary to Article 49 relied upon by Mexico in this regard, in which the Commission had stated:

[a] second essential element of countermeasures is that they ‘must be directed against’ a State which has committed an internationally wrongful act...

and

[t]his does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. ... Similarly if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.¹²²⁰

The Panel noted that the European Communities, intervening, had relied upon the Articles in order to criticize the invocation by Mexico of Article XX(d) as a justification for the measures adopted by it. In particular, the Panel recorded the European Communities’ argument that Mexico’s interpretation of Article XX(d) would transform it:

[...] into an authorisation of counter-measures within the meaning of public international law. It must be assumed, however, that if the contracting parties had intended such an interpretation, they would have expressed this in a clearer way. Moreover, under customary international law, as codified in the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, counter-measures are subject to strict substantive and procedural conditions, which are not contained in Article XX(d) of the GATT 1994.

The EC notes that Mexico has not so far justified its measure as a counter-measure under customary international law. Such a justification would already meet the objection that the Mexican measure does not only apply to products from the United States, but from anywhere. In any event, should Mexico still attempt such a justification, then this would also raise the difficult question of whether the concept of counter-measures is available to justify the violation of WTO obligations. In accordance with Article 50 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, this would not be the case if the WTO agreements are to be considered as a *lex specialis* precluding the taking of counter-measures. This complex question has been addressed in the report of the International Law Commission at its fifty-third session.¹²²¹

The Panel in interpreting Article XX(d) GATT 1994 found that the words ‘to secure compliance’ should be interpreted as meaning ‘to enforce compliance’,¹²²² and that Article XX(d) was therefore applicable only to justify enforcement of domestic law obligations:¹²²³

[t]he identification of the phrase ‘to secure compliance’ with the notion of enforcement has important implications for the arguments presented by Mexico. The context of Mexico’s action is essentially international. Countermeasures have an intrinsic inter-state character, and there is no concept of private action against a state being justifiable on this basis. On the other hand, the notion of enforcement contains a concept of action within a hierarchical structure that is

¹²²⁰ Ibid., note 73, quoting from Commentary to Article 49, paragraphs (4) and (5)

¹²²¹ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, 7 October 2005, WTO doc. WT/DS308/R, para. 5.54–55.

¹²²² Ibid., para. 8.175

¹²²³ Ibid. See also *ibid.*, para. 8.194

associated with the relation between the state and its subjects, and which is almost entirely absent from international law (action under Chapter VII of the United Nations Charter is arguably an exception, but it has no relevance in the present dispute). The possibility for states to take countermeasures, that is to try by their own actions to persuade other states to respect their obligations, is itself an acknowledgement of the absence of any international body with enforcement powers. In contrast to this, the capacity to enforce laws and regulations through the use of coercion, if necessary, is perhaps the most important of the features that distinguish states from other kinds of bodies.

The examples provided in Article XX(d) serve to reinforce the conclusion that this provision is concerned with action at a domestic rather than international level.¹²²⁴

In this context, the Panel made reference to Article 49(1) of the Articles and the Commentary to Article 50 as supporting that interpretation:

[t]he Panel will return to the notion of enforcement in its discussion of ‘laws or regulations’, but before leaving the current topic it is worth noting that the Draft Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission do not speak of enforcement when addressing the use of countermeasures. Rather, paragraph 1 of Article 49 states that ‘[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.’ Nor is the notion of enforcement used in the Commentary on the articles, except in regard to procedures within the European Union, which because of its unique structures and procedures is obviously a special case.¹²²⁵

In *European Communities - Measures Affecting Trade in Commercial Vessels*,¹²²⁶ the United States of America, intervening, made reference to Article 49(2) of the Articles, although only to express the view that the provision was of no relevance to the question before the Tribunal of whether the measures adopted by the European Communities were permitted within the dispute settlement system of the WTO.¹²²⁷

¹²²⁴ Ibid., para. 8.178–8.179

¹²²⁵ Ibid., referring to Commentary to Article 50, paragraph (10)

¹²²⁶ *European Communities – Measures Affecting Trade in Commercial Vessels*, Report of the Panel of 22 April 2005, WTO doc. WT/DS301/R.

¹²²⁷ Ibid., paras. 5.36 and 7.183.

