

INTERNATIONAL COURT OF JUSTICE

**APPEAL RELATING TO THE JURISDICTION OF THE  
ICAO COUNCIL UNDER ARTICLE II, SECTION 2, OF THE  
1944 INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT**

(BAHRAIN, EGYPT AND UNITED ARAB EMIRATES v. QATAR)

**MEMORIAL OF THE KINGDOM OF BAHRAIN,  
THE ARAB REPUBLIC OF EGYPT  
AND THE UNITED ARAB EMIRATES**

**Volume II of VII**

Annexes 1 – 21

27 DECEMBER 2018



# LIST OF ANNEXES

## VOLUME II

INTERNATIONAL TREATIES AND RULES		
<b>Annex 1</b>	Convention on International Civil Aviation, signed at Chicago on 7 December 1944	1
<b>Annex 2</b>	International Air Services Transit Agreement, signed at Chicago on 7 December 1944	43
<b>Annex 3</b>	Pact of the League of Arab States, signed at Cairo on 22 March 1945	51
<b>Annex 4</b>	Agreement between the United Nations and the International Civil Aviation Organization, signed at New York on 1 October 1947	71
<b>Annex 5</b>	International Law Commission, Commentary on the Draft Convention on Arbitral Procedure adopted by the ILC at its Fifth Session (1955), Articles 14 and 30	87
<b>Annex 6</b>	ICAO, Rules for the Settlement of Differences, approved on 9 April 1957; amended on 10 November 1975	99
<b>Annex 7</b>	International Law Commission, Model Rules on Arbitral Procedure adopted by the ILC at its Tenth Session (1958)	115
<b>Annex 8</b>	Charter of the Co-operation Council for the Arab States of the Gulf, concluded at Abu Dhabi on 25 May 1981	123
<b>Annex 9</b>	United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, Part XV – Settlement of Disputes	165
<b>Annex 10</b>	League of Arab States, Arab Convention on the Suppression of Terrorism, adopted at Cairo on 22 April 1998	179

<b>Annex 11</b>	Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999	203
<b>Annex 12</b>	International Convention for the Suppression of the Financing of Terrorism, signed at New York on 9 December 1999	221
<b>Annex 13</b>	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), in Report of the International Law Commission on the Work of its Fifty-third Session (2001)	253
<b>Annex 14</b>	GCC Anti-Terrorism Agreement, signed at Kuwait City on 4 May 2004	369
<b>Annex 15</b>	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006	403
<b>Annex 16</b>	Security Agreement Between the States of the Gulf Cooperation Council, signed at Riyadh on 13 November 2012	453
<b>Annex 17</b>	ICAO, Rules of Procedure for the Council, Ninth Edition 2013	475
<b>Annex 18</b>	UNCITRAL Arbitration Rules 2013, Article 17	515
<b>Annex 19</b>	First Riyadh Agreement, 23 and 24 November 2013	519
<b>Annex 20</b>	Mechanism Implementing the Riyadh Agreement, 17 April 2014	525
<b>Annex 21</b>	Supplementary Riyadh Agreement, 16 November 2014	537

## **Annex 1**

Convention on International Civil Aviation,  
signed at Chicago on 7 December 1944

15 United Nations, *Treaty Series* 295

No. 102

---

**AFGHANISTAN, AUSTRALIA, BELGIUM,  
BOLIVIA, BRAZIL, etc.**

**Convention on International Civil Aviation. Signed at Chi-  
cago, on 7 December 1944**

*English official text<sup>1</sup> communicated by the Permanent Representative of the  
United States of America at the seat of the United Nations. The filing and  
recording took place on 19 April 1948.*

---

**AFGHANISTAN, AUSTRALIE, BELGIQUE,  
BOLIVIE, BRESIL, etc.**

**Convention relative à l'Aviation civile internationale. Signée  
à Chicago, le 7 décembre 1944**

*Texte officiel anglais<sup>1</sup> communiqué par le représentant permanent des Etats-Unis  
d'Amérique au siège de l'Organisation des Nations Unies. Le classement et  
l'inscription au répertoire ont eu lieu le 19 avril 1948.*

---

<sup>1</sup> See explanatory note (1), page 362, concerning the official languages of the Convention.

---

<sup>1</sup> Voir note explicative (1), page 363, concernant les langues officielles de la Convention.

No. 102. CONVENTION<sup>1</sup> ON INTERNATIONAL CIVIL AVIATION. SIGNED AT CHICAGO, ON 7 DECEMBER 1944

---

PREAMBLE

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

PART I. AIR NAVIGATION

CHAPTER I

GENERAL PRINCIPLES AND APPLICATION OF THE CONVENTION

*Article 1*

*Sovereignty*

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

---

<sup>1</sup> Came into force on 4 April 1947, the thirtieth day after deposit with the Government of the United States of America of the twenty-sixth instrument of ratification thereof or notification of adherence thereto, in accordance with article 91 (b). For the list of States Parties to the Convention, see page 372.

