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Responsibility of States for internationally wrongful acts

Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

Contents

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Abbreviations

GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IFOR	Implementation Force
MERCOSUR	Common Market of the South
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
SFOR	Stabilization Force
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts (State responsibility articles) at its fifty-third session, in 2001. In resolution 56/83 of 12 December 2001, the General Assembly took note of the State responsibility articles adopted by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. In resolution 59/35 of 2 December 2004, the Assembly commended once again the State responsibility articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. Moreover, in the latter resolution, the Assembly requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles. It also requested the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles, to invite Governments to submit information on their practice in that regard, and to submit the material well in advance of its sixty-second session.

2. By a note verbale dated 29 December 2004, the Secretary-General invited Governments to submit, no later than 1 February 2007, their written comments on any further action regarding the State responsibility articles. He also invited Governments to submit information regarding decisions of international courts, tribunals and other bodies referring to the articles no later than 1 February 2007. By a note verbale dated 13 January 2006, the Secretary-General reiterated that invitation.*

3. In preparing the present compilation, the Secretariat reviewed the decisions of the following international courts, tribunals and other bodies: the International Court of Justice; the International Tribunal for the Law of the Sea; the WTO Appellate Body; international arbitral tribunals;[1] panels established under GATT and WTO; the Iran-United States Claims Tribunal; the United Nations Compensation Commission; the International Tribunal for the Former Yugoslavia; the International Criminal Tribunal for Rwanda; the Special Court for Sierra Leone; the United Nations Administrative Tribunal; the International Labour Organization Administrative Tribunal; the World Bank Administrative Tribunal; the International Monetary Fund Administrative Tribunal; the European Court of Justice; the European Court of Human Rights; the Inter-American Court of Human Rights; universal human rights and humanitarian law bodies, both United Nations Charter-based and treaty-based; the European Commission of Human Rights; the Inter-American Commission of Human Rights; and the African Commission on Human and Peoples' Rights. The Secretariat reviewed the official compilations of decisions prepared by the various bodies, information provided on their websites and secondary sources.

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* The comments and information received from Governments are reproduced in document A/62/63.

[1] The Secretariat reviewed in particular decisions of international arbitral tribunals under annex VII of the United Nations Convention on the Law of the Sea, the ICSID Convention, the Additional Facility Rules of ICSID, NAFTA, MERCOSUR and other international arbitral tribunals.

4. The compilation reproduces the extracts of decisions under each of the articles referred to by international courts, tribunals or bodies, following the structure and numerical order of the State responsibility articles finally adopted in 2001. Under each article, decisions appear in chronological order to reflect historical developments and to facilitate the understanding of decisions containing references to previous case law.

5. There have been 129 instances in which international courts, tribunals and other bodies have referred in their decisions to the State responsibility articles and commentaries, including the draft articles provisionally adopted from 1973 to 1996, the draft articles adopted on first reading in 1996 and the articles finally adopted in 2001.[2] In view of the number and length of these decisions, the compilation includes only the relevant extracts of the decisions[3] referring to the State responsibility articles. Each extract is accompanied by a brief description of the context in which the statement was made by the international court, tribunal or other body.

6. The compilation also includes two annexes. Annex I provides a table of decisions referring to the various State responsibility articles. Annex II reproduces the complete text of the State responsibility articles finally adopted by the International Law Commission, as annexed to General Assembly resolution 56/83.

II. Extracts of decisions referring to the articles on responsibility of States for internationally wrongful acts

Part One
The internationally wrongful act of a State

Iran-United States Claims Tribunal

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

> ... the Tribunal observes that only injuries resulting from popular movements which are not an act of the Government of Iran are excluded from the Tribunal's jurisdiction by this provision [i.e., paragraph 11 of the Declaration

[2] References to draft articles adopted prior to the final adoption of the articles in 2001 have been included only when the draft article has been incorporated in the final articles. In those cases, the text of the draft article is reproduced in a footnote accompanying the extract.

[3] The compilation contains those extracts of decisions in which the international court, tribunal or other body invoked the State responsibility articles as the basis for its decision or otherwise indicated its view concerning the status of the relevant provision as the existing law governing the issue in question. It does not reproduce extracts of decisions which merely summarize the submissions of the parties invoking the State responsibility articles. It also does not reproduce any opinions of judges appended to a decision (e.g., separate, concurring or dissenting opinions).

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

of the Government of Algeria of 19 January 1981[5]], which exclusion is no more than a restatement of the customary international law requirement that a State's responsibility is engaged only by wrongful conduct attributable to the State. Such conduct has in recent years come under the scrutiny of the United Nations International Law Commission, culminating in the development of a set of draft articles on the origins of State responsibility for internationally wrongful acts. The Tribunal has adopted the criteria set down by the International Law Commission as the most recent and authoritative statement of current international law in this area. *See* draft articles on State responsibility (Part 2 of the draft) as provisionally adopted by the International Law Commission, cited 1980 Yearbook of the International Law Commission, vol. II, Part Two at pp. 30-34, United Nations doc. A/CN.4/SER.A/1980/Add.1 (Part 2); accord Alfred L.W. Short v. The Islamic Republic of Iran, Award No. 312-11135-3 (14 July 1987).[6]

In furtherance of this finding, the Tribunal later referred to draft articles 5 to 10 provisionally adopted by the International Law Commission as the legal basis "to examine the circumstances of each departure [of United States citizens from the Islamic Republic of Iran] and to identify the general and specific acts relied on and evidenced to determine how they affected or motivated at that time the individual who now is alleging expulsion and whether such acts are attributable to Iran".[7]

Chapter I
General principles

Article 1
Responsibility of a State for its internationally wrongful acts

International Tribunal for the Former Yugoslavia Trial Chamber

8. In its 1997 decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* in the *Blaškić* case, which was later submitted to review

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

[6] Iran-United States Claims Tribunal, *Rankin* v. *Islamic Republic of Iran*, award No. 326-10913-2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 141, para. 18. The relevant extract of the previous case referred to in this passage (*Short* v. *Islamic Republic of Iran*) is reported in para. 69 below.

[7] Ibid., pp. 147-148, para. 30.

by the Appeals Chamber,[8] Trial Chamber II of the International Tribunal for the Former Yugoslavia, in considering whether individuals could be subject to orders (more specifically *subpoenae duces tecum*) from the Tribunal, quoted the text of draft article 1 adopted on first reading,[9] which it considered to be an "established rule of international law":

> 95. If the individual complies with the order in defiance of this government, he may face the loss of his position and possibly far greater sanctions than need be mentioned here. Given the International Tribunal's lack of police power, it would be very difficult to provide adequate protection for an official who so defied his State. Based on the principle *ultra posse nemo tenetur*, which states that one should not be compelled to engage in a behaviour that is nearly impossible, it may not be proper to compel an individual to comply with such an order in his official capacity in such circumstances. However, these concerns must be balanced with the need of the International Tribunal to obtain the information necessary for a just and fair adjudication of the criminal charges before it. Due to these concerns and noting the established rule of international law that "[e]very internationally wrong act of a State entails the international responsibility of that State", the duty to comply in such a scenario must be placed on the State, with appropriate sanctions or penalties for non-compliance ...[10]

International arbitral tribunal

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

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[8] In this decision, Trial Chamber II considered that "it is incumbent upon an individual acting in an official capacity to comply with the orders of the International Tribunal" (International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Decision on the Objection of the Republic of Croatia to the Issuance of* Subpoenae Duces Tecum, Case No. IT-95-14, 18 July 1997, para. 96) and therefore reinstated the *subpoena duces tecum* issued on 15 January 1997 by Judge McDonald to the Republic of Croatia and the Croatian Defence Minister, Mr. Gojko Susak (ibid., disposition). The Appeals Chamber, on the contrary, later found that "the International Tribunal may not address binding orders under Article 29 to State officials acting in their official capacity" and thus quashed the *subpoena duces tecum* (International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14, 29 October 1997, disposition). On the Appeals Chamber judgement, see para. 19 below.

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

[10] International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Decision on the Objection of the Republic of Croatia to the Issuance of* Subpoenae Duces Tecum, Case No. IT-95-14, 18 July 1997, para. 95 (footnotes omitted).

[11] *In the matter of an* Ad hoc *Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland*, partial award, 19 August 2005, para. 188. The artbitral tribunal referred in particular to paragraphs 1 and 8 of the commentary to article 1 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

Article 2
Elements of an internationally wrongful act of a State

International arbitral tribunal (under the ICSID Convention)

10. In its 1990 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 3 provisionally adopted by the International Law Commission[12] (as well as articles 5 and 10 provisionally adopted), which it quoted *in extenso*, constituted "an expression of accepted principles of international law":

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

Ad hoc *committee (under the ICSID Convention)*

11. In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ad hoc committee noted that, "[i]n considering the [arbitral] Tribunal's findings on the merits [in the award involved in the annulment proceedings], it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims 'based directly on alleged actions or failures to act of the Argentine Republic' and, on the other hand, claims relating to conduct of the [Argentine province of] Tucumán authorities which are nonetheless brought against Argentina and 'rely ... upon the principle of attribution'".[14] In a footnote, the ad hoc committee criticized the arbitral tribunal's terminology on the basis of the text of and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission:

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

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

[13] ICSID, *Amco Asia Corporation and Others* v. *Republic of Indonesia*, award on the merits, 31 May 1990, para. 172 reproduced in *International Law Reports*, vol. 89, p. 457.

[14] ICSID, Ad Hoc Committee, *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux)* v. *Argentine Republic*, Case No. ARB/97/3, decision of annulment, 3 July 2002, para. 16 (footnote omitted), reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 19, No. 1, 2004, p. 100.

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

International arbitral tribunal

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

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

International arbitral tribunal (under the ICSID Convention)

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

Ad hoc *committee (under the ICSID Convention)*

14. In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ad hoc committee, in considering the relation between the breach of a contract and the breach of a treaty in the said instance, referred to

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[15] Ibid., p. 100, para. 16, note 17.

[16] *In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland*, partial award, 19 August 2005, para. 188. The arbitral tribunal referred in particular to paragraph 4 of the commentary to article 2 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

[17] ICSID, *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, decision on objections to jurisdiction, 25 January 2000, para. 82, note 64, reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 31.

article 3 finally adopted by the International Law Commission in 2001, which it considered to be "undoubtedly declaratory of general international law". The ad hoc committee further quoted passages of the commentary of the Commission to that provision:

> "95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the bilateral investment treaty [Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments of 3 July 1991] do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the bilateral investment treaty. The point is made clear in article 3 of the International Law Commission articles, which is entitled 'Characterization of an act of a State as internationally wrongful': ...
>
> "96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the bilateral investment treaty and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law — in the case of the bilateral investment treaty, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.
>
> "97. The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to article 3 of the International Law Commission articles, which reads in relevant part as follows:
>
> '(4) The International Court has often referred to and applied the principle. For example in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible ... the Member cannot contend that this obligation is governed by municipal law." In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:
>
> > Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.
>
> Conversely, as the Chamber explained:
>
> > … the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was

> unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness ... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.
>
> ...
>
> '(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.'"[18]

International arbitral tribunal (under the ICSID Additional Facility Rules)

15. In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *Mexico* case, having stated that the fact "[t]hat the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement [at issue in the case] or to international law", quoted the following passage taken from the commentary to article 3 finally adopted by the International Law Commission:

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

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[18] ICSID, Ad Hoc Committee, *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux)* v. *Argentine Republic*, Case No. ARB/97/3, decision of annulment, 3 July 2002 (footnotes omitted), reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 19, No. 1, 2004, pp. 127-129.

[19] ICSID, *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States*, Case No. ARB(AF)/00/2, award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original). The quoted passage is taken from paragraph 1 of the International Law Commission's commentary to article 3 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

International arbitral tribunal (under the ICSID Convention)

16. In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *SGS* v. *Pakistan* case, in the context of its interpretation of article 11 of the bilateral investment agreement between Switzerland and Pakistan,[20] quoted *in extenso* the passage of the decision on annulment in the *Vivendi* case, reproduced in paragraph 14 above, to illustrate the statement according to which "[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders".[21] The tribunal thus considered that claims under the bilateral investment treaty at issue and contract claims were reasonably distinct in principle.

International arbitral tribunal (under the ICSID Convention)

17. In its 2004 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *SGS* v. *Philippines* case, in the context of its interpretation of article X(2) of the bilateral investment treaty between Switzerland and the Philippines,[22] recognized the "well established" principle that "a violation of a contract entered into by a State with an investor of another State is not, by itself, a violation of international law", as it was affirmed in the *Vivendi* case and relied upon by the tribunal in the *SGS* v. *Pakistan* case (see passages quoted in paras. 14 and 16 above). It noted however, that, contrary to the ad hoc committee in the *Vivendi* case, the tribunal in the *SGS* v. *Pakistan* case, as the tribunal in this case, needed to "consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law". In this respect, it considered that "it might do so, as the International Law Commission observed in its commentary to article 3 of the International Law Commission articles on responsibility of States for internationally wrongful acts", adding that "the question is essentially one of interpretation, and does not seem to be determined by any presumption".[23]

International arbitral tribunal (under the ICSID Convention)

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

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

[21] ICSID, *SGS Société générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, Case No. ARB/01/13, decision on objections to jurisdiction, 6 August 2003, para. 147, reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 352-355.

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

[23] ICSID, *SGS Société générale de Surveillance S.A.* v. *Republic of the Philippines*, Case No. ARB/02/6, decision on objections to jurisdiction, 29 January 2004, para. 122 and note 54. The tribunal was referring more particularly to paragraph 7 of the commentary to article 3, mentioning the possibility that "the provisions of internal law are actually incorporated in some form, conditionally or unconditionally, into [the international] standard".

> ... 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.[24]

Chapter II
Attribution of conduct to a State

ICTY Appeals Chamber

19. In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia considered the situation in which, following the issue of a binding order of the Tribunal to a State for the production of documents necessary for trial, "a State official who holds evidence in his official capacity, having been requested by his authorities to surrender it to the International Tribunal ... refuses to do so, and the central authorities [do] not have the legal or factual means available to enforce the International Tribunal's request".[25] The Appeals Chamber observed that

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

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[24] ICSID, *Noble Ventures, Inc.* v. *Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 53.