ARTICLE 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) obligations for the protection of fundamental human rights;
 - (c) obligations of a humanitarian character prohibiting reprisals;
 - (d) other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) under any dispute settlement procedure applicable between it and the responsible State;
 - (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 50 specifies various obligations which may not be affected by the adoption of countermeasures. Paragraph 1 lists a number of obligations reflecting fundamental values which, due to their importance, are not permitted to be suspended by way of countermeasures: the specific obligations listed are the obligation to refrain from the threat or use of force, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, as well as a catch-all category of other obligations arising under peremptory norms of general international law (i.e. *jus cogens*). Paragraph 2 provides that, by reason of the taking of countermeasures, a State is not released from performance of two other types of obligations. These obligations, although not rising to the level of *jus cogens*, are nevertheless of fundamental importance and therefore are held to be similarly inviolable and may not be affected by way of countermeasures; these are obligations under any dispute resolution procedure which is applicable in the relations between the State taking countermeasures and the responsible State, and obligations relating to the inviolability of diplomatic and consular agents, premises, archives and documents.

In its Partial Award in relation to *Prisoners of War — Eritrea's Claim 17*,¹²²⁸ the Eritrea-Ethiopia Claims Commission referred to Article 50 of the Articles in the context of discussion of Eritrea's claims of Ethiopia's State responsibility on the basis that Ethiopia had failed to repatriate prisoners of war in a timely fashion. Ethiopia resisted the claims in this regard on jurisdictional grounds, and therefore did not as such respond to Eritrea's claims on their merits.

In this regard, however, the Eritrea-Ethiopia Claims Commission took note of Eritrea's argument, relying on Article 50 of the Articles, that:

Ethiopia's suspension of prisoner of war exchanges cannot be justified as a non-forcible countermeasure under the law of state responsibility because, as article 50 of [the Articles] emphasizes, such measures may not affect 'obligations for the protection of fundamental human rights', or 'obligations of a humanitarian character prohibiting reprisals'.¹²²⁹

¹²²⁸ *Prisoners of War – Eritrea's Claim 17 (Eritrea v Federal Democratic Republic of Ethiopia)*, Partial Award of 1 July 2003.

¹²²⁹ *Ibid.* para. 159.

Eritrea also emphasized that the suspension of exchanges could not, in light of Article 13 of Geneva Convention III, be considered a lawful measure of reprisal under the law of armed conflict.¹²³⁰

In this regard, the Commission simply observed that Eritrea's arguments in this regard were 'well-founded in law',¹²³¹ although it went on to distinguish between different periods of time, concluding that in relation to some of those periods, it had not been proved that Ethiopia had breached its obligation of repatriation.¹²³²

In *Guyana/Suriname*,¹²³³ the Tribunal, having found that it had jurisdiction to examine Guyana's claims of Suriname's State responsibility, and having found that there had been a breach of the prohibition of the threat or use of force,¹²³⁴ addressed Suriname's argument that 'should the Tribunal regard [its 3 June 2000] measures as contrary to international obligations owed by Suriname to Guyana, the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana in order to achieve cessation of that act'.¹²³⁵

The Tribunal rejected this argument briskly, referring to Article 50 of the Articles, and the accompanying Commentary:

[i]t is a well established principle of international law that countermeasures may not involve the use of force. This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(a), which states that countermeasures shall not affect 'the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'. As the Commentary to the ILC Draft Articles mentions, this principle is consistent with the jurisprudence emanating from international judicial bodies...¹²³⁶

As noted above in relation to Article 49, in *Mexico - Tax Measures on Soft Drinks and Other Beverages*,¹²³⁷ the Panel made reference to a short passage from the Commentary to Article 50 in support of the proposition that the Articles and Commentaries thereto 'do not speak of enforcement when addressing the use of countermeasures', and noted that the one exception in the Commentaries related to the European Union, 'which because of its unique structures and procedures is obviously a special case'.¹²³⁸

As noted above, at the merits stage of *Oil Platforms (Islamic Republic of Iran v United States of America)*,¹²³⁹ Judge Simma in his Separate Opinion¹²⁴⁰ made reference to the Articles contained in Part Three, Chapter Two as a whole in the context of his discussion of whether military action could be taken in response to a use of armed force falling short of an 'armed attack' within the

¹²³⁰ Ibid.

¹²³¹ Ibid., para. 160

¹²³² Ibid. paras. 160–163.

¹²³³ *Guyana/Suriname*, Award of 17 September 2007

¹²³⁴ Ibid., para. 445 and see the dispositif, para. 488(2).