*Article 2**Territory*

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

*Article 3**Civil and state aircraft*

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

*Article 4**Misuse of civil aviation*

Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.

## CHAPTER II

## FLIGHT OVER TERRITORY OF CONTRACTING STATES

*Article 5**Right of non-scheduled flight*

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to



require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

### *Article 6*

#### *Scheduled air services*

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

### *Article 7*

#### *Cabotage*

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.

### *Article 8*

#### *Pilotless aircraft*

No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

*Article 9**Prohibited areas*

(a) Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.

(b) Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.

(c) Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas contemplated in subparagraphs (a) or (b) above to effect a landing as soon as practicable thereafter at some designated airport within its territory.

*Article 10**Landing at customs airport*

Except in a case where, under the terms of this Convention or a special authorization, aircraft are permitted to cross the territory of a contracting State without landing, every aircraft which enters the territory of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a contracting State, such aircraft shall depart from a similarly designated customs airport. Particulars of all designated customs airports shall be published by the State and transmitted to the International Civil Aviation Organization established under Part II of this Convention for communication to all other contracting States.

*Article 11**Applicability of air regulations*

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

*Article 12**Rules of the air*

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

*Article 13**Entry and clearance regulations*

The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

*Article 14**Prevention of spread of disease*

Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with inter-

national regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties.

### *Article 15*

#### *Airport and similar charges*

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

### *Article 16*

#### *Search of Aircraft*

The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.

## CHAPTER III

## NATIONALITY OF AIRCRAFT

*Article 17**Nationality of aircraft*

Aircraft have the nationality of the State in which they are registered.

*Article 18**Dual registration*

An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

*Article 19**National laws governing registration*

The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

*Article 20**Display of marks*

Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.

*Article 21**Report of registrations*

Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States.

## CHAPTER IV

## MEASURES TO FACILITATE AIR NAVIGATION

*Article 22**Facilitation of formalities*

Each contracting State agrees to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance.

*Article 23**Customs and immigration procedures*

Each contracting State undertakes, so far as it may find practicable, to establish customs and immigration procedures affecting international air navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention. Nothing in this Convention shall be construed as preventing the establishment of customs-free airports.

*Article 24**Customs duty*

(a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision.

(b) Spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another contracting State

engaged in international air navigation shall be admitted free of customs duty, subject to compliance with the regulations of the State concerned, which may provide that the articles shall be kept under customs supervision and control.

### *Article 25*

#### *Aircraft in distress*

Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention.

### *Article 26*

#### *Investigation of accidents*

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

### *Article 27*

#### *Exemption from seizure on patent claims*

(a) While engaged in international air navigation, any authorized entry of aircraft of a contracting State into the territory of another contracting State or authorized transit across the territory of such State with or without landings shall not entail any seizure or detention of the aircraft or any claim against the owner or operator thereof or any other interference therewith by or on behalf of such State or any person therein, on the ground that the construction, mechanism, parts, accessories or operation of the aircraft is an infringement of any patent, design, or model duly granted or registered in the State whose territory is entered by the aircraft, it being agreed that no deposit of security in con-

nection with the foregoing exemption from seizure or detention of the aircraft shall in any case be required in the State entered by such aircraft.

(*b*) The provisions of paragraph (*a*) of this Article shall also be applicable to the storage of spare parts and spare equipment for the aircraft and the right to use and install the same in the repair of an aircraft of a contracting State in the territory of any other contracting State, provided that any patented part or equipment so stored shall not be sold or distributed internally in or exported commercially from the contracting State entered by the aircraft.

(*c*) The benefits of this Article shall apply only to such States, parties to this Convention, as either (1) are parties to the International Convention for the Protection of Industrial Property and to any amendments thereof; or (2) have enacted patent laws which recognize and give adequate protection to inventions made by the nationals of the other States parties to this Convention.

### *Article 28*

#### *Air navigation facilities and standard systems*

Each contracting State undertakes, so far as it may find practicable, to:

(*a*) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;

(*b*) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention;

(*c*) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention.



## CHAPTER V

## CONDITIONS TO BE FULFILLED WITH RESPECT TO AIRCRAFT

*Article 29**Documents carried in aircraft*

Every aircraft of a contracting State, engaged in international navigation, shall carry the following documents in conformity with the conditions prescribed in this Convention:

- (a) Its certificate of registration;
- (b) Its certificate of airworthiness;
- (c) The appropriate licenses for each member of the crew;
- (d) Its journey log book;
- (e) If it is equipped with radio apparatus, the aircraft radio station license;
- (f) If it carries passengers, a list of their names and places of embarkation and destination;
- (g) If it carries cargo, a manifest and detailed declarations of the cargo.

*Article 30**Aircraft radio equipment*

(a) Aircraft of each contracting State may, in or over the territory of other contracting States, carry radio transmitting apparatus only if a license to install and operate such apparatus has been issued by the appropriate authorities of the State in which the aircraft is registered. The use of radio transmitting apparatus in the territory of the contracting State whose territory is flown over shall be in accordance with the regulations prescribed by that State.