[25] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14, 29 October 1997, para. 51.

[26] Ibid. Draft article 11, as adopted by the International Law Commission on first reading, was deleted on second reading on the understanding that its "negative formulation" rendered it "unnecessary" in the codification of State responsibility (Yearbook ... 1998, vol. II (Part Two), p. 85, para. 419). However, the principles reflected in that provision are referred to in paragraphs 3 and 4 of the introductory commentary to chapter II of the articles finally adopted in 2001 (see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77) and this is the reason why it is reproduced here. The text of draft article 11 adopted on first reading was the following:

> Article 11
> Conduct of persons not acting on behalf of the State
>
> 1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

Article 4
Conduct of organs of a State

Iran-United States Claims Tribunal

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

Iran-United States Claims Tribunal

21. In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the tribunal, in determining whether its jurisdiction over the case was precluded by paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981 (also known as the "General Declaration"),[29] referred in the following terms to draft articles 5 *et seq*. of the articles provisionally adopted by the International Law Commission:

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

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> 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

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

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

[28] Iran-United States Claims Tribunal, *International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary* v. *Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force, and the Ministry of National Defense, acting for the Civil Aviation Organization*, award No. 196-302-3, 24 October 1985, Iran-United States Claims Tribunal Reports, vol. 9 (1985-II), p. 238, note 35.

[29] For the text of that provision, see note 5 above.

> the General Declaration does not effectively restrict the Tribunal's jurisdiction over this Claim.[30]

International arbitral tribunal (under the ICSID Convention)

22. In its 1990 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 5 provisionally adopted by the International Law Commission (as well as articles 3 and 10 provisionally adopted), which it quoted *in extenso*, constituted "an expression of accepted principles of international law". The relevant passage is reproduced in paragraph 10 above.

International Tribunal for the Former Yugoslavia Trial Chamber

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

International Tribunal for the Former Yugoslavia Appeals Chamber

24. The decision referred to in paragraph 23 above was later submitted, on request by the Republic of Croatia, to review by the Appeals Chamber.[33] In its 1997 judgement on this matter in the *Blaškić* case, the Appeals Chamber observed that Croatia had submitted in its brief that the International Tribunal could not issue binding orders to State organs acting in their official capacity. The Appeals Chamber noted that, in support of this contention, Croatia had argued, inter alia,

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

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[30] Iran-United States Claims Tribunal, *Yeager* v. *Islamic Republic of Iran*, award No. 324-10199-1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 100-101, para. 33.

[31] See para. 8 above.

[32] International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Decision on the Objection of the Republic of Croatia to the Issuance of* Supoenae Duces Tecum, Case No. IT-95-14, 18 July 1997, para. 95, note 156. The text of draft article 5 adopted by the International Law Commission on first reading (see *Yearbook ...* 1996, vol. II (Part Two), para. 65) was identical to that of draft article 5 provisionally adopted (see note 27 above).

[33] See note 8 above.

[34] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14, 29 October 1997, para. 39. Croatia was referring to draft article 5 adopted by the International Law Commission on first reading.

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

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

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

International Court of Justice

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

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

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[35] Ibid., para. 41.

[36] Ibid., paras. 42-43.

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

> Article 6
> Irrelevance of the position of the organ in the organization of the State
>
> The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

[38] *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 62.

International Tribunal for the Former Yugoslavia Appeals Chamber

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

> "It would ... seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as 'a well-established rule of international law' [see the advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* quoted in paragraph 25 above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority."[39]

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

WTO panel

27. In its 2000 report on *Korea — Measures Affecting Government Procurement*, the panel rejected the Republic of Korea's argument according to which it would not be responsible for the answer given by its ministry of commerce to questions asked by the United States during the negotiations for the Republic of Korea's accession to the Agreement on Government Procurement based on the fact that the issues dealt with were under the competence of the ministry of transportation. The panel considered that its finding according to which such answer was given on behalf of the whole Korean Government was "supported by the long established international law principles of State responsibility" by which "the actions and even omissions of

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[39] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Duško Tadić Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 109 (footnotes omitted).

[40] Ibid., para. 109, note 129.

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

> 1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State. (*Yearbook* ... 2000, vol. II (Part Two), p. 65.)

State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law". In a footnote, the panel then referred to draft articles 5 and 6, and the commentary thereto, as adopted by the International Law Commission on first reading, which it considered applicable to the context of negotiations of a multilateral agreement such as the Agreement on Government Procurement.[42]

International arbitral tribunal (under MERCOSUR)

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

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

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

Ad hoc *committee (under the ICSID Convention)*

29. In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ICSID ad hoc committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passage is quoted in paragraph 11 above. Later in the same decision, when commenting on a passage of the challenged award which "appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, a priori, have breached" the bilateral investment treaty concerned, the ad hoc committee again referred to the commentaries to articles 4 and 12 in support of the statement that "there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."[44]

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[42] WTO Panel Report, *Korea — Measures Affecting Government Procurement*, WT/DS163/R, 1 May 2000, para. 6.5, note 683.

[43] MERCOSUR, *Import Prohibition of Remolded Tires from Uruguay*, award, 9 January 2002, p. 39 (unofficial English translation).

[44] ICSID, Ad Hoc Committee, *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux)* v. *Argentine Republic*, Case No. ARB/97/3, decision of annulment, 3 July 2002, para. 110 and note 78, reproduced in *ICSID Review — Foreign*

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

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

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

31. In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc*. v. *United States* case, after having found that an "existing non-conforming measure" of a "Party" saved by article 1108(1) of NAFTA might "not only be a federal government measure but also a state or provincial government measure and even a measure of a local government",[46] considered that its view was "in line with the established rule of customary international law", formulated in article 4 finally adopted by the International Law Commission in 2001, that "acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units".[47] The tribunal then quoted the text of that provision and observed in a footnote, with reference to the commentary thereto, that

> [t]he international customary law status of the rule is recognized in, inter alia, *Differences relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* ... [see paragraph 25 above]. See also paras. 8, 9 and 10 of the commentary of the International Law Commission [to article 4], stressing that "the principle in article 4 applies equally to organs of the central government and to those of regional or local units" (para. 8 [*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77]), and that "[i]t does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the

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Investment Law Journal, vol. 19, No. 1, 2004, p. 134. The committee referred, in particular, to paragraph 6 of the commentary to article 4 and paragraphs 9 and 10 of the commentary to article 12 (see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

[45] NAFTA (ICSID Additional Facility), *Mondev International Ltd.* v. *United States of America*, Case No. ARB(AF)/99/2, award, 11 October 2002, para. 67, note 12, reproduced in *International Law Reports*, vol. 125, p. 130.

[46] NAFTA (ICSID Additional Facility), *ADF Group Inc.* v. *United States of America*, Case No. ARB(AF)/00/1, award, 9 January 2003, para. 165, reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 269-270. As noted by the tribunal, the pertinent part of article 1108(1) of NAFTA states that articles 1102, 1103, 1106 and 1107 of the agreement do not apply to any "existing non-conforming measure" maintained "by (i) a Party at the federal level, as set out in its Schedule to Annex I or III, [or] (ii) a state or province, for two years after the date of entry into force of [NAFTA] …, or (iii) a local government".

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

component unit to abide by the State's international obligations". (para. 9 [ibid.]).[48]

International arbitral tribunal (under the ICSID Additional Facility Rules)

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

International arbitral tribunal

33. In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention explained that its proposed interpretation of article 9(1) of the Convention was "consistent with contemporary principles of State responsibility", and in particular with the principle according to which "[a] State is internationally responsible for the acts of its organs".[50] It added that:

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

International arbitral tribunal (under the ICSID Convention)

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

> Insofar as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the articles on State responsibility adopted by the International Law Commission is abundantly clear on this

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

[49] ICSID, *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States*, Case No. ARB(AF)/00/2, award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original).

[50] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland* v. *United Kingdom), Final Award, 2 July 2003,* para. 144.

[51] Ibid., para. 145 (footnotes omitted).

> point. Unless a specific reservation is made in accordance with articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other State institutions does not necessarily make them separate disputes. No such reservation took place in connection with the [relevant bilateral investment treaty].[52]

International arbitral tribunal (under the ICSID Convention)

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

WTO panel

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

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

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[52] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, decision on objections to jurisdiction, 17 July 2003, para. 108 (footnote omitted).

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

[54] WTO Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, para. 6.128 (footnotes omitted).

International arbitral tribunal

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

International arbitral tribunal (under the ICSID Convention)

38. In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in determining whether the acts of a Romanian "institution of public interest" (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 4 finally adopted by the International Law Commission in 2001, which it considered to lay down a "well-established rule":

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

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[55] *In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland*, partial award, 19 Augut 2005, paras. 127-128.

[56] Ibid., paras. 130-131. The arbitral tribunal referred in particular to paragraphs 6 and 7 of the commentary to article 4 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

[57] ICSID, *Noble Ventures, Inc.* v. *Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 69.

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

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

International arbitral tribunal (under the ICSID Convention)

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

WTO panel

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

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[58] Ibid., para. 82.

[59] ICSID, *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt*, Case No. ARB/04/13, decision on jurisdiction, 16 June 2006, para. 89.

[60] Under that provision:

> Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central

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

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

International arbitral tribunal (under the ICSID Convention)

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

> [t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been

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administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

[61] WTO Panel Report, *European Communities — Selected Customs Matters*, WT/DS315/R, 16 June 2006, paras. 4.706-4.708.

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

[63] ICSID, *Azurix Corp.* v. *Argentina Republic*, Case No. ARB/01/12, award, 14 July 2006, para. 46.

> often referred to by international arbitral tribunals in investor-State arbitration.[64]

International arbitral tribunal (under NAFTA and the UNCITRAL rules)

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

Article 5
Conduct of persons or entities exercising elements of governmental authority

Iran-United States Claims Tribunal

43. In its 1989 award in the *Phillips Petroleum Co. Iran* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether the Islamic Republic of Iran was responsible for expropriation of goods of the claimant when it allegedly took the latter's property interests through the National Iranian Oil Company (NIOC), observed in a footnote, with reference to draft article 7 provisionally adopted by the International Law Commission:[66]

> International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. *See* article 7(2) of the draft articles on State responsibility adopted by the International Law Commission, Yearbook International Law Commission 2 (1975), at p. 60. The 1974 Petroleum Law of Iran explicitly vests in NIOC "the exercise and ownership right of the Iranian nation on the

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[64] Ibid., para. 50.

[65] NAFTA, *Grand River Enterprises Six Nations Ltd. et al.* v. *United States*, decision on objections to jurisdiction, 20 July 2006, para. 1, note 1. The arbitral tribunal referred in particular to paragraph 4 of the commentary to article 4 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

[66] This provision was amended and incorporated in article 5 finally adopted by the International Law Commission in 2001. The text of draft article 7 provisionally adopted was as follows:

> Article 7
> Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority
>
> 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
>
> 2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

Iranian Petroleum Resources". NIOC was later integrated into the newly-formed Ministry of Petroleum in October 1979.[67]

WTO panel

44. In its 1999 reports on *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the panel referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading[68] in support of its finding that the Canadian provincial marketing boards acting under the explicit authority delegated to them by either the federal Government or a provincial Government were "agencies" of those Governments in the sense of article 9.1(a) of the Agreement on Agriculture, even if they were not formally incorporated as Government agencies. In a footnote, the panel reproduced the text of article 7, paragraph 2, and noted that this provision "might be considered as reflecting customary international law".[69]

International Tribunal for the Former Yugoslavia Appeals Chamber

45. In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, observed:

> It would ... seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law" [see para. 25 above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[70]

In a footnote,[71] the Appeals Chamber quoted draft article 7 adopted by the International Law Commission on first reading, as well as the corresponding draft article provisionally adopted by the Commission's Drafting Committee in 1998.[72]

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[67] Iran-United States Claims Tribunal, *Rankin* v. *Islamic Republic of Iran*, award No. 326-10913-2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 141, para. 18.

[68] Draft article 7 adopted on first reading was amended and incorporated in article 5 as finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook ...* 1996, vol. II (Part Two), para. 65) was identical to that of article 7 provisionally adopted: see note 66 above.

[69] WTO Panel Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R and WT/DS113/R, 17 May 1999, para. 7.77, note 427.

[70] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Duško Tadić, Judgement,* Case No. IT-94-1-A, 15 July 1999, para. 109 (footnotes omitted).

[71] Ibid., para. 109, note 130.

[72] The text of draft article 5 (Attribution to the State of the conduct of entities exercising elements of the governmental authority) adopted by the International Law Commission Drafting Committee in 1998 was the following:

Later in the same judgement, the Appeals Chamber twice referred to draft article 7 adopted by the ILC on first reading in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals.[73] In a footnote corresponding to the statement that "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives",[74] the Appeals Chamber noted that

> [t]his sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in article 7 of the International Law Commission draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member states of federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy.[75]

Subsequently, the Appeals Chamber also observed that

> [i]n the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity.[76]

International arbitral tribunal (under the ICSID Convention)

46. In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading:

> a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil. Paragraph 2 of article 7 of the International Law Commission's draft articles on State responsibility supports this position.[77]

> The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question. (*Yearbook …* 2000, vol. II (Part Two), p. 65.)

[73] For the complete passage of the Appeals Chamber's judgement on that issue, see para. 55 below.

[74] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Duško Tadić, Judgement,* Case No. IT-94-1-A, 15 July 1999, para. 122.

[75] Ibid., para. 122, note 140.

[76] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Duško Tadić, Judgement,* Case No. IT-94-1-A, 15 July 1999, para. 123 (footnotes omitted).

[77] ICSID, *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, decision on objections to jurisdiction, 25 January 2000, para. 78 (footnotes omitted), reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 29.

International arbitral tribunal

47. In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention referred to article 5 (as well as article 4) finally adopted by the International Law Commission in 2001. The relevant passage is quoted in paragraph 33 above.