¹²³⁵ Ibid., para. 446

¹²³⁶ Ibid., para. 446, referring to Commentary to Article 50, paragraph (5). Mirroring the Commentary to Article 50, paragraph (5), the Tribunal then went on to refer to the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, General Assembly resolution 2625 (XXV), 24 October 1970

¹²³⁷ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, 7 October 2005, WTO doc. WT/DS308/R.

¹²³⁸ Ibid., para. 8.180, referring to Commentary to Article 50, paragraph (10)

¹²³⁹ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, ICJ Reports 2003, p. 161.

¹²⁴⁰ *Oil Platforms (United States of America v Islamic Republic of Iran)*, Separate Opinion of Judge Simma, ICJ Reports 2003, p. 324.

meaning of Article 51 of the UN Charter. Having referred to a passage from the judgment of the Court in *Military and Paramilitary Activities* case,¹²⁴¹ he observed that the Court had there drawn:

[...] a distinction between measures taken in legitimate self-defence on the basis of Article 51 of the Charter and lower-level, smaller-scale proportionate counter-measures which do not need to be based on that provision. In view of the context of the Court's above dictum, by such proportionate counter-measures the Court cannot have understood mere pacific reprisals, more recently, and also in the terminology used by the International Law Commission, called 'countermeasures'. Rather, in the circumstances of the Nicaragua case, the Court can only have meant what I have just referred to as defensive military action 'short of' full-scale self-defence.¹²⁴²

In the footnote accompanying the reference to the International Law Commission's use of the terminology of 'countermeasures', Judge Simma made specific reference to the prohibition of countermeasures involving the threat or use of armed force contained in Article 50(1)(a):

Cf. Articles 49-54 of the ILC's text on the Responsibility of States for Internationally Wrongful Acts, [...]. The Commission strictly excluded from its concept of 'counter-measures' any such measures amounting to a threat or use of force; cf. Article 50, para. 1 (a).¹²⁴³

¹²⁴¹ Ibid., at p. 332, quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p. 14 at 127, para. 249.

¹²⁴² *Oil Platforms (United States of America v Islamic Republic of Iran)*, Separate Opinion of Judge Simma, ICJ Reports 2003, p. 324, at p. 332, para. 12.

¹²⁴³ Ibid., p. 332, note 19.

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 51 is concerned with the proportionality of countermeasures. It provides that, taking into account the gravity of the internationally wrongful act and the rights in question, countermeasures adopted must be 'commensurate' with the injury suffered.

A number of WTO cases have made reference to Article 51.

In *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*,¹²⁴⁴ the WTO Appellate Body, in support of its interpretation of Article 6.4 of the Agreement on Textiles and Clothing that where 'serious damage' had arisen due to imports from a number of members, that provision did not permit the attribution of all the serious damage to a single member, but only that part actually attributable to it. The extent of the serious damage assessed as being attributable to a State was relevant for the imposition of safeguard measures. In interpreting Article 6.4, the Appellate Body invoked the notion of proportionality and made reference to Article 51 of the Articles:

[i]n consequence, where imports from more than one Member contribute to serious damage, it is only that part of the total damage which is actually caused by imports from such a Member that can be attributed to that Member under Article 6.4, second sentence. Damage that is actually caused to the domestic industry by imports from one Member cannot, in our view, be attributed to a different Member imports from whom were not the cause of that part of the damage. This would amount to a 'mis-attribution' of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4. Therefore, the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member. Contrary to the view of the United States, we believe that Article 6.4, second sentence, does not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage

Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.¹²⁴⁵

In an accompanying footnote, the Appellate Body set out the text of Article 51. The Appellate Body continued with the analogy as follows:

It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, 'punitive', attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the

¹²⁴⁴ *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (AB–2001–3), Report of the Appellate Body, 8 October 2001, WTO doc. WT/DS192/AB/R.

¹²⁴⁵ *Ibid.*, paras. 119–120 (footnotes omitted).

attribution of serious damage could be justified only if the drafters of the [Agreement on Textiles and Clothing] had expressly provided for it, which is not the case.¹²⁴⁶

Similarly, in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*,¹²⁴⁷ the Appellate Body referred to its previous reference to Article 51 of the Articles in *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, in relation to its interpretation of Article 5.1 of the Agreement on Safeguards as relating only to injury attributable to increased imports, or whether safeguard measures could also be used to address the injurious effects caused by other factors.