(b) Radio transmitting apparatus may be used only by members of the flight crew who are provided with a special license for the purpose, issued by the appropriate authorities of the State in which the aircraft is registered.

*Article 31**Certificates of airworthiness*

Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.

*Article 32**Licenses of personnel*

(a) The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

(b) Each contracting State reserves the right to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to any of its nationals by another contracting State.

*Article 33**Recognition of certificates and licenses*

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

*Article 34**Journey log books*

There shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey, in such form as may be prescribed from time to time pursuant to this Convention.

*Article 35**Cargo restrictions*

(a) No munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State. Each State shall determine by regulations what constitutes munitions of war or implements of war for the purposes of this Article, giving due consideration, for the purposes of uniformity, to such recommendations as the International Civil Aviation Organization may from time to time make.

(b) Each contracting State reserves the right, for reasons of public order and safety, to regulate or prohibit the carriage in or above its territory of articles other than those enumerated in paragraph (a): provided that no distinction is made in this respect between its national aircraft engaged in inter-

national navigation and the aircraft of the other States so engaged; and provided further that no restriction shall be imposed which may interfere with the carriage and use on aircraft of apparatus necessary for the operation or navigation of the aircraft or the safety of the personnel or passengers.

*Article 36*

*Photographic apparatus*

Each contracting State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.

CHAPTER VI

INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES

*Article 37*

*Adoption of international standards and procedures*

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

- (a) Communications systems and air navigation aids, including ground marking;
- (b) Characteristics of airports and landing areas;
- (c) Rules of the air and air traffic control practices;
- (d) Licensing of operating and mechanical personnel;
- (e) Airworthiness of aircraft;
- (f) Registration and identification of aircraft;
- (g) Collection and exchange of meteorological information;
- (h) Log books;

- (i) Aeronautical maps and charts;
- (j) Customs and immigration procedures;
- (k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

### Article 38

#### *Departures from international standards and procedures*

Any State which finds it impracticable to comply in all respects with any such international standards or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

### Article 39

#### *Endorsement of certificates and licenses*

(a) Any aircraft or part thereof with respect to which there exists an international standard of airworthiness or performance, and which failed in any respect to satisfy that standard at the time of its certification, shall have endorsed on or attached to its airworthiness certificate a complete enumeration of the details in respect of which it so failed.

(b) Any person holding a license who does not satisfy in full the conditions laid down in the international standard relating to the class of license or certificate which he holds shall have endorsed on or attached to his license a complete enumeration of the particulars in which he does not satisfy such conditions.

*Article 40**Validity of endorsed certificates and licenses*

No aircraft or personnel having certificates or licenses so endorsed shall participate in international navigation, except with the permission of the State or States whose territory is entered. The registration or use of any such aircraft, or of any certificated aircraft part, in any State other than that in which it was originally certificated shall be at the discretion of the State into which the aircraft or part is imported.

*Article 41**Recognition of existing standards of airworthiness*

The provisions of this Chapter shall not apply to aircraft and aircraft equipment of types of which the prototype is submitted to the appropriate national authorities for certification prior to a date three years after the date of adoption of an international standard of airworthiness for such equipment.

*Article 42**Recognition of existing standards of competency of personnel*

The provisions of this Chapter shall not apply to personnel whose licenses are originally issued prior to a date one year after initial adoption of an international standard of qualification for such personnel; but they shall in any case apply to all personnel whose licenses remain valid five years after the date of adoption of such standard.

**PART II. THE INTERNATIONAL CIVIL AVIATION ORGANIZATION****CHAPTER VII****THE ORGANIZATION***Article 43**Name and composition*

An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.

*Article 44**Objectives*

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

(a) Insure the safe and orderly growth of international civil aviation throughout the world;

(b) Encourage the arts of aircraft design and operation for peaceful purposes;

(c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

(e) Prevent economic waste caused by unreasonable competition;

(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;

(g) Avoid discrimination between contracting States;

(h) Promote safety of flight in international air navigation;

(i) Promote generally the development of all aspects of international civil aeronautics.

*Article 45**Permanent seat*

The permanent seat of the Organization shall be at such place as shall be determined at the final meeting of the Interim Assembly of the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944. The seat may be temporarily transferred elsewhere by decision of the Council.

*Article 46**First meeting of Assembly*

The first meeting of the Assembly shall be summoned by the Interim Council of the above-mentioned Provisional Organization as soon as the Convention has come into force, to meet at a time and place to be decided by the Interim Council.

*Article 47**Legal capacity*

The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.

## CHAPTER VIII

## THE ASSEMBLY

*Article 48**Meetings of Assembly and voting*

(a) The Assembly shall meet annually and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General.