International arbitral tribunal

48. In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, referred to the commentary to article 5 finally adopted by the International Law Commission in 2001.[78]

International arbitral tribunal (under the ICSID Convention)

49. In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in determining whether the acts of a Romanian "institution of public interest" (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 5 finally adopted by the International Law Commission in 2001:

> The 2001 draft articles ... attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by article 5 of the 2001 International Law Commission draft.[79]

International arbitral tribunal (under the ICSID Convention)

50. In its 2005 and 2006 awards, the arbitral tribunal constituted to hear the *Consorzio Groupement LESI-DIPENTA* v. *Algeria* and the *LESI and Astaldi* v. *Algeria* cases referred, inter alia, to article 6 finally adopted by the International Law Commission in 2001 in support of its finding according to which "the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence".[80]

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[78] *In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Euroko BV and Republic of Poland*, partial award, 19 August 2005, para. 132. The arbitral tribunal referred in particular to paragraph 1 of the commentary to article 5 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77).

[79] ICSID, *Noble Ventures, Inc.* v. *Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 70.

[80] ICSID, *Consorzio Groupement LESI-DIPENTA* v. *People's Democratic Republic of Algeria*, Case No. ARB/03/08, award, 10 January 2005, para. 19, reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 19, No. 2, 2004, pp. 455-456 (unofficial English translation by

International arbitral tribunal (under the UNCITRAL rules)

51. In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp.* v. *Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, after having found that the conduct at issue of Petroecuador, a State-owned and State-controlled instrumentality of Ecuador, was attributable to the latter, noted that it "does not matter for this purpose whether this result flows from the principle stated in article 5 of the International Law Commission's articles on responsibility of States for internationally wrongful acts or that stated in article 8", and quoted the text of these provisions as finally adopted by the Commission in 2001.[81]

International arbitral tribunal (under the ICSID Convention)

52. In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt* case referred, inter alia, to article 5 finally adopted by the International Law Commission in 2001. The relevant passage is referred to in paragraph 39 above.

Article 7
Excess of authority or contravention of instruction

Iran-United States Claims Tribunal

53. In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether an agent of Iran Air (which was controlled by the Iranian Government) had acted in his official capacity when he had requested an additional amount of money in order to get the claimant's daughter onto a flight for which she had a confirmed ticket, referred to the "widely accepted" principle codified in draft article 10 provisionally adopted by the International Law Commission,[82] and to the commentary to that provision:

ICSID of the French original) and *LESI, S.p.A. and Astaldi, S.p.A.* v. *People's Democratic Republic of Algeria*, Case No. ARB/05/3, award, 12 July 2006, para. 78. Although in these awards the tribunal inadvertently refers to article 8 (concerning the conduct of private persons directed or controlled by a State), the situation it was dealing with involved the conduct of a public entity exercising elements of governmental authority, which is covered by article 5 of the International Law Commission articles. These references are accordingly included under this section of the compilation.

[81] Arbitral tribunal (under UNCITRAL arbitration rules), *Encana Corporation* v. *Republic of Ecuador*, London Court of International Arbitration Case No. UN3481, award, 3 February 2006, para. 154.

[82] This provision was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. Draft article 10 provisionally adopted read as follows:

> Article 10
> Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity
>
> The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

> It is widely accepted that the conduct of an organ of a State may be attributable to the State, even if in a particular case the organ exceeded its competence under internal law or contravened instructions concerning its activity. It must have acted in its official capacity as an organ, however. *See* International Law Commission draft article 10. Acts which an organ commits in a purely private capacity, even if it has used the means placed at its disposal by the State for the exercise of its function, are not attributable to the State. *See* commentary on the International Law Commission draft article 10, Yearbook of the International Law Commission, 1975, volume II, p. 61.[83]

The tribunal found that, in the said instance, the agent had acted in a private capacity and not in his official capacity as an organ of Iran Air.

International arbitral tribunal (under the ICSID Convention)

54. In its 1990 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 10 provisionally adopted by the International Law Commission (as well as draft articles 3 and 5 provisionally adopted), which it quoted in extenso, constituted "an expression of accepted principles of international law". The relevant passage is quoted in paragraph 10 above.

International Tribunal for the Former Yugoslavia Appeals Chamber

55. In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals,[84] incidentally referred to draft article 10 adopted by the International Law Commission on first reading,[85] which it considered to be a restatement of "the rules of State responsibility":

> Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[86]

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[83] Iran-United States Claims Tribunal, *Yeager* v. *Islamic Republic of Iran*, award No. 324-10199-1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 111, para. 65.

[84] For the relevant passage of the Appeals Chamber's judgement, see para. 45 above.

[85] Draft article 10 adopted on first reading was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook* ... 1996, vol. II (Part Two), para. 65) was identical to that of draft article 10 provisionally adopted (see note 82 above).

[86] ICTY, Appeals Chamber, *Prosecutor* v. *Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 121 (footnotes omitted).

The Appeals Chamber also indicated in this regard that:

> In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity ... [I]nternational law renders any State responsible for acts in breach of international law performed ... by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*) ...[87]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

56. In its 2000 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Metalclad Corporation* v. *Mexico* case, in considering Mexico's responsibility for the conduct of its State and local governments (i.e., the municipality of Guadalcazar and the State of San Luis Potosí) found that the rules of NAFTA accorded "fully with the established position in customary international law", and in particular with draft article 10 adopted by the International Law Commission on first reading, which, "though currently still under consideration, may nonetheless be regarded as an accurate restatement of the present law".[88]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

57. In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc.* v. *United States* case, while noting that "even if the United States measures [at issue in the case] were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in article 1105(1)" of NAFTA, stated that "[a]n unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity", thereafter referring in a footnote to article 7 finally adopted by the International Law Commission in 2001.[89]

Human Rights Committee

58. In its 2003 views on communication No. 950/2000 (Sri Lanka), the Human Rights Committee, with regard to the abduction of the son of the author of the communication by an officer of the Sri Lankan Army, noted that "it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra*

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[87] Ibid., para. 123.

[88] NAFTA (ICSID Additional Facility) *Metalclad Corporation* v. *United Mexican States,* award, 30 August 2000, para. 73, reproduced in *International Law Reports*, vol. 119, p. 634.

[89] NAFTA (ICSID Additional Facility), *ADF Group Inc.* v. *United States of America*, Case No. ARB(AF)/00/1, award, 9 January 2003, para. 190 (and footnote 184), reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 18, No. 1, 2003, p. 283.

vires or that superior officers were unaware of the actions taken by that officer".[90] In a footnote, the Committee referred to article 7 of the articles finally adopted by the International Law Commission, as well as to article 2, paragraph 3, of the International Covenant on Civil and Political Rights.[91] It then concluded that, "in the circumstances, the State party is responsible for the disappearance of the author's son".

European Court of Human Rights

59. In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, in interpreting the term "jurisdiction" in article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[92] examined the issue of State responsibility and referred, inter alia, to article 7 finally adopted by the International Law Commission in 2001 in support of its finding that a State may be held responsible where its agents are acting *ultra vires* or contrary to instructions:

> A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms], a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (see *Ireland* v. *the United Kingdom*, judgement of 18 January 1978, Series A no. 25, p. 64, § 159; see also article 7 of the International Law Commission's draft articles on the responsibility of States for internationally wrongful acts ... and the Cairo case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516).[93]

International arbitral tribunal (under the ICSID Convention)

60. In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, having found that the acts of a Romanian "institution of public interest" (the State Ownership Fund (SOF), subsequently replaced by the Authority for Privatization and Management of the State Ownership (APAPS)) were attributable to Romania, noted that that conclusion would be the same even if those acts were regarded as *ultra vires*, as established by the "generally recognized rule recorded" in article 7 finally adopted by the International Law Commission in 2001:

> Even if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally

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[90] Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, communication No. 950/2000: Sri Lanka, CCPR/C/78/D/950/2000, 31 July 2003, para. 9.2.

[91] Ibid., para. 9.2, note 13.

[92] Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

[93] European Court of Human Rights, Grand Chamber, *Ilaşcu and others* v. *Moldova and Russia* (Application No. 48787/99), judgement, 8 July 2004, para. 319.

> recognized rule recorded in article 7 of the 2001 International Law Commission draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds it authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.[94]

International arbitral tribunal (under the ICSID Convention)

61. In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp*. v. *Argentina* case observed that the claimant had argued that "Argentina is responsible for the actions of the [Argentine] Province [of Buenos Aires] under the [1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America] and customary international law". The claimant had referred in particular to "the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission".[95] The tribunal considered, in this regard, that

> [t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.[96]

Article 8
Conduct directed or controlled by a State

Iran-United States Claims Tribunal

62. In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(a) provisionally adopted by the International Law Commission[97] as a provision codifying a principle "generally accepted in international law":

> "... attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted that a State is also responsible for acts of persons, if it is established

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[94] ICSID, *Noble Ventures, Inc.* v. *Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 81.

[95] ICSID, *Azurix Corp.* v. *Argentine Republic*, Case No. ARB/01/12, award, 14 July 2006, para. 46.

[96] Ibid., para. 50.

[97] This provision was amended and incorporated in article 8 finally adopted by the International Law Commission in 2001. It provided that: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) It is established that such person or group of persons was in fact acting on behalf of that State; ...".

that those persons were in fact acting on behalf of the State. *See* ILC draft article 8(a)."[98]

International Tribunal for the Former Yugoslavia Trial Chamber

63. In its 1996 review of the indictment pursuant to rule 61 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia in the *Rajić* case, the Trial Chamber considered the issue of when a group of persons may be regarded as the agent of a State with reference to draft article 8 adopted by the International Law Commission on first reading:[99]

> "24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 draft articles on State responsibility. Draft article 8 provides in relevant part that the conduct of a person or a group of persons shall 'be considered as an act of the State under international law' if 'it is established that such person or group of persons was in fact acting on behalf of that State'. 1980 II (Part Two) Yearbook International Law Commission at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was
>
> > whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 109.)
>
> It found that the United States had financed, organized, trained, supplied and equipped the *contras* and had assisted them in selecting military and

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[98] Iran-United States Claims Tribunal, *Yeager* v. *Islamic Republic of Iran*, award No. 324-10199-1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 103, para. 42.

[99] This provision was amended and incorporated in articles 8 and 9 finally adopted by the International Law Commission in 2001. Draft article 8 adopted on first reading read as follows:

> Article 8
> Attribution to the State of the conduct of persons acting in fact on behalf of the State
>
> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> (a) It is established that such person or group of persons was in fact acting on behalf of that State
>
> (b) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. (*Yearbook* ... 1996, vol. II (Part Two), para. 65.)

paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the contras.

"25. The Trial Chamber deems it necessary to emphasize that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the 'general control by the [United States] over a force with a high degree of dependency on [the United States]' was not sufficient to establish liability for violations by that force. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 115.) In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats."[100]

International Tribunal for the Former Yugoslavia Trial Chamber

64. In its 1997 judgement in the *Tadić* case (which was later reviewed on appeal[101]), the Trial Chamber invoked the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) with regard to the attribution to States of acts performed by private individuals. In this context, it reproduced a passage of the separate opinion of Judge Ago in that case, which referred to draft article 8 adopted by the International Law Commission on first reading:

It seems clear to the Trial Chamber that the officers of non-Bosnian Serb extraction were sent as "volunteers" on temporary, if not indefinite, assignment to the VRS [the Bosnian Serb Army]. In that sense, they may well be considered agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). In the *Nicaragua* case, by contrast, no evidence was led to the effect that United States personnel operated with or commanded troops of the contras on Nicaraguan territory. As Judge Ago, formerly the Special Rapporteur to the International Law Commission on State Responsibility, explained in the course of his Separate Opinion in the *Nicaragua* case:

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[100] International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Ivica Rajić ("Stupni Do")*, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95-12-R61, 13 September 1996, paras. 24-25.

[101] For the relevant part of the judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see para. 65 below.

> [T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft [i.e., article 8 read together with article 11]. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.[102]

International Tribunal for the Former Yugoslavia Appeals Chamber

65. In its 1999 judgement in the *Tadić* case, reviewing the judgement of the Trial Chamber referred to above, the Appeals Chamber explained the reasons why it considered that the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) with regard to the attribution to States of acts performed by private individuals "would not seem to be consonant with the logic of the law of State responsibility". In this context, it referred to draft article 8 as adopted by the International Law Commission on first reading, which it considered to reflect the "principles of international law concerning the attribution to States of acts performed by private individuals". Its elaboration on this matter, which was later referred to by the International Law Commission in its commentary to article 8 finally adopted in 2001, read as follows:

> "117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in article 8 of the draft on State responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the International Law Commission Drafting

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[102] International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Duško Tadić, Opinion and Judgement,* Case No. IT-94-1-T, 7 May 1997, para. 601, reproducing paragraph 16 of the Separate Opinion of Judge Ago in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see *I.C.J. Reports 1986*, pp. 188-189).

Committee. Under this article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

...

"121. ... Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.

"122. The same logic should apply to the situation under discussion. As noted above, the situation of an organized group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organized group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State*. To a large extent the wise words used by the United States-Mexico General Claims Commission in the *Youmans* case with regard to State responsibility for acts of State military officials should hold true for acts of organized groups over which a State exercises overall control.

"123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status

> of State officials or of officials of a State's public entity. In the case under discussion here, that of organized groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organized groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility."[103]

WTO Appellate Body

66. In its 2005 report on *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, the Appellate Body noted that the Republic of Korea, in support of its argument that the panel's interpretation of article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures — that a private body may be entrusted to take an action even when the action never occurs — was legally and logically incorrect, had referred to article 8 of the articles finally adopted by the International Law Commission in 2001. According to the Appellate Body,

> Korea explains that article 8, which is entitled "Conduct directed or controlled by a State", provides that private conduct shall be attributed to a State only "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." Korea finds "striking" the similarity of wording in the reference to "carrying out" a conduct and submits that the requirement of conduct taking place in order to establish State responsibility is a matter of "common sense".[104]

In interpreting the said provision of the agreement, the Appellate Body subsequently referred, in a footnote, to the commentary by the International Law Commission to article 8:

> ... the conduct of private bodies is presumptively not attributable to the State. The commentaries to the International Law Commission draft articles explain that "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority". (Commentaries to the International Law Commission draft articles ..., article 8, commentary (6) ...).[105]

And later, the Appellate Body added, in another footnote:

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[103] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Duško Tadić, Judgement,* Case No. IT-94-1-A, 15 July 1999 (footnotes omitted).