Having concluded as a matter of construction that Article 5.1 only permitted safeguard measures in relation to imports,¹²⁴⁸ the Appellate Body observed:

[w]e note as well the customary international law rules on state responsibility, to which we also referred in *US – Cotton Yarn*. We recalled there that the rules of general international law on state responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the [Articles] provides that ‘countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’. Although Article 51 is part of the International Law Commission’s Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law.¹²⁴⁹

In *United States – Tax Treatment for Foreign Sales Corporations*,¹²⁵⁰ the Arbitrator made reference to Article 51 of the Articles in the context of discussion of the appropriate interpretation of Article. 4.10 of the Agreement on Subsidies and Countervailing Measures ‘which refers to the grant of authorization by the Dispute Settlement Body to a complaining Member ‘to take appropriate countermeasures’, and to footnote 9 thereto which specifies that the term appropriate in Article 4.10 ‘is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.’

In this regard, the Arbitrator observed:

[i]t should also be noted that the negative formulation of the requirement under footnote 9 is consistent with a greater degree of latitude than a positive requirement may have entailed: footnote 9 clarifies that Article 4.10 is not intended to allow countermeasures that would be ‘disproportionate’. It does not require strict proportionality.¹²⁵¹

In a footnote accompanying that passage, the Arbitrator made reference to the Commentary to Article 51, and set out the text of Article 51:

¹²⁴⁶ Ibid., para. 120.

¹²⁴⁷ *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Appellate Body, 15 February 2002, WTO doc. WT/DS202/AB/R..

¹²⁴⁸ Ibid., para. 258.

¹²⁴⁹ Ibid., para. 259 (footnotes omitted). The Appellate Body also observed that ‘the United States has acknowledged this principle elsewhere. In its comments on the International Law Commission’s draft articles, the United States stated that ‘under customary international law a rule of proportionality applies to the exercise of countermeasures’ (ibid.).

¹²⁵⁰ *United States – Tax Treatment for Foreign Sales Corporations*, Decision of the Arbitrator, 30 August 2002, WTO doc. WT/DS108/ARB.

¹²⁵¹ Ibid., para. 5.26

[w]e note in this regard the view of [the ILC] on the relevant Article of the ILC text on State Responsibility,[...], which expresses—but only in positive terms—a requirement of proportionality for countermeasures:

‘the positive formulation of the proportionality requirement is adopted in Article 51. A negative formulation might allow too much latitude.’¹²⁵²

Having set out the text of Article 51, the footnote continued:

[w]e also note in this respect that, while that provision expressly refers - contrary to footnote 9 of the SCM Agreement - to the injury suffered, it also requires the gravity of the wrongful act and the right in question to be taken into account. This has been understood to entail a qualitative element to the assessment, even where commensurateness with the injury suffered is at stake. We note the view of [the ILC in its] Commentaries to the ILC Articles:

‘Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely ‘quantitative’ element of the injury suffered, but also ‘qualitative’ factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but ‘taking into account’ two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to ‘the rights in question’ has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.’¹²⁵³

¹²⁵² Ibid., note 52. The footnote in fact referred to the views of ‘the commentator, Sir [*sic*] James Crawford’.

¹²⁵³ *United States – Tax Treatment for Foreign Sales Corporations*, Decision of the Arbitrator, 30 August 2002, WTO doc. WT/DS108/ARB, note 52. Again, the footnote referred to the views of ‘the commentator, Sir [*sic*] James Crawford in his Commentaries...’.

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.
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 52 lays down conditions relating to the adoption of countermeasures, as well as indicating an additional limitation on when countermeasures may be adopted. Paragraph 1 provides that prior to adopting countermeasures, an injured State must give notice to the responsible State, in accordance with Article 43 of the Articles, requiring it to comply with its obligations under Part Two, as well as providing notice of any decision to adopt countermeasures, and make an offer to negotiate. However, pursuant to paragraph 2, it is not necessary for an injured State to comply with those steps in the case of urgent countermeasures necessary to preserve its rights. Paragraph 3 provides that countermeasures may not be adopted, and must be suspended without undue delay if already taken, in circumstances in which the internationally wrongful act has ceased and the dispute is pending before a body having the power to make decisions binding on the parties; however paragraph 4 qualifies paragraph 3, to the extent that the responsible State fails to implement the applicable dispute settlement procedure in good faith.