(b) All contracting States shall have an equal right to be represented at the meetings of the Assembly and each contracting State shall be entitled to one vote. Delegates representing contracting States may be assisted by technical advisers who may participate in the meetings but shall have no vote.

(c) A majority of the contracting States is required to constitute a quorum for the meetings of the Assembly. Unless otherwise provided in this Convention, decisions of the Assembly shall be taken by a majority of the votes cast.

*Article 49**Powers and duties of Assembly*

The powers and duties of the Assembly shall be to:

- (a) Elect at each meeting its President and other officers;

- (b) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX;
- (c) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council;
- (d) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable;
- (e) Vote an annual budget and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII;
- (f) Review expenditures and approve the accounts of the Organization;
- (g) Refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action;
- (h) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time;
- (i) Carry out the appropriate provisions of Chapter XIII;
- (j) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI;
- (k) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

#### CHAPTER IX

#### THE COUNCIL

#### *Article 50*

#### *Composition and election of Council*

(a) The Council shall be a permanent body responsible to the Assembly. It shall be composed of twenty-one contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election.

(b) In electing the members of the Council, the Assembly shall give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the



provision of facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all major geographic areas of the world are represented on the Council. Any vacancy on the Council shall be filled by the Assembly as soon as possible; any contracting State so elected to the Council shall hold office for the unexpired portion of its predecessor's term of office.

(c) No representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.

### *Article 51*

#### *President of Council*

The Council shall elect its President for a term of three years. He may be reelected. He shall have no vote. The Council shall elect from among its members one or more Vice Presidents who shall retain their right to vote when serving as acting President. The President need not be selected from among the representatives of the members of the Council but, if a representative is elected, his seat shall be deemed vacant and it shall be filled by the State which he represented. The duties of the President shall be to:

(a) Convene meetings of the Council, the Air Transport Committee, and the Air Navigation Commission;

(b) Serve as representative of the Council; and

(c) Carry out on behalf of the Council the functions which the Council assigns to him.

### *Article 52*

#### *Voting in Council*

Decisions by the Council shall require approval by a majority of its members. The Council may delegate authority with respect to any particular matter to a committee of its members. Decisions of any committee of the Council may be appealed to the Council by any interested contracting State.

### *Article 53*

#### *Participation without a vote*

Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions on any question which especially affects its interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party.

*Article 54**Mandatory functions of Council*

The Council shall:

- (a) Submit annual reports to the Assembly;
- (b) Carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention;
- (c) Determine its organization and rules of procedure;
- (d) Appoint and define the duties of an Air Transport Committee, which shall be chosen from among the representatives of the members of the Council, and which shall be responsible to it;
- (e) Establish an Air Navigation Commission, in accordance with the provisions of Chapter X;
- (f) Administer the finances of the Organization in accordance with the provisions of Chapters XII and XV;
- (g) Determine the emoluments of the President of the Council;
- (h) Appoint a chief executive officer who shall be called the Secretary General, and make provision for the appointment of such other personnel as may be necessary, in accordance with the provisions of Chapter XI;
- (i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds;
- (j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council;
- (k) Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;
- (l) Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken;

(*m*) Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX;

(*n*) Consider any matter relating to the Convention which any contracting State refers to it.

### Article 55

#### *Permissive functions of Council*

The Council may:

(*a*) Where appropriate and as experience may show to be desirable, create subordinate air transport commissions on a regional or other basis and define groups of states or airlines with or through which it may deal to facilitate the carrying out of the aims of this Convention;

(*b*) Delegate to the Air Navigation Commission duties additional to those set forth in the Convention and revoke or modify such delegations of authority at any time;

(*c*) Conduct research into all aspects of air transport and air navigation which are of international importance, communicate the results of its research to the contracting States, and facilitate the exchange of information between contracting States on air transport and air navigation matters;

(*d*) Study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto;

(*e*) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.

## CHAPTER X

### THE AIR NAVIGATION COMMISSION

#### Article 56

##### *Nomination and appointment of Commission*

The Air Navigation Commission shall be composed of twelve members appointed by the Council from among persons nominated by contracting States.

These persons shall have suitable qualifications and experience in the science and practice of aeronautics. The Council shall request all contracting States to submit nominations. The President of the Air Navigation Commission shall be appointed by the Council.

#### *Article 57*

##### *Duties of Commission*

The Air Navigation Commission shall:

(a) Consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention;

(b) Establish technical subcommissions on which any contracting State may be represented, if it so desires;

(c) Advise the Council concerning the collection and communication to the contracting States of all information which it considers necessary and useful for the advancement of air navigation.

#### CHAPTER XI

#### PERSONNEL

#### *Article 58*

##### *Appointment of personnel*

Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State.

#### *Article 59*

##### *International character of personnel*

The President of the Council, the Secretary General, and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nationals in the discharge of their responsibilities.