[104] WTO Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, 27 June 2005, para. 69 (footnotes omitted).

[105] Ibid., para. 112, footnote 179.

> The commentaries to the International Law Commission draft articles similarly state that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it". (Commentaries to the International Law Commission draft articles ..., article 8, commentary (5), ... (footnote omitted).[106]

International arbitral tribunal (under the UNCITRAL rules)

67. In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp.* v. *Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, quoted, inter alia, article 8 finally adopted by the International Law Commission in 2001. The relevant passage is quoted in paragraph 51 above.

Article 9
Conduct carried out in the absence or default of the official authorities

Iran-United States Claims Tribunal

68. In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(b) provisionally adopted by the International Law Commission:[107]

> ... attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. ... An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. *See* International Law Commission draft article 8(b).[108]

Article 10
Conduct of an insurrectional or other movement

Iran-United States Claims Tribunal

69. In its 1987 award in the *Short* v. *Islamic Republic of Iran* case, the Tribunal, in examining whether the facts invoked by the claimant as having caused his departure from the Iranian territory were attributable to the Islamic Republic of Iran, referred to draft articles 14 and 15 provisionally adopted by the International Law

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[106] Ibid., para. 116, footnote 188.

[107] This provision was amended and incorporated in article 9 finally adopted by the International Law Commission in 2001. Article 8(b) provisionally adopted read as follows: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: ... (b) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority." (*Yearbook ...* 1980, vol. II (Part Two), para. 34.)

[108] Iran-United States Claims Tribunal, *Yeager* v. *Islamic Republic of Iran*, award No. 324-10199-1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 103, para. 42.

Commission,[109] which it considered a confirmation of principles still valid contained in the previous case law on attribution:

> The Tribunal notes ... that it is not infrequent that foreigners have had to leave a country *en masse* by reason of dramatic events that occur within the country. It was often the case during this century, even since 1945. A number of international awards have been issued in cases when foreigners have suffered damages as a consequence of such events. ... Although these awards are rather dated, the principles that they have followed in the matter of State international responsibility are still valid and have recently been confirmed by the United Nations International Law Commission in its draft articles on the law of State responsibility. *See* draft articles on state responsibility, adopted by the International Law Commission on first reading, notably articles 11, 14 and 15. 1975 Yearbook International Law Commission, vol. 2, at 59, United Nations doc. A/CN.4/SER.A/1975/Add.1 (1975).[110]

The Tribunal further noted, with reference to the commentary to the above mentioned draft article 15, that:

> Where a revolution leads to the establishment of a new government the State is held responsible for the acts of the overthrown government insofar as the latter

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[109] Those provisions were amended and incorporated in article 10 finally adopted by the ILC in 2001. The text of draft articles 14 and 15 provisionally adopted on first reading was as follows:

Article 14
Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15
Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

[110] Iran-United States Claims Tribunal, *Short* v. *Islamic Republic of Iran*, award No. 312-11135-3, 14 July 1987, Iran-United States Claims Tribunal Reports, vol. 16 (1987-III), p. 83, para. 28. Draft article 11, to which the passage also refers, was deleted by the International Law Commission on second reading (see note 26 above).

> maintained control of the situation. The successor government is also held responsible for the acts imputable to the revolutionary movement which established it, even if those acts occurred prior to its establishment, as a consequence of the continuity existing between the new organization of the State and the organization of the revolutionary movement. *See* draft articles on State responsibility, *supra*, commentary on article 15, paras. 3 and 4, 1975 Yearbook International Law Commission, vol. 2 at 100.[111]

Iran-United States Claims Tribunal

70. In its 1987 award in the *Rankin* v. *Islamic Republic of Iran* case, the Tribunal, in determining the applicable law with regard to the claim, considered that draft article 15 provisionally adopted by the International Law Commission reflected "an accepted principle of international law". It observed that

> ... several problems remain even though it is an accepted principle of international law that acts of an insurrectional or revolutionary movement which becomes the new government of a State are attributable to the State. *See* article 15, draft articles on State responsibility ... First, when property losses are suffered by an alien during a revolution, there may be a question whether the damage resulted from violence which was directed at the alien or his property per se or was merely incidental or collateral damage resulting from the presence of the alien's property or property interests during the period of revolutionary unrest. Second, even with respect to some property losses that are not the result of incidental or collateral damage — for example, losses resulting from acts directed by revolutionaries against the alien because of his nationality — a further question of attribution remains, that is, whether those acts are acts of the revolutionary movement itself, rather than acts of unorganized mobs or of individuals that are not attributable to the movement.[112]

In the same award, the Tribunal further referred to draft article 15 in determining that a number of statements made by the leaders of the Revolution, which it found to be inconsistent with the requirements of the Treaty of Amity between Iran and the United States and customary international law to accord protection and security to foreigners and their property, were "clearly ... attributable to the Revolutionary Movement and thereby to the Iranian State".[113]

Article 11
Conduct acknowledged and adopted by a State as its own

International Criminal Tribunal for the former Yugoslavia Trial Chamber

71. In its 2002 decision on the defence motion challenging the exercise of jurisdiction by the Tribunal in the *Nikolić ("Sušica Camp")* case, Trial Chamber II needed to consider the situation in which "some unknown individuals [had] arrested the Accused in the territory of the FRY [Federal Republic of Yugoslavia] and [had]

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[111] Ibid., p. 84, para. 33.

[112] Iran-United States Claims Tribunal, *Rankin* v. *Islamic Republic of Iran*, award No. 326-10913-2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 143-144, para. 25.

[113] Ibid., p. 147, para. 30.

brought him across the border with Bosnia and Herzegovina and into the custody of SFOR".[114] In this respect, the Trial Chamber used the principles laid down in the articles finally adopted by the International Law Commission in 2001, and in particular article 11 and the commentary thereto, "as *general* legal guidance ... insofar as they may be helpful for determining the issue at hand":[115]

> "60. In determining the question as to whether the illegal conduct of the individuals can somehow be attributed to SFOR, the Trial Chamber refers to the principles laid down in the draft articles of the International Law Commission on the issue of 'responsibilities of States for internationally wrongful acts'. These draft articles were adopted by the International Law Commission at its fifty-third session in 2001. The Trial Chamber is however aware of the fact that any use of this source should be made with caution. The draft articles were prepared by the International Law Commission and are still subject to debate amongst States. They do not have the status of treaty law and are not binding on States. Furthermore, as can be deduced from its title, the draft articles are primarily directed at the responsibilities of States and not at those of international organizations or entities. As draft article 57 emphasizes,
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> > [t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.
>
> "61. In the present context, the focus should first be on the possible attribution of the acts of the unknown individuals to SFOR. As indicated in article I of Annex 1-A to the Dayton Agreement, IFOR (SFOR) is a multinational military force. It 'may be composed of ground, air and maritime units from NATO and non-NATO nations' and 'will operate under the authority and subject to the direction and political control of the North Atlantic Council.' For the purposes of deciding upon the motions pending in the present case, the Chamber does not deem it necessary to determine the exact legal status of SFOR under international law. Purely as *general* legal guidance, it will use the principles laid down in the draft articles [on State responsibility] insofar as they may be helpful for determining the issue at hand.
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> "62. Article 11 of the draft articles [on State responsibility] relates to 'Conduct acknowledged and adopted by a State as its own' and states the following:
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> > 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.
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> "63. The report of the International Law Commission on the work of its fifty-third session sheds light on the meaning of the article:
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> > 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

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[114] ICTY, Trial Chamber II, *Prosecutor* v. *Dragan Nikolić ("Sušica Camp"), Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, Case No. IT-94-2-PT, para. 57.

[115] Ibid., para. 61.

> which is subsequently acknowledged and adopted by the State as its own. (…), article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes 'nevertheless' that conduct is to be considered as an act of State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'.

Furthermore, in this report a distinction is drawn between concepts such as 'acknowledgement' and 'adoption' from concepts such as 'support' or 'endorsement'. The International Law Commission argues that

> [a]s a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption', on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct."[116]

The Trial Chamber observed that both parties in the case had used the same and similar criteria of "acknowledgement", "adoption", "recognition", "approval" and "ratification", as used by the ILC.[117] After having examined the facts of the case, it concluded that SFOR and the Prosecution had become the "mere beneficiary" of the fortuitous rendition of the accused to Bosnia, which did not amount to an "adoption" or "acknowledgement" of the illegal conduct "as their own".[118]

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

Ad hoc *committee (under the ICSID Convention)*

72. In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ICSID *ad hoc* committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passages are quoted in paragraphs 11 and 29 above.

Article 13
International obligation in force for a State

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

73. In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case observed that the basic principle "that a State can only be internationally responsible for breach of a

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[116] Ibid., paras. 60-63 (footnotes omitted).
[117] Ibid., para. 64.
[118] Ibid., paras. 66-67.

treaty obligation if the obligation is in force for that State at the time of the alleged breach" was "stated both in [article 28 of] the Vienna Convention on the Law of Treaties and in the International Law Commission's articles on State responsibility, and has been repeatedly affirmed by international tribunals".[119] It referred in a footnote to article 13 finally adopted by the International Law Commission in 2001.

European Court of Human Rights

74. In its 2006 judgement in the *Blečić* v. *Croatia* case, the European Court, sitting as a Grand Chamber, quoted the text of articles 13 and 14, as finally adopted by the International Law Commission in 2001, in the section devoted to the "relevant international law and practice".[120] The European Court later observed that

> while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the [1950 European Convention on Human Rights] ... the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date ... Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlines the law of State responsibility.[121]

The European Court found thereafter that, on the basis of its jurisdiction *ratione temporis*, it could not take cognizance of the merits of the case, since the facts allegedly constitutive of interference preceded the date into force of the Convention in respect of Croatia.[122]

Article 14
Extension in time of the breach of an international obligation

International arbitral tribunal

75. In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal, having determined that France had committed a material breach of its obligations to New Zealand, referred to the distinction made by the International Law Commission between an instantaneous breach and a breach having a continuing character, as it appeared in draft article 24 and draft article 25, paragraph 1,[123] provisionally adopted:

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[119] NAFTA (ICSID Additional Facility), *Mondev International Ltd.* v. *United States of America*, Case No. ARB(AF)/99/2, award, 11 October 2002, para. 68 (footnotes omitted), reproduced in *International Law Reports*, vol. 125, p. 131.

[120] European Court of Human Rights, Grand Chamber, *Blečić* v. *Croatia* (Application No. 59532/00), judgement, 8 March 2006, para. 48.

[121] Ibid., para. 81.

[122] Ibid., para. 92 and operative paragraph.

[123] These provisions were amended and incorporated in article 14 finally adopted by the International Law Commission in 2001. Draft article 24 provisionally adopted read as follows:

> Article 24
> Moment and duration of the breach of an international obligation by an act of the State not extending in time
>
> The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

> In its codification of the law of State responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commission distinguishes the breach which does not extend in time, or instantaneous breach, defined in article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".
>
> Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents [Major Mafart and Captain Prieur, as provided for under the agreement between the Parties,] has been not only a material but also a continuous breach.
>
> And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[124]

The arbitral tribunal again referred to draft article 25 provisionally adopted in the context of the determination of the time of commission of the breach by France. It noted that, in the case of breaches extending or continuing in time,

> [a]ccording to article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. [It thus followed that] France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.[125]

International arbitral tribunal

76. In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case, in order to determine the moment when the unlawful act was performed for the purposes of deciding the scope of the damages due, found that Burundi's violation in that case was of a continuing nature and thereafter referred to

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Paragraph 1 of draft article 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time) provisionally adopted read as follows:

> 1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

[124] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, arbitral award, 30 April 1990, para. 101, reproduced in UNRIAA, vol. XX, pp. 263-264.

[125] Ibid., pp. 265-266, para. 105.

paragraph 1 of draft article 25 provisionally adopted by the International Law Commission,[126] which was quoted in the award.[127]

International Court of Justice

77. In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court referred to the commentary to draft article 41, as adopted by the International Law Commission on first reading:[128]

> A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the commentary on article 41 of the draft articles on State responsibility, ... *Yearbook of the International Law Commission*, 1993, vol. II (Part Two), p. 57, para. 14).[129]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

78. In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case referred to article 14, paragraph 1, finally adopted by the International Law Commission in 2001 in support of its statement that "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage".[130]

International arbitral tribunal (under the ICSID Additional Facility Rules)

79. In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred in a footnote to the commentary to articles 14 and 15 finally adopted by the International Law Commission to support the statement that "[w]hether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible

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[126] This provision was amended and incorporated in article 14, paragraph 2, finally adopted by the International Law Commission in 2001. For the text of this provision, see note 123 above.

[127] *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, arbitral award to 4 March 1991, para. 66 (English version in: *International Law Reports*, vol. 96, pp. 323-324).

[128] The extract of the commentary to draft article 41 (Cessation of wrongful conduct) by the International Law Commission referred to by the Court in the quoted passage was not retained in the commentary to article 30 (Cessation and non-repetition) as finally adopted in 2001. However, the International Law Commission included a citation of this passage of the Court's judgment in its commentary to article 14 finally adopted in 2001. For this reason, the said passage is hereby reproduced with reference to article 14.

[129] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 54, para. 79.

[130] NAFTA (ICSID Additional Facility), *Mondev International Ltd.* v. *United States of America*, Case No. ARB(AF)/99/2, award, 11 October 2002, para. 58 and note 9, reproduced in *International Law Reports*, vol. 125, p. 128.

to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused".[131]

European Court of Human Rights

80. In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, after having observed that the principle of "State responsibility for the breach of an international obligation" was a "recognized principle of international law", referred in particular to the commentary to article 14, paragraph 2, and to article 15, paragraph 2, as finally adopted by the International Law Commission in 2001:

> 320. Another recognized principle of international law is that of State responsibility for the breach of an international obligation, as evidenced by the work of the International Law Commission.
>
> 321. A wrongful act may be described as continuing if it extends over the entire period during which the relevant conduct continues and remains at variance with the international obligation (see the commentary on draft article 14 § 2 ... of the work of the International Law Commission).
>
> In addition, the Court considers that, in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see also draft article 15 § 2 of the work of the International Law Commission).[132]

International arbitral tribunal (under the ICSID Convention)

81. In its 2005 decision on jurisdiction, the arbitral tribunal constituted to hear the *Impregilo* v. *Pakistan* case noted that Impregilo had invoked article 14 finally adopted by the International Law Commission in 2001, "which, in its opinion, reflects customary international law", to allege that Pakistan's acts previous to the date of entry into force of the bilateral investment treaty had to conform to the provisions of that treaty. According to the tribunal, "[w]hether or not this article does in fact reflect customary international law need not be addressed for present purposes": the case before the tribunal was not covered by article 14, since the acts in question had no "continuing character" within the meaning of that provision.[133]

European Court of Human Rights

82. In its 2006 judgement in the *Blečić* v. *Croatia* case, the European Court, sitting as a Grand Chamber, quoted, inter alia, the text of article 14 finally adopted by the International Law Commission in 2001. The relevant passage is quoted in paragraph 74 above.