In *European Communities - Measures Affecting Trade in Commercial Vessels*,¹²⁵⁴ both the European Communities and Korea made reference to Article 52 of the Articles in their arguments in relation to the question of whether measures adopted by the European Communities could be justified within the specific context of the WTO dispute resolution system.¹²⁵⁵ However, the Panel made no reference to the Articles in ruling on that issue.

¹²⁵⁴ *European Communities – Measures Affecting Trade in Commercial Vessels*, Report of the Panel of 22 April 2005, WTO doc. WT/DS301/R.

¹²⁵⁵ See *ibid.*, paras. 4.188–4.189, 4.196, 4.256–4.258.

Chapter II

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 53 is the corollary of the principle contained in Article 49(1) that countermeasures may only be adopted in order to induce a responsible State to comply with its secondary obligations under Part Two; it provides that countermeasures must be terminated once the responsible State has complied with those secondary obligations as regards the internationally wrongful act in question.

No reference appears to have been made to Article 53 since the adoption of the Articles in 2001.

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.

Article 54 is a saving clause, making clear that the other provisions of Chapter II of Part Three do not prejudice the right of a State other than an injured State to take measures which are lawful in order to ensure compliance with the secondary obligations arising under Part Two of the Articles to ensure cessation of a breach of the obligation in question, and to make reparation.

No judicial reference to Article 54 has been made since the adoption of the Articles.

PART FOUR GENERAL PROVISIONS

Part Four contains general provisions relative to the application of the Articles as a whole. Article 55 constitutes the implementation of the principle of *lex specialis* in the field of State responsibility. Articles 56 to 59 are general saving clauses, making clear that the Articles are without prejudice to, respectively, any questions of State responsibility not covered by the Articles, questions of the international responsibility of an international organization, the responsibility of individuals under international law, and the Charter of the United Nations.

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.

The Articles attempt to set out the general rules of customary international law governing responsibility of States for internationally wrongful acts. However, it may be that in relation to any given obligation of a State, more specific rules are applicable which derogate from those general rules, and which more particularly govern the conditions for State responsibility in relation to that particular obligation, the content of any State responsibility which arises from breach of such an obligation or the implementation of responsibility. To the extent that such more specific rules apply, they displace the operation of the general default rules contained in the Articles to the extent of any inconsistency. This is the principle of *lex specialis*.

In this regard, Article 55 constitutes a saving clause, making clear that each of the Articles applies only to the extent that there is no more specific rule governing the aspect of the law of State responsibility to which it relates in relation to the particular obligation in question.

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹²⁵⁶ the International Court of Justice, although without express reference to Article 55 of the Articles, rejected an argument by Bosnia and Herzegovina that, due to the particular nature of the crime of genocide, the applicable rules of attribution concerns the acts of persons acting on the instructions or under the direction and control of a State were different from those under the general customary international law of State responsibility:

[t]he Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations

¹²⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007

carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in [Military and Paramilitary Activities].. 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 Responsibility¹²⁵⁷

As noted above in relation to Articles 4 and 5 of the Articles, in *United Parcel Services, Inc. v Canada*,¹²⁵⁸ the claimant argued that conduct of Canada Post, a State entity created by statute having a monopoly in the collection, transmission and delivery of first class post, was directly attributable to Canada on the basis of Articles 4 and 5 for the purposes of Canada's obligations under Articles 1102-1105 NAFTA.

Canada, while not disputing the Commission's formulation of the rules of attribution contained in Articles 4 and 5, argued that they were 'irrelevant, and were displaced by the specific terms of NAFTA'.¹²⁵⁹ In that regard, Canada relied on the fact that the Articles had a 'residual character', and invoked the *lex specialis* principle embodied in Article 55 of the Articles, arguing that NAFTA contained:

[...] special provisions relating to attribution, to the content of the obligation and to methods of implementation (through the investor which initiated arbitration) which would displace any possible operation of the residual proposition of law reflected in article 4 about the attribution of acts of a 'State organ'.¹²⁶⁰

In that regard, the Tribunal observed that:

Articles 1102-1105, read alone, could well be understood as applying to Canada Post. For the reasons given by UPS, Canada Post may be seen as part of the Canadian government system, broadly conceived.¹²⁶¹

However, the Tribunal nevertheless concluded that the conduct of Canada Post was not attributable to Canada under Article 4 of the Articles, on the basis that Article 4 was not applicable as the standard of attribution given that NAFTA contained specific provisions in Chapter 15 dealing with monopolies and State enterprises and constituted a *lex specialis* for these purposes. In this regard, it made reference to Article 55 of the Articles:

Articles 1102-1105 are not however to be read alone. They are to be read with chapter 15 and, so far as this Tribunal is concerned, with the jurisdictional provisions of Articles 1116 and 1117. The immediately relevant provisions of chapter 15 are the two specific provisions which UPS contends Canada is breaching. They are articles 1502(3)(a) and 1503(2) [...]