*Article 60**Immunities and privileges of personnel*

Each contracting State undertakes, so far as possible under its constitutional procedure, to accord to the President of the Council, the Secretary General, and the other personnel of the Organization, the immunities and privileges which are accorded to corresponding personnel of other public international organizations. If a general international agreement on the immunities and privileges of international civil servants is arrived at, the immunities and privileges accorded to the President, the Secretary General, and the other personnel of the Organization shall be the immunities and privileges accorded under that general international agreement.

## CHAPTER XII

## FINANCE

*Article 61**Budget and apportionment of expenses*

The Council shall submit to the Assembly an annual budget, annual statements of accounts and estimates of all receipts and expenditures. The Assembly shall vote the budget with whatever modification it sees fit to prescribe, and, with the exception of assessments under Chapter XV to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine.

*Article 62**Suspension of voting power*

The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization.

*Article 63**Expenses of delegations and other representatives*

Each contracting State shall bear the expenses of its own delegation to the Assembly and the remuneration, travel, and other expenses of any person whom it appoints to serve on the Council, and of its nominees or representatives on any subsidiary committees or commissions of the Organization.

## CHAPTER XIII

## OTHER INTERNATIONAL ARRANGEMENTS

*Article 64**Security arrangements*

The Organization may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace.

*Article 65**Arrangements with other international bodies*

The Council, on behalf of the Organization, may enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the Organization.

*Article 66**Functions relating to other agreements*

(a) The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.

(b) Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on December 7, 1944 shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement.

## PART III. INTERNATIONAL AIR TRANSPORT

## CHAPTER XIV

## INFORMATION AND REPORTS

*Article 67**File reports with Council*

Each contracting State undertakes that its international airlines shall, in accordance with requirements laid down by the Council, file with the Council

traffic reports, cost statistics and financial statements showing among other things all receipts and the sources thereof.

#### CHAPTER XV

#### AIRPORTS AND OTHER AIR NAVIGATION FACILITIES

##### *Article 68*

##### *Designation of routes and airports*

Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use.

##### *Article 69*

##### *Improvement of air navigation facilities*

If the Council is of the opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated, the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose. No contracting State shall be guilty of an infraction of this Convention if it fails to carry out these recommendations.

##### *Article 70*

##### *Financing of air navigation facilities*

A contracting State, in the circumstances arising under the provisions of Article 69, may conclude an arrangement with the Council for giving effect to such recommendations. The State may elect to bear all of the costs involved in any such arrangement. If the States does not so elect, the Council may agree, at the request of the State, to provide for all or a portion of the costs.

##### *Article 71*

##### *Provision and maintenance of facilities by Council*

If a contracting State so requests, the Council may agree to provide, man, maintain, and administer any or all of the airports and other air navigation

facilities, including radio and meteorological services, required in its territory for the safe, regular, efficient and economical operation of the international air services of the other contracting States, and may specify just and reasonable charges for the use of the facilities provided.

#### *Article 72*

##### *Acquisition or use of land*

Where land is needed for facilities financed in whole or in part by the Council at the request of a contracting State, that State shall either provide the land itself, retaining title if it wishes, or facilitate the use of the land by the Council on just and reasonable terms and in accordance with the laws of the State concerned.

#### *Article 73*

##### *Expenditure and assessment of funds*

Within the limit of the funds which may be made available to it by the Assembly under Chapter XII, the Council may make current expenditures for the purposes of this Chapter from the general funds of the Organization. The Council shall assess the capital funds required for the purposes of this Chapter in previously agreed proportions over a reasonable period of time to the contracting States consenting thereto whose airlines use the facilities. The Council may also assess to States that consent any working funds that are required.

#### *Article 74*

##### *Technical assistance and utilization of revenues*

When the Council, at the request of a contracting State, advances funds or provides airports or other facilities in whole or in part, the arrangement may provide, with the consent of that State, for technical assistance in the supervision and operation of the airports and other facilities, and for the payment, from the revenues derived from the operation of the airports and other facilities, of the operating expenses of the airports and the other facilities, and of interest and amortization charges.

#### *Article 75*

##### *Taking over of facilities from Council*

A contracting State may at any time discharge any obligation into which it has entered under Article 70, and take over airports and other facilities which



the Council has provided in its territory pursuant to the provisions of Articles 71 and 72, by paying to the Council an amount which in the opinion of the Council is reasonable in the circumstances. If the State considers that the amount fixed by the Council is unreasonable it may appeal to the Assembly against the decision of the Council and the Assembly may confirm or amend the decision of the Council.

#### *Article 76*

##### *Return of funds*

Funds obtained by the Council through reimbursement under Article 75 and from receipts of interest and amortization payments under Article 74 shall, in the case of advances originally financed by States under Article 73, be returned to the States which were originally assessed in the proportion of their assessments, as determined by the Council.

### CHAPTER XVI

#### JOINT OPERATING ORGANIZATIONS AND POOLED SERVICES

#### *Article 77*

##### *Joint operating organizations permitted*

Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention, including those relating to the registration of agreements with the Council. The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.