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[131] ICSID, *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States*, Case No. ARB(AF)/00/2, award, 29 May 2003, para. 62, note 26 (unofficial English translation of the Spanish original). The passages of the commentaries to articles 14 and 15 referred to can be found in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77.

[132] European Court of Human Rights, Grand Chamber, *Ilaşcu and others* v. *Moldova and Russia* (Application No. 48787/99), judgement, 8 July 2004, paras. 320-321.

[133] ICSID, *Impregilo S.p.A.* v. *Islamic Republic of Pakistan*, Case No. ARB/03/3, decision on jurisdiction, 22 April 2005, para. 312.

Article 15
Breach consisting of a composite act

International arbitral tribunal (under the ICSID Additional Facility Rules)

83. In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred to a text taken from the commentary to article 15 finally adopted by the International Law Commission. The relevant passage is quoted in paragraph 79 above.

European Court of Human Rights

84. In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, referred inter alia to the commentary to article 15, paragraph 2 finally adopted by the International Law Commission in 2001. The relevant passage is quoted in paragraph 80 above.

Chapter IV
Responsibility of a State in connection with the act of another State

Article 16
Aid or assistance in the commission of an internationally wrongful act

WTO panel

85. In its 1999 report on *Turkey — Restrictions on Imports of Textile and Clothing Products*, the panel, in examining the Turkish argument according to which the measures at issue had been taken by a separate entity (i.e. the Turkey-European Communities customs union or the European Communities), concluded that the said measures were attributable to Turkey, since they had been adopted by the Turkish Government or had at least been implemented, applied and monitored by Turkey. In this regard, the panel found that, in any event, "in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey-EC customs union",[134] on the basis of the principle reflected in draft article 27 adopted on first reading by the International Law Commission.[135] In the report, the panel reproduced a passage of the commentary of the Commission to that provision.[136]

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[134] WTO Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, para. 9.42.

[135] This provision was amended and incorporated in article 16 finally adopted by the International Law Commission in 2001. The text of draft article 27 was the following:

> Article 27
> Aid or assistance by a State to another State for the commission of an internationally wrongful act
>
> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

[136] WTO Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, para. 9.43, where the panel quoted a passage taken from paragraph 2

Chapter V
Circumstances precluding wrongfulness

International arbitral tribunal

86. In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal observed that France had alleged, "citing the report of the International Law Commission", [that] the reasons which may be invoked to justify non-execution of a treaty are a part of the general subject matter of the international responsibility of States".[137] Having considered that, inter alia, the determination of the circumstances that may exclude wrongfulness was a subject that belonged to the customary law of State responsibility, the tribunal referred to the set of rules provisionally adopted by the International Law Commission under the title "circumstances precluding wrongfulness" (draft articles 29 to 35), and in particular to draft articles 31, 32 and 33, which it considered to be relevant to the decision on that case.[138]

Article 23
Force majeure

International arbitral tribunal

87. In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal referred to the text of draft article 31 provisionally adopted by the International Law Commission,[139] as well as to the commentary thereto, and concluded that France could not invoke the excuse of *force majeure* to preclude the wrongfulness of the removal of Major Mafart from the island of Hao for health reasons, in violation of the agreement between the Parties. Having quoted paragraph 1 of draft article 31, the tribunal stated the following:

> In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, article 31 refers to "a situation

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of the commentary to draft article 27 provisionally adopted (*Yearbook* ... vol. II (Part Two), p. 99).

[137] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, arbitral award, 30 April 1990, para. 74, reproduced in UNRIAA, vol. XX, p. 250.

[138] Ibid., pp. 251-252, paras. 75-76.

[139] The part of this provision concerning *force majeure* was amended and incorporated in article 23 finally adopted by the International Law Commission in 2001. Draft article 31 provisionally adopted read as follows:

> Article 31
> *Force majeure* and fortuitous event
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
>
> 2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (*Yearbook ...* 1979, vol. II, p. 122, para. 2, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (ibid., p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means ... The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation ... the Commission has sought to emphasize that the State must not have had any option in that regard (*Yearbook ...* 1979, vol. II, p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.[140]

International arbitral tribunal

88. In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case stated that the defence by Burundi according to which it was objectively impossible for the shareholder, Libyan Arab Foreign Investment company (LAFICO), to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[141] was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility". The tribunal first referred to the exception of *force majeure*, and in this regard quoted in

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[140] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, arbitral award, 30 April 1990, para. 77, reproduced in UNRIAA, vol. XX, pp. 252-253.

[141] In this case, LAFICO had contended that the expulsion from Burundi of Libyan managers of HALB and one of its subsidiaries, and the prohibition against LAFICO carrying out any activities in Burundi constituted an infringement by Burundi of its shareholder rights and had prevented HALB from realizing its objectives (i.e. to invest in companies operating within certain sectors of the Burundi economy), thereby violating inter alia the 1973 Technical and Economic Cooperation Agreement between the Libyan Arab Republic and the Republic of Burundi.

extenso draft article 31 provisionally adopted by the International Law Commission. The tribunal found that it was "not possible to apply this provision to the case ... because the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi".[142]

International arbitral tribunal (under the ICSID Convention)

89. In its 2003 award, the arbitral tribunal constituted to hear the *Aucoven* v. *Venezuela* case, in examining whether Venezuela's failure to increase the toll rates (as provided by the relevant concession agreement) was excused by the civil unrest existing in the country in 1997, considered that *force majeure* was "a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law".[143] It then referred, inter alia, to the International Law Commission articles on State responsibility in general (and implicitly to article 23 finally adopted in 2001) to support its finding that international law did not impose a standard which would displace the application of Venezuela's national law referring to *force majeure*:

> ... the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular *General Dynamics Telephone Sys. Ctr.* v. *The Islamic Republic of Iran*, Award No. 192-285-2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also *Gould Marketing, Inc.* v. *Ministry of Defense of Iran*, Award No. ITL 24-49-2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and *Sylvania Tech. Sys., Inc.* v. *Iran*, Award No. 180-64-1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the draft articles on State Responsibility of the International Law Commission, and the legal arguments of the parties.[144]

Article 24
Distress

International arbitral tribunal

90. In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal referred to draft article 32 provisionally adopted by the International Law Commission,[145] as

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[142] *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, arbitral award to 4 March 1991, para. 55 (English version in: *International Law Reports*, vol. 96, p. 318).

[143] ICSID, Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela, Case No. ARB/00/5, award, 23 September 2003, para. 108.

[144] Ibid., para. 123.

[145] This provision was amended and incorporated in article 24 finally adopted by the International Law Commission in 2001. Draft article 32 provisionally adopted read as follows:

> Article 32
> Distress
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

well as to the commentary thereto, to determine whether the wrongfulness of France's behaviour could be excluded on the basis of distress. The tribunal also clarified, in this context, the difference between this ground of justification and, first, that of *force majeure*, and, second, that of state of necessity, dealt with under draft article 33 provisionally adopted by the Commission:[146]

> "Article 32 of the articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the 'distress' of the author of the conduct which constitutes the act of State whose wrongfulness is in question.
>
> ...
>
> "The commentary of the International Law Commission explains that '"distress" means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question' (*Yearbook ...* 1979, p. 133, para. 1).
>
> "The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, 'has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea — for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster' (ibid., p. 134, para. 4). Yet the Commission found that 'the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases' (ibid., p. 135, para. 8).
>
> "The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: 'in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand' (*Yearbook ...* 1979, p. 122, para. 3). But 'this choice is not a "real choice" or "free choice" as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the "possibility" of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress' (*Yearbook ...* 1979, p. 133, para. 2).

> 2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril. (*Yearbook ...* 1980, vol. II (Part Two), para. 34.)

[146] This provision was amended and incorporated in article 25 finally adopted in 2001. The text of that provision was identical to that of draft article 33 adopted on first reading (see *Yearbook ...* 1996, vol. II (Part Two), para. 65) and is contained in the passage of the judgement of the ICJ in the *Gabčíkovo-Nagymaros Project* case reproduced in para. 92 below.

"The report adds that the situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State' (*Yearbook ...* 1979, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

"The report also distinguishes with precision the ground of justification of article 32 from the controversial doctrine of the state of necessity dealt with in article 33. Under article 32, on distress, what is 'involved is situations of necessity' with respect to the actual person of the State organs or of persons entrusted to his care, 'and not any real "necessity" of the State'.

"On the other hand, article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

"This distinction between the two grounds justifies the general acceptance of article 32 and at the same time the controversial character of the proposal in article 33 on state of necessity.

"It has been stated in this connection that there is

> no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed ... in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated ... In these cases — in which adequate compensation must be paid — it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

"The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State may exclude wrongfulness in this case."[147]

The arbitral tribunal then examined France's behaviour in accordance with these legal considerations. It concluded that

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[147] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, arbitral award, 30 April 1990, para. 78, reproduced in UNRIAA, vol. XX, pp. 253-255.

> "the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart [from the island of Hao] without obtaining New Zealand's consent [as provided for by the agreement between the Parties], but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared)."[148]

Article 25
Necessity

International arbitral tribunal

91. In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case stated that the defence by Burundi according to which it was objectively impossible for the shareholder LAFICO to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[149] was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility".[150] The tribunal, after excluding the exception of *force majeure*, then considered "whether it [was] possible to apply the notion of 'state of necessity' elaborated in article 33 of the draft articles", as provisionally adopted by the International Law Commission. After having quoted in extenso the said provision, the tribunal stated:

> It is not desired here to express a view on the appropriateness of seeking to codify rules on "state of necessity" and the adequacy of the concrete proposals made by the International Law Commission, which has been a matter of debate in the doctrine.[151]

The tribunal found that "the various measures taken by [Burundi] against the rights of the shareholder LAFICO [did] not appear to the Tribunal to have been the only means of safeguarding an essential interest of Burundi against a grave and imminent peril".[152]

International Court of Justice

92. In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court examined "the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments".[153] In this respect, relying on draft article 33

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[148] Ibid., p. 263, para. 99.

[149] See note 141 above.

[150] *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, arbitral award to 4 March 1991, para. 55 (English version in: *International Law Reports*, vol. 96, p. 318).

[151] Ibid., p. 319, para. 56.

[152] Ibid.

[153] International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 39, para. 49.

(State of necessity) as adopted by the International Law Commission on first reading, which it quoted, it considered that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation":

> "50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in article 33 of the draft articles on the international responsibility of States that it adopted on first reading. That provision is worded as follows:
>
> Article 33. *State of necessity*
>
> 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
>
> (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
>
> (c) if the State in question has contributed to the occurrence of the state of necessity. (Yearbook of the International Law Commission, 1980, vol. II, Part Two, p. 34.)
>
> "In its Commentary, the Commission defined the 'state of necessity' as being
>
> 'the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State' (ibid., para. 1).
>
> "It concluded that 'the notion of state of necessity is ... deeply rooted in general legal thinking' (ibid., p. 49, para. 31).
>
> "51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in article 33 of its draft

> ‘in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness ...’ (ibid., p. 51, para. 40).
>
> “Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.”[154]

The Court later referred to the commentary by the International Law Commission when examining the meaning given to some terms used in the said draft provision. With regard to the expression “essential interest”, the Court noted:

> “The Commission, in its Commentary, indicated that one should not, in that context, reduce an ‘essential interest’ to a matter only of the ‘existence’ of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, vol. II, Part Two, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, ‘a grave danger to ... the ecological preservation of all or some of [the] territory [of a State]’ (ibid., p. 35, para. 3); and specified, with reference to State practice, that ‘It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an “essential interest” of all States.’ (ibid., p. 39, para. 14)”.[155]

With regard to the terms “grave and imminent peril”, the Court stated that:

> “As the International Law Commission emphasized in its commentary, the ‘extremely grave and imminent’ peril must ‘have been a threat to the interest at the actual time’ (*Yearbook of the International Law Commission*, 1980, vol. II, Part Two, p. 49, para. 33). That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”[156]

In its conclusion on the issue of the existence of a “state of necessity”, the Court referred again to the commentary of the International Law Commission:

> “The Court concludes from the foregoing that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they ‘imminent’; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a

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[154] Ibid., pp. 39-40, paras. 50-51.
[155] Ibid., p. 41, para. 53.
[156] Ibid., p. 42, para. 54.

situation ‘characterized so aptly by the maxim *summum jus summa injuria’* (*Yearbook of the International Law Commission*, 1980, vol. II, Part Two, p. 49, para. 31).”[157]

International Tribunal for the Law of the Sea

93. In its 1999 judgment in the *M/V “SAIGA” (No. 2)* case, the Tribunal referred to draft article 33 adopted by the International Law Commission on first reading, as well as to the earlier judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case,[158] to identify the conditions for the defence based on the “state of necessity” under customary international law. In the context of its examination of the issue whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone could be justified under general international law by Guinea’s appeal to “state of necessity”,[159] the Tribunal stated the following:

> “133. In the Case Concerning the *Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 40 and 41, paras. 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on ‘state of necessity’ which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission’s draft articles on State responsibility, are:
>
> (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> “134. In endorsing these conditions, the Court stated that they ‘must be cumulatively satisfied’ and that they ‘reflect customary international law’.”[160]

International Court of Justice

94. In its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court reaffirmed its earlier finding in the *Gabčíkovo-Nagymaros Project* case on the state of necessity (see para. 92 above), by reference to article 25 finally adopted by the International Law Commission in 2001:

> The Court has ... considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance [i.e. conventions on international humanitarian law and human rights law] include qualifying clauses of the rights guaranteed or provisions for derogation ... Since those treaties already address considerations of this kind within their own provisions, it might be asked

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[157] Ibid., p. 45, para. 57.