Several features of these provisions read as a whole lead the Tribunal to the conclusion that the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances. The special rules of law stated in chapters

¹²⁵⁷ Ibid., para. 401.

¹²⁵⁸ *United Parcel Services, Inc v Canada*, Award of 11 June 2007.

¹²⁵⁹ Ibid., para. 54.

¹²⁶⁰ Ibid., para. 55.

¹²⁶¹ Ibid., para. 57.

11 and 15, in terms of the principle reflected in article 55 of the ILC text, ‘govern’ the situation and preclude the application of that law:

- chapter 11 and chapter 15 draw a clear distinction between the ‘Parties’, on the one side, and government and other monopolies and State enterprises on the other. The governments which negotiated and agreed to NAFTA did not simply and directly apply the rather generally stated obligations of chapter 11 to government and other monopolies and to State enterprises as well as to themselves. Rather they elaborated a more detailed set of provisions about competition, monopolies and State enterprises and incorporated them in a distinct chapter (chapter 15) of the Agreement.

- The particular provisions of chapter 15 themselves distinguish in their operation between the Party on the one side and the monopoly or enterprise on the other. It is the Party which is to ensure that the monopolies or enterprises meet the Party’s obligations stated in the prescribed circumstances. The obligations remain those of the State Party; they are not placed on the monopoly or enterprise.

- Were the expression ‘Each Party’ in the two paragraphs of articles 1502(3)(a) and 1503(2) to be read as including Canada Post in the particular circumstances of the this case, the paragraphs would in effect require Canada Post (as ‘Party’) to ensure that itself (as a government monopoly or State enterprise) complied with certain obligations; if that reading is not nonsensical it is certainly very odd.

- The particular obligations of compliance with chapter 11 which are in issue under articles 1502(3)(a) and 1503(2) are confined, at least in some degree (as discussed later), by the requirement that there be a delegation by the Party to the monopoly or enterprise of regulatory, administrative or other governmental authority which the monopoly or enterprise has exercised. (UPS’ submission do not go to the extent that all actions of all monopolies (private as well as public) and that all actions of all State enterprises are ‘governmental’.) That limit would have no effect if Canada Post were to be treated as a ‘Party’ and as itself bound by the obligations of chapter 11.

- Four (at least) of the particular obligations which would fall within the obligations of a Party under chapter 11 and which could be the subject of investor arbitration were the allegations to be made directly against that Party are not among the obligations, subject to investor arbitration, specifically identified in articles 1116 and 1117 [...]. The relevant provisions are article 1502(3)(b), (c) and (d) and article 1503(3):

[...]

The careful construction of distinctions between the State and the identified entities and the precise placing of limits on investor arbitration when it is the actions of the monopoly or the enterprise which are principally being questioned would be put at naught on the facts of this case were the submissions of UPS to be accepted. It is well established that the process of interpretation should not render futile provisions of a treaty to which the parties have agreed unless the text, context or purposes clearly so demand [...].

The foregoing analysis of [NAFTA] also shows why the WTO panel report in the Canada Periodicals case [...] is not in point. The provisions of the GATT considered in that case do not distinguish, as chapters 11 and 15 of NAFTA

plainly and carefully do, between organs of State of a standard type [...] and various other forms of State enterprises.

Accordingly we conclude that actions of Canada Post are not in general actions of Canada which can be attributed to Canada as a 'Party' within the meaning of articles 1102 to 1105 or for that matter in articles 1502(3)(a) and 1503(2). Chapter 15 provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case.¹²⁶²

The Tribunal also reached a similar conclusion in relation to the claimant's reliance on Article 5, again concluding that (with a minor exception) Article 5 was not applicable so as to govern the attribution to Canada of Canada Post for the purposes of Chapter 11:

[i]t will be recalled that UPS also contends, as an alternative to the argument based on the rules of customary international law reflected in article 4 of the ILC text, that the proposition reflected in its article 5 apply to make Canada directly responsible for actions of Canada Post. That provision [...] is concerned with the conduct of non-State entities. It attributes to the State '[t]he conduct of a person or activity [sic] which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority ... provided the person or entity is acting in that capacity in the particular instance.' For reasons we have already given, there is real force in the argument that in many if not all respects the actions of Canada Post over its long history and at present are 'governmental' in a broad sense [...]. We again recall however that the proposition in article 5 of the ILC text (as in other provisions) has a 'residual character' and does not apply to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of a State's international responsibility are governed by special rules of international law – the *lex specialis* principle [...]. For the reasons which we have just given in relation to the argument based on article 4, and in particular the careful structuring and drafting of chapters 11 and 15 which we need not repeat, we find that this argument also fails, as a general proposition. It would be otherwise if in a particular situation Canada Post were in fact exercising 'governmental authority', as Canada indeed accepts in one respect [...].¹²⁶³

In its decision on annulment in *CMS Gas Transmission Company v Argentine Republic*¹²⁶⁴ the ad hoc Committee referred to the principle of *lex specialis*, although without invoking Article 55, in the context of its criticism of the approach of the Tribunal in the Award the subject of the application for annulment as to the relationship between the 'emergency' clause contained in Article XI and the state of necessity under customary international law, as embodied in Article 25 of the Articles. The ad hoc Committee observed:

[i]f state of necessity means that there has not been even a prima facie breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. In other terms, [...] if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been 'no breach' of the BIT. Article XI and Article 25 thus

¹²⁶² Ibid., paras. 59–62.

¹²⁶³ Ibid. para. 63.

¹²⁶⁴ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007.

Part Four – General Provisions

construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25.¹²⁶⁵

¹²⁶⁵ Ibid., para. 133 (footnotes omitted).

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 56 is a general saving clause making clear that, to the extent that questions of responsibility for a wrongful act are not governed by the Articles, they continue to be governed by the applicable rules of international law.

Unsurprisingly, no reference has been made to Article 56 since the adoption of the 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 57 is a further saving clause, making clear that the Articles are without prejudice to the responsibility of international organizations, or of the responsibility of States for the conduct of international organizations.

In *Nikolić ('Sušica Camp')*, Trial Chamber II of the ICTY made reference to Article 11 of the Articles in order to dispose of a defence motion challenging the ICTY's exercise of jurisdiction over the accused as a result of the manner in which he had been brought before the Tribunal.¹²⁶⁶ That motion was based on the fact that the accused had been abducted by unknown persons and delivered into the custody of SFOR, and it was argued that that conduct could be attributed to SFOR, on the basis that it should be held to have 'adopted' or 'acknowledged' that conduct as its own, with the consequence that the jurisdiction of the ICTY was tainted.

In referring to Article 11 of the Articles as '*general/legal guidance*'¹²⁶⁷ on the issue of attribution on the basis of adoption and acknowledgment, the Trial Chamber emphasised that use of the Articles 'should be made with caution',¹²⁶⁸ given that they 'do not have the status of treaty law and are not binding on States',¹²⁶⁹ and that the Articles were 'primarily directed at the responsibilities of States and not at those of international organisations or entities'. In that latter regard, the Trial Chamber referred to and set out Article 57.¹²⁷⁰

¹²⁶⁶ Case No. IT-94-2-PT, *Prosecutor v Dragan Nikolić ('Sušica Camp')*, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002.

¹²⁶⁷ *Ibid.*, para. 61 (emphasis in original).

¹²⁶⁸ *Ibid.*, para. 60

¹²⁶⁹ *Ibid.*

¹²⁷⁰ *Ibid.*

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.

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹²⁷¹ the International Court of Justice made reference to Article 58 of the Articles and the accompanying Commentary in responding to an argument of Serbia and Montenegro that the nature of the Genocide Convention was such as to exclude State responsibility for genocide and the other acts criminalized thereby:

[t]he Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: ‘No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.’ The Court notes also that the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts [...] affirm in Article 58 the other side of the coin: ‘These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.’ In its Commentary on this provision, the Commission said:

‘Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.’

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

‘Article 58 ... [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term ‘individual responsibility’ has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.’¹²⁷²

¹²⁷¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007.

¹²⁷² *Ibid.*, para. 173, citing Commentary to Article 58, paragraphs (3) and (4).

Part Four – General Provisions

ARTICLE 59

Charter of the United Nations

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

Article 59, the final provision of the Articles, provides that the Articles are without prejudice to the Charter of the United Nations.

No reference has been made to Article 59 since the adoption of the Articles in 2001.