#### *Article 78*

##### *Function of Council*

The Council may suggest to contracting States concerned that they form joint organizations to operate air services on any routes or in any regions.

*Article 79**Participation in operating organizations*

A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be state-owned or partly state-owned or privately owned.

## PART IV. FINAL PROVISIONS

## CHAPTER XVII

## OTHER AERONAUTICAL AGREEMENTS AND ARRANGEMENTS

*Article 80**Paris and Habana Conventions*

Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919 or the Convention on Commercial Aviation signed at Habana on February 20, 1928, if it is a party to either. As between contracting States, this Convention supersedes the Conventions of Paris and Habana previously referred to.

*Article 81**Registration of existing agreements*

All aeronautical agreements which are in existence on the coming into force of this Convention, and which are between a contracting State and any other State or between an airline of a contracting State and any other State or the airline of any other State, shall be forthwith registered with the Council.

*Article 82**Abrogation of inconsistent arrangements*

The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A con-

tracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention.

### *Article 83*

#### *Registration of new arrangements*

Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.

## CHAPTER XVIII

### DISPUTES AND DEFAULT

### *Article 84*

#### *Settlement of disputes*

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

### *Article 85*

#### *Arbitration procedure*

If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties

to the dispute shall name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or the preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

#### *Article 86*

##### *Appeals*

Unless the Council decides otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

#### *Article 87*

##### *Penalty for non-conformity of airline*

Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article.

#### *Article 88*

##### *Penalty for non-conformity by State*

The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.

## CHAPTER XIX

## WAR

*Article 89**War and emergency conditions*

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

## CHAPTER XX

## ANNEXES

*Article 90**Adoption and amendment of Annexes*

(a) The adoption by the Council of the Annexes described in Article 54, subparagraph (1), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.

(b) The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto.

## CHAPTER XXI

## RATIFICATIONS, ADHERENCES, AMENDMENTS, AND DENUNCIATIONS

*Article 91**Ratification of Convention*

(a) This Convention shall be subject to ratification by the signatory States. The instruments of ratification shall be deposited in the archives of the Government of the United States of America, which shall give notice of the date of the deposit to each of the signatory and adhering States.

(b) As soon as this Convention has been ratified or adhered to by twenty-six States it shall come into force between them on the thirtieth day after deposit of the twenty-sixth instrument. It shall come into force for each State ratifying thereafter on the thirtieth day after the deposit of its instrument of ratification.

(c) It shall be the duty of the Government of the United States of America to notify the government of each of the signatory and adhering States of the date on which this Convention comes into force.

#### *Article 92*

##### *Adherence to Convention*

(a) This Convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict.

(b) Adherence shall be effected by a notification addressed to the Government of the United States of America and shall take effect as from the thirtieth day from the receipt of the notification by the Government of the United States of America, which shall notify all the contracting States.

#### *Article 93*

##### *Admission of other States*

States other than those provided for in Articles 91 and 92 (a) may, subject to approval by any general international organization set up by the nations of the world to preserve peace, be admitted to participation in this Convention by means of a four-fifths vote of the Assembly and on such conditions as the Assembly may prescribe: provided that in each case the assent of any State invaded or attacked during the present war by the State seeking admission shall be necessary.

#### *Article 94*

##### *Amendment of Convention*

(a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.

(b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that

any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.

#### *Article 95*

##### *Denunciation of Convention*

(a) Any contracting State may give notice of denunciation of this Convention three years after its coming into effect by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States.

(b) Denunciation shall take effect one year from the date of the receipt of the notification and shall operate only as regards the State effecting the denunciation.

#### CHAPTER XXII

#### DEFINITIONS

#### *Article 96*

For the purpose of this Convention the expression:

(a) "Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

(b) "International air service" means an air service which passes through the air space over the territory of more than one State.

(c) "Airline" means any air transport enterprise offering or operating an international air service.

(d) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail.

#### SIGNATURE OF CONVENTION

IN WITNESS WHEREOF, the undersigned plenipotentiaries, having been duly authorized, sign this Convention on behalf of their respective governments on the dates appearing opposite their signatures.

DONE at Chicago the seventh day of December 1944, in the English language. A text drawn up in the English, French, and Spanish languages<sup>1</sup>, each of which shall be of equal authenticity, shall be open for signature at Washington, D. C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign or adhere to this Convention.

For Afghanistan:

A. Hosayn AZIZ

For the Government of the Commonwealth of Australia:

Arthur S. DRAKEFORD

For Belgium:

Vicomte du PARC

April 9th 1945

For Bolivia:

Tonl. Al. PACHECO

For Brazil:

Fernando LOBO

May 29th, 1945

For Canada:

H J SYMINGTON

<sup>1</sup>The Convention was signed in the English original version formulated at the International Civil Aviation Conference which took place at Chicago from 1 November to 7 December 1944. No trilingual text has been opened for signature as provided for in the Convention.