[158] See above para. 92.

[159] The *M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)*, judgment, 1 July 1999, para. 132.

[160] Ibid., paras. 133-134.

whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (article 25 of the International Law Commission's articles on responsibility of States for internationally wrongful acts; see also former article 33 of the draft articles on the international responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.[161]

International arbitral tribunal (under the ICSID Convention)

95. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case[162] examined the respondent's subsidiary argument according to which Argentina should be exempted from liability for its alleged breach of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic in light of the existence of a state of necessity or state of emergency due to the severe economic, social and political crisis in the country as of 2000. Argentina having based its argument on article 25 finally adopted by the International Law Commission in 2001 and the pronouncement of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case (see para. 92 above), the tribunal noted in particular that the said provision "adequately reflect[ed] the state of customary international law on the question of necessity":

> "315. The Tribunal, like the parties themselves, considers that article 25 of the articles on State responsibility adequately reflects the state of customary international law on the question of necessity. This article, in turn, is based on a number of relevant historical cases discussed in the Commentary, with particular reference to the *Caroline*, the *Russian Indemnity, Société Commerciale de Belgique*, the *Torrey Canyon* and the *Gabcíkovo-Nagymaros* cases.

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[161] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004*, para. 40, para. 140.

[162] It should be noted that, on 8 September 2005, Argentina filed an application requesting the annulment of this award on the grounds that the tribunal had allegedly manifestly exceeded its powers and that the award had allegedly failed to state the reasons on which it is based. The annulment proceedings are currently pending before an ICSID ad hoc committee and a stay of enforcement of the award is effective until the application for annulment is decided.

"316. Article 25 reads as follows:

...

"317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

"318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgement on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

...

"324. The International Law Commission's comment to the effect that the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,' is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.

"325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by article 26 of the articles.

"326. In addition to the basic conditions set out under paragraph 1 of article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the commentary, the use of the expression 'in any case' in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.

"327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

"328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The commentary clarifies that this contribution must be 'sufficiently substantial and not merely incidental or

peripheral'. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

"329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular 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.

"330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcíkovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be 'cumulatively' satisfied.

"331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."[163]

The tribunal then turned to the discussion on necessity and emergency under article XI of the bilateral treaty[164] and noted inter alia in this context that the consequences stemming from Argentina's economic crisis "while not excusing liability or precluding wrongfulness from the legal point of view ... ought nevertheless to be considered by the Tribunal when determining compensation".[165]

International arbitral tribunal (under the ICSID Convention)

96. In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp.*, *LG&E Capital Corp., LG&E International Inc.* v. *Argentina* found that Argentina was excused, under article XI of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, from liability for any breaches of that treaty between 1 December 2001 and 26 April 2003, given that it was under a state of necessity. The tribunal then underlined that

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[163] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, paras. 315-331 (footnotes omitted).

[164] The said provision read as follows: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

[165] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 356.

its conclusion was supported by "the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility)" and gave a lengthy commentary on the conditions thereon:

> "245. ... The concept of excusing a State for the responsibility for violation of its international obligations during what is called a 'state of necessity' or 'state of emergency' also exists in international law. While the Tribunal considers that the protections afforded by article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility) supports the Tribunal's conclusion.
>
> "246. In international law, a state of necessity is marked by certain characteristics that must be present in order for a State to invoke this defense. As articulated by Roberto Ago, one of the mentors of the draft articles on State responsibility, a state of necessity is identified by those conditions in which a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory. In other words, the State must be dealing with interests that are essential or particularly important.
>
> "247. The United Nations Organization has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it.
>
> "248. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its draft articles on State responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.
>
> ...
>
> "250. Taking each element in turn, article 25 requires first that the act must be the only means available to the State in order to protect an interest ...
>
> "251. The interest subject to protection also must be essential for the State. What qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any

danger seriously compromising its internal or external situation, are also considered essential interests ...

...

"253. The interest must be threatened by a serious and imminent danger ...

"254. The action taken by the State may not seriously impair another State's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action. The idea is to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest.

"255. The international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a bilateral investment treaty constitutes the acceptance, in the relations between States, of the possibility that one of them may invoke the state of necessity.

...

"258. While this analysis concerning article 25 of the draft articles on State responsibility alone does not establish Argentina's defence, it supports the Tribunal's analysis with regard to the meaning of article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.

"259. Having found that the requirements for invoking the state of necessity were satisfied, the Tribunal considers that it is the factor excluding the State from its liability vis-à-vis the damage caused as a result of the measures adopted by Argentina in response to the severe crisis suffered by the country.

...

"261. Following this interpretation the Tribunal considers that article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately."[166]

[166] ICSID, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentine Republic*, Case No. ARB/02/1, decision on liability, 3 October 2006, paras. 245-259 and 261 (footnotes omitted).

Article 26
Compliance with peremptory norms

International arbitral tribunal (under the ICSID Convention)

97. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[167] in the context of its examination of Argentina's defence based on state of necessity,[168] made incidental reference to article 26, as finally adopted by the International Law Commission in 2001, noting that there did not appear "that a peremptory norm of international law might have been compromised [by Argentina's conduct], a situation governed by article 26 of the articles".[169]

Article 27
Consequences of invoking a circumstance precluding wrongfulness

International arbitral tribunal (under the ICSID Convention)

98. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina case*,[170] after having concluded its examination of Argentina's defence based on state of necessity and article XI of the relevant bilateral treaty,[171] stated that it was "also mindful" of the rule embodied in subparagraph (a) of article 27, as finally adopted by the International Law Commission in 2001 (which it quoted), adding thereafter:

> "380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the *Rainbow Warrior* and *Gabcíkovo Nagymaros* cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'.
>
> ...
>
> "382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present."[172]

The tribunal then quoted subparagraph (b) of article 27 finally adopted by the International Law Commission, observing that it found support again in the *Gabcíkovo Nagymaros Project* case, as well as in earlier decisions such as the *Compagnie générale de l'Orinoco*, the *Properties of the Bulgarian Minorities in Greece* and *Orr & Laubenheimer* cases (in the latter cases, the tribunal noted, "the concept of damages appears to have been broader than that of material loss in article 27"). After having described the positions of the parties on this issue, the tribunal continued as follows:

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[167] See note 162 above.
[168] See para. 95 above.
[169] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 325.
[170] See note 162 above.
[171] See para. 95 above.
[172] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, paras. 379, 380 and 382.

"390. The Tribunal is satisfied that article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.

"391. The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of article XI and the plea of necessity.

"392. The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.

"393. The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's commentary to article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.

"394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next."[173]

International arbitral tribunal (under the ICSID Convention)

99. In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp.*, *LG&E Capital Corp.*, *LG&E International Inc.* v. *Argentina*, having found that Argentina was under a state of necessity that excused it from liability for any breaches of the 1991 bilateral investment treaty under article XI of that treaty,[174] responded to the claimants argument, based on article 27 finally adopted by the International Law Commission in 2001, that Argentina should compensate them for losses incurred as a result of the government's actions:

With regard to article 27 of the United Nations draft articles alleged by Claimants, the Tribunal opines that the article at issue does not specifically refer to the compensation for one or all the losses incurred 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

[173] Ibid., paras. 390-394 (footnotes omitted).

[174] See para. 96 above.

> 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.[175]

The tribunal later added that

> Article 27 of the International Law Commission's draft articles, as well as article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, ... this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.[176]

Ad hoc *committee (under the ICSID Convention)*

100. In its 2006 decision on the application for annulment of the award rendered on 9 February 2004 in the *Patrick Mitchell* v. *Democratic Republic of the Congo* case, the ad hoc committee noted that even if the arbitral tribunal had concluded that the measures at issue were not wrongful by reason of the state of war in the Congo, "this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation". The ad hoc committee thereafter quoted in a footnote the text of article 27 finally adopted by the International Law Commission in 2001, "bearing witness to the existence of a principle of international law in this regard".[177]

Part Two
Content of the international responsibility of a State

Chapter I
General principles

Article 30
Cessation and non-repetition

International arbitral tribunal

101. In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal, having noted that France had alleged that New Zealand was demanding, rather than *restitutio in integrum*, the cessation of the denounced behaviour, made reference to the concept of cessation, and its distinction with restitution, with reference to the reports submitted to the International Law Commission by Special Rapporteurs Riphagen and Arangio-Ruiz.[178] The arbitral tribunal observed in particular that, by

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[175] ICSID, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentine Republic*, Case No. ARB/02/1, decision on liability, 3 October 2006, para. 260 (footnote omitted).

[176] Ibid., para. 264.

[177] ICSID, *Ad Hoc* Committee, *Patrick Mitchell* v. *Democratic Republic of the Congo,* Case No. ARB/99/7, decision on the application for annulment of the award, 1 November 2006, para. 57, note 30.

[178] At the time of the said award, the draft articles on the legal consequences of the commission of an internationally wrongful act were still under consideration, on the basis of the reports by Special Rapporteurs Riphagen and Arangio-Ruiz. The provisions finally adopted by the International Law Commission in 2001 on cessation and restitution are, respectively, articles 30 and 35.

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

> "Recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*. Professor Riphagen observed that in numerous cases 'stopping the breach was involved, rather than reparation or *restitutio in integrum stricto sensu*' (*Yearbook* ... 1981, vol. II, Part One, document A/CN.4/342 and Add.1-4, para. 76).
>
> "The present Special Rapporteur, Professor Arangio-Ruiz, has proposed a distinction between the two remedies (International Law Commission report to the General Assembly for 1988, para. 538).
>
> ...
>
> "The International Law Commission has accepted the insertion of an article separate from the provisions on reparation and dealing with the subject of cessation, thus endorsing the view of the Special Rapporteur Arangio-Ruiz that cessation has inherent properties of its own which distinguish it from reparation (International Law Commission report to the General Assembly for 1989, para. 259).
>
> "Special Rapporteur Arangio-Ruiz has also pointed out that the provision on cessation comprises all unlawful acts extending in time, regardless of whether the conduct of a State is an action or an omission (International Law Commission report to the General Assembly for 1988, para. 537).
>
> "This is right, since there may be cessation consisting in abstaining from certain actions — such as supporting the 'contras' — or consisting in positive conduct, such as releasing the United States hostages in Teheran.
>
> ...
>
> "Undoubtedly the order requested by the New Zealand Government for the return of the two agents would really be an order for the cessation of the wrongful omission rather than a *restitutio in integrum*. This characterization of the New Zealand request is relevant to the Tribunal's decision, since in those cases where material restitution of an object is possible, the expiry of a treaty obligation may not be, by itself, an obstacle for ordering restitution."[179]

International arbitral tribunal

102. In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case, in order to determine the consequences for the parties of Burundi's responsibility in the case, quoted draft article 6 of Part Two of the draft articles

[179] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, arbitral award, 30 April 1990, para. 113, reproduced in UNRIAA, vol. XX, p. 270.

("Content, forms and degrees of international responsibility"),[180] as provisionally adopted by the International Law Commission. It considered that the nature as a rule of customary international law of this provision concerning the obligation to put an end to a wrongful act "is not in doubt".[181]

Article 31
Reparation

Panel of Commissioners of the United Nations Compensation Commission

103. In its 2003 report and recommendations concerning part three of the third instalment of "F3" claims,[182] the Panel of Commissioners of the United Nations Compensation Commission found that the loss resulting from the use or diversion of Kuwait's resources to fund the costs of putting right the loss and damage arising directly from Iraq's invasion and occupation of Kuwait (which it termed "direct financing losses") fell "squarely within the types of loss contemplated by articles 31 and 35 of the International Law Commission articles, and the principles established in the *[Factory at] Chorzów* case, and so are compensable".[183]

Panel of Commissioners of the United Nations Compensation Commission

104. In the 2005 report and recommendations concerning the fifth instalment of "F4" claims,[184] the Panel of Commissioners of the United Nations Compensation Commission noted that the claimants had asked for compensation for loss of use of natural resources damaged as a result of Iraq's invasion and occupation of Kuwait during the period between the occurrence of the damage and the full restoration of the resources. While Iraq had argued that there was no legal justification for compensating claimants for "interim loss" of natural resources that had no commercial value, the claimants invoked, inter alia, the principle whereby reparation must "wipe out all consequences of the illegal act", first articulated by the Permanent Court of International Justice in the *Factory at Chorzów* case and then "accepted by the International Law Commission".[185] The Panel concluded that a loss due to depletion of or damage to natural resources, including resources that may have a commercial value, was compensable if such loss was a direct result of Iraq's invasion and occupation of Kuwait. Although this finding was based on an

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

> Article 6
> Cessation of wrongful conduct
>
> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

[181] *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, arbitral award to 4 March 1991, para. 61 (English version in: *International Law Reports*, vol. 96, pp. 320-321).

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

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

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

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

interpretation of Security Council resolution 687 (1991) and United Nations Compensation Commission Governing Council decision 7, the panel noted that it was not "inconsistent with any principle or rule of general international law".[186]

International arbitral tribunal (under the ICSID Convention)

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

Chapter II
Reparation for injury

Article 34
Forms of reparation

International Tribunal for the Law of the Sea

106. In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal referred to paragraph 1 of draft article 42 (Reparation), as adopted by the International Law Commission on first reading,[188] to determine the reparation which Saint Vincent and the Grenadines was entitled to obtain for damage suffered directly by it as well as for damage or other loss suffered by the Saiga oil tanker:

> Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" (article 42, paragraph 1, of the draft articles of the International Law Commission on State responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.[189]

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

[187] ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, award, 2 October 2006, paras. 494 and 495.

[188] This provision was amended and partially incorporated in article 34, as finally adopted by the International Law Commission in 2001. The text of paragraph 1 of draft article 42 (Reparation) adopted on first reading was as follows: "The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination". (*Yearbook ...* 1996, vol. II (Part Two), para. 65.)

[189] The *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)*, judgment, 1 July 1999, para. 171.

International arbitral tribunal (under the ICSID Convention)

107. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[190] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 34, the tribunal considered it "broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction".[191]

Article 35
Restitution

Panel of Commissioners of the United Nations Compensation Commission

108. In its 2003 report and recommendations concerning part three of the third instalment of "F3" claims,[192] the Panel of Commissioners of the United Nations Compensation Commission referred inter alia to article 35 finally adopted by the International Law Commission in 2001. The relevant passage is quoted in paragraph 103 above.

International arbitral tribunal (under the ICSID Convention)

109. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[193] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 35, the tribunal observed that "[r]estitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation".[194]

International arbitral tribunal (under the ICSID Convention)

110. In its 2006 award, the arbitral tribunal constituted to hear the *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary* case, in determining the "customary international law standard" for damages assessment applicable in the case, noted that article 35 finally adopted by the International Law Commission in 2001 provided that "restitution in kind is the preferred remedy for an internationally wrongful act".[195]

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[190] See note 162 above.

[191] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 399 and note 211.

[192] "F3" claims before the UNCC are claims filed by the Government of Kuwait, excluding environmental claims.

[193] See note 162 above.

[194] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 400 and note 212.

[195] ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, award, 2 October 2006, paras. 494 and 495.

Article 36
Compensation

Panel of Commissioners of the United Nations Compensation Commission

111. In its 1999 report concerning the second instalment of "E2" claims,[196] the Panel of Commissioners of the United Nations Compensation Commission found that its interpretation, based on Governing Council decision 9, according to which losses resulting from a decline in operations were compensable, was "confirmed by accepted principles of international law regarding State responsibility" as enshrined, for example, in draft article 44, paragraph 2, adopted by the International Law Commission on first reading:[197]

> "77. The preceding analysis based on decision 9 [of the Governing Council of the United Nations Compensation Commission] is confirmed by accepted principles of international law regarding State responsibility. The Draft Articles on State Responsibility by the International Law Commission, for example, provide in relevant part that 'compensation covers any economically assessable damage sustained …, and, where appropriate, loss of profits'."[198]

Panel of Commissioners of the United Nations Compensation Commission

112. In its 2000 report concerning the fourth instalment of "E2" claims,[199] the UNCC Panel of Commissioners, after having found that "[t]he standard measure of compensation for each loss that is deemed to be direct should be sufficient to restore the claimant to the same financial position that it would have been in if the contract had been performed", referred in a footnote (without specifying any paragraph) to the commentary to draft article 44 adopted by the International Law Commission on first reading.[200]

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196 "E2" claims before the United Nations Compensation Commission are claims of non-Kuwaiti corporations that do not fall into any of the other subcategories of "E" claims (i.e., "E1" (oil sector claims), "E3" (claims of non-Kuwaiti corporations related to construction and engineering) and "E4" (claims of Kuwaiti corporations, excluding those relating to the oil sector)).

197 This provision was amended and incorporated in article 36 as finally adopted in 2001. The text of draft article 44 adopted on first reading was as follows:

> Article 44
> Compensation
>
> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
>
> 2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits. (*Yearbook* ... 1996, vol. II (Part Two), para. 65.)

198 S/AC.26/1999/6, para. 77 (footnote omitted).

199 See note 196 above.

200 S/AC.26/2000/2, para. 157, note 61.

International arbitral tribunal (under NAFTA and the UNCITRAL Rules)

113. In its 2000 partial award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA under the UNCITRAL Rules to hear the *Myers* v. *Canada* case, in order to determine the methodology for the assessment of the compensation due in that case, noted that, "[t]here being no relevant provisions of the NAFTA other than those contained in article 1110", it needed to turn "for guidance" to international law.[201] After having quoted a passage of the judgement of the Permanent Court of International Justice on the merits in the *Factory at Chorzów* case on the question of reparation, the arbitral tribunal further observed that

> [t]he draft articles on State responsibility under consideration by the International Law Commission at the date of this award similarly propose that in international law, a wrong committed by one State against another gives rise to a right to compensation for the economic harm sustained.[202]

International arbitral tribunal (under the ICSID Convention)

114. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[203] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 36, it stated that "[c]ompensation is designed to cover any 'financially assessable damage including loss of profits insofar as it is established'" and that "compensation is only called for when the damage is not made good by restitution".[204]

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[201] NAFTA, *S.D. Myers Inc.* v. *Canada*, partial award, 13 November 2000, para. 310 reproduced in *International Law Reports*, vol. 121, p. 127. The relevant parts of article 1110 of NAFTA read as follows:

> 1110(1). No Party may directly or indirectly nationalize or expropriate an investment of an investor or another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) For a public purpose;
> (b) On a non-discriminatory basis;
> (c) In accordance with due process of law and Article 1105(1); and
> (d) On payment of compensation in accordance with paragraphs 2 through 6.
>
> 1110(2). Compensation shall be equivalent to the firm market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

[202] Ibid., para. 312, reproduced in *International Law Reports*, vol. 121, p. 128. Although the arbitral tribunal did not mention it expressly, it was referring to draft article 44, as adopted by the International Law Commission on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65), which was amended and incorporated in article 36 finally adopted in 2001. For the text of draft article 44, see note 197 above.

[203] See note 162 above.

[204] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 401 and notes 214 and 215.

International arbitral tribunal (under the ICSID Convention)

115. In its 2006 award, the arbitral tribunal constituted to hear the *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary* case, in determining the "customary international law standard" for damages assessment applicable in the case, noted that article 36 finally adopted by the International Law Commission in 2001 provided that "only where restitution cannot be achieved can equivalent compensation be awarded".[205]

Article 38
Interest

Panel of Commissioners of the United Nations Compensation Commission

116. In its 2003 report and recommendations concerning part three of the third instalment of "F3" claims,[206] the Panel of Commissioners was of the view that Governing Council decision 16 on "awards of interest" addressed any claim that in fact arose as a result of the delay of payment of compensation. It noted that the said decision provided that interest would be awarded "from the date the loss occurred until the date of payment". In a footnote, the panel further observed that this decision was "similar" to article 38, paragraph 2, as finally adopted by the International Law Commission in 2001, which it quoted.[207]

International arbitral tribunal (under the ICSID Convention)

117. In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[208] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to the principles embodied in articles 34, 35, 36 and 38, as finally adopted by the International Law Commission in 2001. With regard to article 38, it found that "[d]ecisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends".[209]

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[205] ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, award, 2 October 2006, paras. 494 and 495.

[206] See note 192 above.

[207] S/AC.26/2003/15, para. 172, note 59.

[208] See note 162 above.

[209] ICSID, *CMS Gas Transmission Company* v. *Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 404 and note 220.

Part Three
The implementation of the international responsibility of a State

Chapter I
Invocation of the responsibility of a State

Article 42
Invocation of responsibility by an injured State

WTO panel

118. In its 1997 reports on *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel, in considering the European Communities argument according to which the United States had "no legal right or interest" in the case (given that its banana production was minimal and its banana exports were nil, and therefore it had not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by article 3.3. and 3.7 of the WTO Dispute Settlement Understanding), considered that a WTO member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO agreement were each sufficient to establish a right to pursue a WTO dispute settlement proceeding. The panel was of the view that this result was consistent with decisions of international tribunals: in a footnote,[210] it referred to relevant findings by the Permanent Court of International Justice and the International Court of Justice, as well as to paragraph 2 (e) and (f) of draft article 40 adopted by the International Law Commission on first reading.[211]

Article 44
Admissibility of claims

International arbitral tribunal

119. In its 1978 award, the arbitral tribunal established to hear the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, to decide on France's allegation according to which the United States was required, before resorting to arbitration, to wait until the United States company (Pan American World Airways) that considered itself injured had exhausted the local remedies available under French law, referred to the principles appearing in draft article 22, as provisionally adopted by the International Law Commission.[212] It considered that it was "significant" that the said provision

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[210] WTO Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM and WT/DS27/R/HND, 22 May 1997, para. 7.50, note 361.

[211] Draft article 40, paragraph 2 (e) and (f) adopted on first reading were amended and incorporated respectively in article 42(b) and article 48, paragraph 1 (a), finally adopted in 2001. The complete text of draft article 40 adopted on first reading is reproduced in note 221 below.

[212] This provision was amended and incorporated in article 44(b) finally adopted by the ILC in 2001. The text of draft article 22 provisionally adopted was as follows:

Article 22
Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be

> establishes the requirement of exhaustion of local remedies only in relation to an obligation of "result", which obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State", and which is an obligation "concerning the treatment of aliens". Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of "procedure" or one of "substance" — a matter which the Tribunal considers irrelevant for the present case — it is clear that the juridical character of the *rules* of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under article I of the Air Service Agreement, "[t]he Contracting Parties grant *to each other* the rights specified in the Annex hereto ..." (emphasis added), and sections I and II of the annex both mention "the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country …" as a right granted by one *Government* to the other *Government*. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a "result" to be achieved, let alone one allowing an "equivalent result" to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an "equivalent result".[213]

On this basis, the arbitral tribunal thus found that its decision should not be postponed until such time as the company had exhausted local remedies.

International Tribunal for the Law of the Sea

120. In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal invoked draft article 22, as adopted by the International Law Commission on first reading,[214] in the context of determining whether the rule that local remedies must be exhausted was applicable in the said case:

> As stated in article 22 of the draft articles on State responsibility adopted on first reading by the International Law Commission, the rule that local

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> accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment. (*Yearbook* ... 1980, vol. II (Part Two), para. 34.)

[213] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, award, 9 December 1978, para. 31, reproduced in UNRIAA, vol. XVIII, pp. 431-432.

[214] The text of that draft article was identical to that of draft article 22 provisionally adopted by the International Law Commission (see note 212 above).

> remedies must be exhausted is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ...". None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.[215]

International arbitral tribunal (under the ICSID Convention)

121. In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in support of its finding that "where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding … because the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations … that are in dispute", referred to draft article 22 adopted by the International Law Commission on first reading and the commentary thereto.[216]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

122. In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 NAFTA to hear *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States* case, in examining the argument of the respondent that "State responsibility only arises when there is final action by the State's judicial system as a whole", referred to article 44 finally adopted by the International Law Commission in 2001:

> The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law … Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the

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[215] The *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)*, judgment, 1 July 1999, para. 98.

[216] ICSID, *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, decision on objections to jurisdiction, 25 January 2000, para. 29 and note 5, reproduced in *ICSID Review — Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 12.

United Kingdom) and was not followed in *Elettronica Sicula Spa (ELSI) United States* v. *Italy* (1989) ICJ 15 at para. 50.[217]

Article 45
Loss of the right to invoke responsibility

International Court of Justice

123. In its 2005 judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court invoked its own previous case law and the commentary of the International Law Commission to article 45, as finally adopted in 2001, in relation to the argument, made by the Democratic Republic of the Congo, that Uganda had waived whatever claims it might have had against the Democratic Republic of the Congo as a result of actions or inaction of the Mobutu regime:

> The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247-250, paras. 12-21). Similarly, the International Law Commission, in its commentary on article 45 of the draft articles on responsibility of States for internationally wrongful acts, points out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal" (International Law Commission report, doc. A/56/10, 2001, para. 77). In the Court's view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu regime.[218]

Article 48
Invocation of responsibility by a State other than an injured State

WTO panel

124. In its 1997 reports on *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel referred, inter alia, to paragraph 2 (f) of draft article 40 (Meaning of injured State) adopted by the International Law Commission on first reading. The relevant passage is reproduced in paragraph 118 above.

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[217] NAFTA (ICSID Additional Facility), *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States*, Case No. ARB(AF)/98/3, award, 26 June 2003, para. 149, note 12, reproduced in *International Legal Materials*, vol. 42, 2003, p. 835.

[218] International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, 19 December 2005*, para. 293.

International Tribunal for the Former Yugoslavia Appeals Chamber

125. In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber noted that article 29 of the Statute of the Tribunal

> does not create bilateral relations. Article 29 [of the Statute] imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*". By the same token, article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in article 29 (on the manner in which this legal interest can be exercised …).[219]

In a first footnote accompanying this text, the Appeals Chamber observed:

> As is well known, in the *Barcelona Traction, Power & Light Co.* case, the International Court of Justice mentioned obligations of States "towards the international community as a whole" and defined them as obligations *erga omnes* (I.C.J. Reports 1970, p. 33, para. 33). The International Law Commission has rightly made a distinction between such obligations and those *erga omnes partes* (*Yearbook of the International Law Commission*, 1992, vol. II, Part Two, p. 39, para. 269). This distinction was first advocated by the Special Rapporteur, G. Arangio-Ruiz, in his third report on State responsibility (see *Yearbook* …, 1991, vol. II, Part One, p. 35, para. 121; see also his fourth report, ibid., 1992, vol. II, Part One, p. 34, para. 92).[220]

In a second footnote, it added, with regard to the obligation under article 29 of the Statute:

> … The fact that the obligation is incumbent on all States while the correlative "legal interest" is only granted to Member States of the United Nations should not be surprising. Only the latter category encompasses the "injured States" entitled to claim the cessation of any breach of article 29 or to promote the taking of remedial measures. See on this matter article 40 of the draft articles on State responsibility adopted on first reading by the International Law Commission (former art. 5 of Part Two). It provides as follows in para. 2 (c): "[injured State means] if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the

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[219] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14, 29 October 1997, para. 26 (footnotes omitted).

[220] Ibid., para. 26, note 33.

benefit of that right", in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10).[221]

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[221] Ibid., para. 26, note 34. Draft article 40, as adopted on first reading, read as follows:

Article 40
Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) If the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) The right has been created or is established in its favour;

(ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(f) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime, all other States. (*Yearbook* ... 1996, vol. II (Part Two), para. 65.)

In the articles finally adopted in 2001, the International Law Commission followed a different approach in which it distinguished, for purposes of invocation of responsibility, the position of the injured State, defined narrowly (article 42), and that of States other than injured State (article 48). The passages of the judgement of the Appeals Chamber reproduced in the text concern the latter category of States and this is the reason why they are reproduced here with reference to article 48.