The Government of the United States of America in the note of the State Department of 22 September 1947 addressed to the Chiefs of Mission of the Governments concerned, after having drawn their attention to the various problems involved in this respect and to the fact that the Convention as drawn up at the Chicago Conference did not place a specific responsibility upon the United States Government, as depository of the Convention, to prepare the trilingual text, concluded: "The Department of State considers that it is not advisable to proceed at this time with preparations to open for signature at Washington trilingual texts of those documents. On the contrary, the United States Government proposes to present the question to the Council of the International Civil Aviation Organization with a request that the question be placed on the agenda for the next meeting of the Assembly of that Organization. It is believed that this procedure will afford the most efficacious means by which the governments concerned may, after due consideration of all the factors and problems involved, make such decisions with respect thereto as they deem appropriate."

The French translation of the Convention as it appears in the *Treaty Series* has been made by the Secretariat.



## For Chile:

R. SAÉNZ  
G. BISQUERT.  
R. MAGALLANES B.

## For China:

CHANG Kia-ngau

## For Colombia:

Gonzalo RESTREPO JARAMILLO October 31— 1947

## For Costa Rica:

F de P GUTIÉRREZ March 10<sup>th</sup> 1945

## For Cuba:

Gmo BELT Abril 20, 1945

## For Czechoslovakia:

V. S. HURBAN April 18, 45.

## For the Dominican Republic:

C. A. McLAUGHLIN

## For Ecuador:

J. A. CORREA  
FRANCISCO GOMEZ JURADO

## For Egypt:

M HASSAN  
M ROUSHDY  
M. A. KHALIFA

## Fo El Salvador:

Felipe VEGA-GÓMEZ May 9, 1945.

## For Ethiopia:

Ras H. S. IMRU. Feb. 10, 1947:

## For France:

M. HYMANS  
C. LEBEL  
BOURGES  
P. LOCUSSOL

For Greece:

D T Noti BOTZARIS  
A. J. ARGYROPOULOS.

For Guatemala:

Osc MORALES L. Jan. 30 - 1945.

For Haiti:

G. Edouard ROY

For Honduras:

E. P. LEFEBVRE

For Iceland:

Thor THORS.

For India:

G V BEWOOR

For Iran:

M. SHAYESTEH

For Iraq:

Ali JAWDAT

For Ireland:

Robt. BRENNAN  
John LEYDON.  
John J. HEARNE  
T. J. O'DRISCOLL

For Lebanon:

C CHAMOUN  
F EL-HOSS

For Liberia:

Walter F WALKER

For Luxembourg:

Hugues LE GALLAIS July 9th 1945

For Mexico:

Pedro A. CHAPA

For the Netherlands:

COPES  
F C ARONSTEIN

For the Government of New Zealand:

Daniel Giles SULLIVAN

For Nicaragua:

R. E. FRIZELL

For Norway:

W. Munthe MORGENSTIERNE

January 30, 1945.

For Panama:

The Delegation of the Republic of Panama signs this Convention *ad referendum*, and subject to the following reservations:

1. Because of its strategic position and responsibility in the protection of the means of communication in its territory, which are of the utmost importance to world trade, and vital to the defense of the Western Hemisphere, the Republic of Panama reserves the right to take, with respect to all flights through the air space above its territory, all measures which in its judgment may be proper for its own security or the protection of said means of communication.

2. The Republic of Panama understands that the technical annexes to which reference is made in the Convention constitute recommendations only, and not binding obligations.

For Paraguay:

Celso R. VELÁZQUEZ

July 27, 1945.

For Peru:

A REVOREDO  
J. S. KOECHLIN  
Luis ALVARADO.  
F ELGUERA  
Gillmo VAN OORDT LEÓN.

For the Philippine Commonwealth:

J HERNANDEZ  
Urbano A. ZAFRA  
J H FOLEY

## For Poland:

Zbyslaw CIOLKOSZ  
Dr. H. J. GÓRECKI.  
Stefan J. KONORSKI  
Witold A. URBANOWICZ  
Ludwik H. GOTTLIEB

## For Portugal:

Mário DE FIGUEREDO  
Alfredo DELESQUE DOS SANTOS CINTRA  
Duarte CALHIEROS  
VASCO VIEIRA GARIN

## For Spain:

E. TERRADAS.  
Germán BARAIBAR  
Duarte CALHEIROS

## For Sweden:

R. KUMLIN

## For Switzerland:

Charles BRUGGMANN

July 6th 1945.

## For Syria:

N KAHALE

## For Turkey:

S. KOCAK  
F. SAHINBAS  
Orhan H. EROL

## For the Union of South Africa:

D. D. FORSYTH

4th June, 1945.