Chapter II
Countermeasures

International Court of Justice

126. In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court relied, inter alia, on draft articles 47 to 50, as adopted by the International Law Commission on first reading,[222] to establish the conditions relating to resort to countermeasures:

> In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, United Nations, Reports of International Arbitral Awards (RIAA), vol. XVIII,* pp. 443 *et seq*.; also articles 47 to 50 of the draft articles on State responsibility adopted by the International Law Commission on first reading, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 144-145.)[223]

WTO panel

127. In its 2005 report on *Mexico — Tax Measures on Soft Drinks and Other Beverages*, the panel noted that the European Communities (which was a third party in the proceedings) had criticized Mexico's invocation of article XX(d) of GATT 1994[224] as a justification for the measures at issue by invoking the articles finally adopted by the International Law Commission in 2001, which it considered a codification of customary international law on the conditions imposed on countermeasures. According to the European Communities:

> 5.54. At a systemic level, Mexico's interpretation would transform article XX(d) of GATT 1994 into an authorization of countermeasures within

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[222] These provisions were amended and incorporated in articles 49 to 52 finally adopted by the International Law Commission in 2001, which constitute, together with articles 53 and 54, chapter II of Part Three of the articles.

[223] International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 55, para. 83.

[224] Mexico had argued that the challenged tax measures were "designed to secure compliance" by the United States with NAFTA, a law that was considered not inconsistent with the provisions of GATT 1994. The relevant part of article XX (General exceptions) of GATT 1994 reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> …
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; …

> the meaning of public international law. It must be assumed, however, that if the contracting parties had intended such an interpretation, they would have expressed this in a clearer way. Moreover, under customary international law, as codified in the International Law Commission's articles on responsibility of States for internationally wrongful acts, countermeasures are subject to strict substantive and procedural conditions, which are not contained in article XX(d) of GATT 1994.
>
> 5.55. The EC notes that Mexico has not so far justified its measure as a countermeasure under customary international law. Such a justification would already meet the objection that the Mexican measure does not only apply to products from the United States, but from anywhere. In any event, should Mexico still attempt such a justification, then this would also raise the difficult question of whether the concept of countermeasures is available to justify the violation of WTO obligations. In accordance with article 50 of the International Law Commission's articles on responsibility of States for internationally wrongful acts, this would not be the case if the WTO agreements are to be considered as a *lex specialis* precluding the taking of countermeasures. This complex question has been addressed in the report of the International Law Commission at its fifty-third session.[225]

The panel considered that the phrase "to secure compliance" in article XX(d) was to be interpreted as meaning "to enforce compliance" and that therefore the said provision was concerned with action at a domestic rather than international level; it thus further found that the challenged measures taken by Mexico were not covered under that provision.[226] In that context, the panel referred itself to the text of article 49 in support of its interpretation of article XX(d):

> … it is worth noting that the draft articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission do not speak of enforcement when addressing the use of countermeasures. Rather, paragraph 1 of article 49 states that "[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two". Nor is the notion of enforcement used in the commentary on the articles, except in regard to procedures within the European Union, which because of its unique structures and procedures is obviously a special case.[227]

Article 49
Object and limits of countermeasures

WTO panel

128. In its 2005 report on *Mexico — Tax Measures on Soft Drinks and Other Beverages*, the panel, in relation to Mexico's argument according to which the measures at issue were a response to the persistent refusal of the United States to

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[225] WTO Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005, paras. 5.54-5.55 (footnotes omitted).

[226] This conclusion was later upheld by the WTO Appellate Body in *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006.

[227] WTO Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005, para. 8.180 (footnotes omitted).

respond to Mexico's repeated efforts to resolve the dispute, referred, in a footnote and without any further comment, to a passage of the International Law Commission's commentary to article 49 finally adopted in 2001:

> As the International Law Commission noted in its commentary on countermeasures, "[a] second essential element of countermeasures is that they 'must be directed against' a State which has committed an internationally wrongful act … This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties … Similarly if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided."[228]

Article 50
Obligations not affected by countermeasures

International Tribunal for the Former Yugoslavia Trial Chamber

129. In its 2000 judgement in the *Kupreškić et al. ("Lasva Valley")* case, the Trial Chamber invoked draft article 50(d) adopted on first reading[229] to confirm its finding that there existed a rule in international law that prohibited belligerent reprisals against civilians and fundamental rights of human beings. It stated that:

> … the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanization of armed conflict is among other things confirmed by the works of the United Nations International Law Commission on State responsibility. Article 50(d) of the draft articles on State responsibility, adopted on first reading in 1996, prohibits as countermeasures any "conduct derogating from basic human rights".[230]

In the same context, the Trial Chamber again relied on draft article 50(d) adopted on first reading, which it considered authoritative, to confirm its interpretation of the relevant rules of international law. It observed that

> The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on subparagraph d of article 14 (now article 50) of the draft articles on State responsibility, which

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[228] WTO Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005, para. 4.335, note 73. The passage referred to is taken from paragraphs 4 and 5 of the commentary to article 49 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 177).

[229] The relevant subparagraph was amended and incorporated in article 50, paragraph 1 (b), finally adopted by the International Law Commission in 2001.

[230] International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Zoran Kupreškić, Mirjian Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić ("Lasva Valley"), Judgement,* Case No. IT-95-16-T, 14 January 2000, para. 529 (footnote omitted).

> excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that article 3 common to the four 1949 Geneva Conventions "prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment". It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, common article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.[231]

Eritrea-Ethiopia Claims Commission

130. In its 2003 partial award on *Prisoners of War — Eritrea's Claim 17*, the Eritrea-Ethiopia Claims Commission noted that Eritrea had claimed inter alia that

> Ethiopia's suspension of prisoner of war exchanges cannot be justified as a non-forcible countermeasure under the law of state responsibility because, as article 50 of the International Law Commission's articles on responsibility of States for internationally wrongful acts emphasizes, such measures may not affect "obligations for the protection of fundamental human rights", or "obligations of a humanitarian character prohibiting reprisals".[232]

The Claims Commission did not refer explicitly to the International Law Commission articles in its subsequent reasoning, but it considered that Eritrea's arguments were "well founded in law", although they were considered insufficient to establish that Ethiopia had violated its repatriation obligation.[233]

Article 51
Proportionality

WTO panel

131. In its 2000 report on *United States — Import Measures on Certain Products from the European Communities*, the panel noted that the suspension of concessions or other obligations authorized by the Dispute Settlement Body — which is the remedial action available, in last resort, for WTO members under the WTO Dispute Settlement Understanding — was "essentially retaliatory in nature". In a footnote, it further referred to the conditions imposed on countermeasures under the International Law Commission articles, and in particular draft article 49, as adopted on first reading:[234]

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[231] Ibid., para. 534 (footnotes omitted).

[232] Eritrea-Ethiopia Claims Commission, *Prisoners of War — Eritrea's Claim 17*, Partial Award, 1 July 2003, para. 159.

[233] Ibid., para. 160.

[234] Although the original text of the quoted passage inadvertently refers to draft article 43 with regard to the issue of proportionality, the draft article adopted on first reading that dealt with

> … Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on state responsibility (proportionality, etc. … see article [49] of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO Dispute Settlement Understanding.[235]

WTO Appellate Body

132. In its 2001 report on *United States — Cotton Yarn*, the Appellate Body considered that its interpretation according to which article 6.4, second sentence, of the agreement on textiles and clothing did not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone had caused all the serious damage

> [was] supported further by the rules of general international law on State responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.[236]

This sentence was followed by a footnote that reproduced the complete text of article 51 finally adopted by the International Law Commission in 2001.

WTO Appellate Body

133. In its 2002 report on *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, the Appellate Body again referred to article 51 finally adopted by the International Law Commission in 2001, which it considered as reflecting customary international law rules on State responsibility, to support its interpretation of the first sentence of article 5.1 of the agreement on safeguards:

> We note … the customary international law rules on State responsibility, to which we also referred in *US — Cotton Yarn*. We recalled there that the rules of general international law on State responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the International

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that issue was draft article 49, which was amended and incorporated in article 51 finally adopted by the International Law Commission in 2001. The text of draft article 49 adopted on first reading was the following:

Article 49
Proportionality

> Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State. (*Yearbook* ... 1996, vol. II (Part Two), para. 65.)

[235] WTO Panel Report, *United States — Import Measures on Certain Products From the European Communities*, WT/DS165/R, 17 July 2000, para. 6.23, note 100.

[236] WTO Appellate Body, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001, para. 120.

Law Commission's draft articles on responsibility of States for internationally wrongful acts provides that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". Although article 51 is part of the International Law Commission's draft articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law. We observe also that the United States has acknowledged this principle elsewhere. In its comments on the International Law Commission's draft articles, the United States stated that "under customary international law a rule of proportionality applies to the exercise of countermeasures".[237]

Part Four
General provisions

Article 57
Responsibility of an international organization

International Tribunal for the Former Yugoslavia Trial Chamber

134. In its 2002 decision on defence motion challenging the exercise of jurisdiction by the tribunal in the *Nikolić ("Sušica Camp")* case, Trial Chamber II needed to consider the situation in which "some unknown individuals arrested the Accused in the territory of the [Federal Republic of Yugoslavia] and brought him across the border with Bosnia and Herzegovina and into the custody of SFOR".[238] In this context, the Trial Chamber noted in particular, quoting article 57 finally adopted by the International Law Commission in 2001, that the Commission's articles were "primarily directed at the responsibilities of States and not at those of international organizations or entities".[239]

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[237] WTO Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, para. 259 (footnotes omitted).

[238] International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor* v. *Dragan Nikolić ("Sušica Camp"), Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, Case No. IT-94-2-PT, para. 57.

[239] Ibid., para. 60. For the complete passage, see paragraph 71 above.

Annex I

Table of decisions

Body of origin	*Case*	*Decision*	*Year*	*Paragraph*[a]
		Part One **The internationally wrongful act of a State**		
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		Chapter I **General principles**		
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International arbitral tribunal	*Eureko BV* v. *Republic of Poland*	Partial award	2005	9
		Article 2 **Elements of an internationally wrongful act of a State**		
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International arbitral tribunal	*Eureko BV* v. *Republic of Poland*	Partial award	2005	12
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Iran-United States Claims Tribunal	*Yeager* v. *Islamic Republic of Iran*	Award	1987	21
International arbitral tribunal (ICSID)	*Amco Indonesia Corporation and Others* v. *Indonesia*	Award on the merits	1990	22
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International Court of Justice	*Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*	Advisory opinion	1999	25
ICTY Appeals Chamber	*Prosecutor* v. *Duško Tadić*	Judgement	1999	26
WTO panel	*Korea — Measures Affecting Government Procurement*	Report	2000	27
International arbitral tribunal (under MERCOSUR)	*Import Prohibition of Remolded Tires from Uruguay*	Award	2002	28

Body of origin	*Case*	*Decision*	*Year*	*Paragraph*[a]
Ad hoc committee (ICSID)	*CAA and Vivendi Universal* v. *Argentina*	Decision on annulment	2002	29
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International arbitral tribunal (NAFTA/ICSID Additional Facility)	*ADF Group Inc.* v. *United States*	Award	2003	31
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International arbitral tribunal	*Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland* v. *United Kingdom)*	Final award	2003	47
International arbitral tribunal	*Eureko BV* v. *Republic of Poland*	Partial award	2005	48
International arbitral tribunal (ICSID)	*Noble Ventures, Inc.* v. *Romania*	Award	2005	49
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Iran-United States Claims Tribunal	*Yeager* v. *Islamic Republic of Iran*	Award	1987	62
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International arbitral tribunal	*LAFICO-Burundi*	Award	1991	76
International Court of Justice	*Gabčíkovo-Nagymaros Project*	Judgment	1997	77
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Body of origin	*Case*	*Decision*	*Year*	*Paragraph*[a]
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Body of origin	*Case*	*Decision*	*Year*	*Paragraph*[a]
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Body of origin	*Case*	*Decision*	*Year*	*Paragraph*[a]
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UNCC Panel of Commissioners		Report concerning the fourth instalment of "E2" claims	2000	112
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International arbitral tribunal (ICSID)	*CMS Gas Transmission Company* v. *Argentina*	Award	2005	114
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UNCC Panel of Commissioners		Report and recommendations concerning part three of the third instalment of "F3" claims	2003	116
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	Article 42 Invocation of responsibility by an injured State			
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ICTY Appeals Chamber	*Prosecutor* v. *Tihomir Blaškić*	Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997	1997	125
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Body of origin	*Case*	*Decision*	*Year*	*Paragraph*[a]
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	Article 50 **Obligations not affected by countermeasures**			
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	Article 51 **Proportionality**			
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WTO Appellate Body	*United States — Cotton Yarn*	Report	2001	132
WTO Appellate Body	*United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*	Report	2002	133
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	Article 57 **Responsibility of an international organization**			
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[a] This column shows the number of the paragraph in the current report in which the decision is discussed.

Annex II

Text of the articles on responsibility of States for internationally wrongful acts

Part One
The internationally wrongful act of a State

Chapter I
General principles

Article 1
Responsibility of a State for its internationally wrongful acts

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

Article 2
Elements of an internationally wrongful act of a State

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

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

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

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

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

Chapter II
Attribution of conduct to a State

Article 4
Conduct of organs of a State

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

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

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the

governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13
International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV
Responsibility of a State in connection with the act of another State

Article 16
Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 17
Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) The coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V
Circumstances precluding wrongfulness

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) The State has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The State has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

Part Two
Content of the international responsibility of a State

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

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

Article 29
Continued duty of performance

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

Article 30
Cessation and non-repetition

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

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

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

Article 31
Reparation

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

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

Article 32
Irrelevance of internal law

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

Article 33
Scope of international obligations set out in this part

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

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

Chapter II
Reparation for injury

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35
Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) Is not materially impossible;

(*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Part Three
The implementation of the international responsibility of a State

Chapter I
Invocation of the responsibility of a State

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) That State individually; or

(*b*) A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specifically affects that State; or

(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) The injured State has validly waived the claim;

(*b*) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) Is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II
Countermeasures

Article 49
Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) Obligations for the protection of fundamental human rights;

(*c*) Obligations of a humanitarian character prohibiting reprisals;

(*d*) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) Under any dispute settlement procedure applicable between it and the responsible State;

(*b*) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(*b*) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) The internationally wrongful act has ceased; and

(*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54
Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Part Four
General provisions

Article 55
Lex specialis

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

Article 56
Questions of State responsibility not regulated by these articles

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

Article 57
Responsibility of an international organization

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

Article 58
Individual responsibility

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

Article 59
Charter of the United Nations

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