For the Government of the United Kingdom  
of Great Britain and Northern Ireland:

SWINTON

## For the United States of America:

Adolf A. BERLE Jr.  
 Alfred L. BULWINKLE  
 Chas. A. WOLVERTON  
 F. LAGUARDIA.  
 Edward WARNER  
 L. Welch POGUE  
 William A. M. BURDEN

## For Uruguay:

Carl CARBAJAL  
 Col. Medardo R. FARIAS

## For Venezuela:

## For Yugoslavia:

## For Denmark:

Henrik KAUFFMANN

## For Thailand:

M. R. SENI PRAMOJ

## LIST OF STATES PARTIES TO THE CONVENTION

INDICATING THE DATES OF DEPOSIT OF INSTRUMENT OF RATIFICATION OR NOTIFICATION OF ADHERENCE WITH THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE DATES OF ENTRY INTO FORCE OF THE CONVENTION IN RESPECT OF EACH PARTY

	Date of deposit of instrument of ratifica- tion or notification of adherence		Date of entry into force of the Convention	
Poland .....	6 April	1945	4 April	1947
Turkey .....	20 December	1945	4 April	1947
Nicaragua .....	28 December	1945	4 April	1947
Paraguay .....	21 January	1946	4 April	1947
Dominican Republic .....	25 January	1946	4 April	1947
Canada .....	13 February	1946	4 April	1947
China .....	20 February	1946	4 April	1947
Peru .....	8 April	1946	4 April	1947
Argentine .....	4 June	1946	4 April	1947

	Date of deposit of instrument of ratifica- tion or notification of adherence		Date of entry into force of the Convention	
Mexico .....	25 June	1946	4 April	1947
Brazil .....	8 July	1946	4 April	1947
United States of America.....	9 August	1946	4 April	1947
Ireland .....	31 October	1946	4 April	1947
Sweden .....	7 November	1946	4 April	1947
Switzerland .....	6 February	1947	4 April	1947
Liberia .....	11 February	1947	4 April	1947
Portugal .....	27 February	1947	4 April	1947
Denmark .....	28 February	1947	4 April	1947
Australia .....	1 March	1947	4 April	1947
Czechoslovakia .....	1 March	1947	4 April	1947
Ethiopia .....	1 March	1947	4 April	1947
India .....	1 March	1947	4 April	1947
Philippines Republic .....	1 March	1947	4 April	1947
Union of South Africa.....	1 March	1947	4 April	1947
United Kingdom .....	1 March	1947	4 April	1947
Spain .....	5 March	1947	4 April	1947
New Zealand .....	7 March	1947	6 April	1947
Chile .....	11 March	1947	10 April	1947
Egypt .....	13 March	1947	12 April	1947
Greece .....	13 March	1947	12 April	1947
Transjordan .....	18 March	1947	17 April	1947
Iceland .....	21 March	1947	20 April	1947
France .....	25 March	1947	24 April	1947
Netherlands .....	26 March	1947	25 April	1947
Venezuela .....	1 April	1947	1 May	1947
Afghanistan .....	4 April	1947	4 May	1947
Bolivia .....	4 April	1947	4 May	1947
Thailand (Siam) .....	4 April	1947	4 May	1947
Guatemala .....	28 April	1947	28 May	1947
Belgium .....	5 May	1947	4 June	1947
Norway .....	5 May	1947	4 June	1947
Iraq .....	2 June	1947	2 July	1947
El Salvador .....	11 June	1947	11 July	1947
Colombia .....	31 October	1947	30 November	1947
Italy <sup>1</sup> .....	31 October	1947	30 November	1947
Pakistan .....	6 November	1947	6 December	1947
Haiti .....	25 March	1948	24 April	1948

<sup>1</sup> The Convention came into force with respect to Italy by virtue of the fulfilment, on 31 October 1947, of the conditions provided in article 93 of the Convention and of the terms and conditions stipulated in the resolution of the Assembly of the International Civil Aviation Organization of 16 May 1947.

## **Annex 2**

International Air Services Transit Agreement,  
signed at Chicago on 7 December 1944

84 United Nations, *Treaty Series* 389

No. 252

---

**AFGHANISTAN, ARGENTINA, AUSTRALIA,  
BELGIUM, BOLIVIA, etc.**

**International Air Services Transit Agreement. Opened for  
signature at Chicago, on 7 December 1944**

*Official text: English.*

*Filed and recorded at the request of the United States of America on 30 March 1951.*

---

**AFGHANISTAN, ARGENTINE, AUSTRALIE,  
BELGIQUE, BOLIVIE, etc.**

**Accord relatif au transit des services aériens internatio-  
naux. Ouvert à la signature à Chicago, le 7 décembre  
1944**

*Texte officiel anglais.*

*Classé et inscrit au répertoire à la demande des États-Unis d'Amérique le 30 mars  
1951.*



No. 252. INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT<sup>1</sup>. OPENED FOR SIGNATURE AT CHICAGO, ON 7 DECEMBER 1944

The States which sign and accept this International Air Services Transit Agreement, being members of the International Civil Aviation Organization, declare as follows :

ARTICLE I

Section I

Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services :

- (1) The privilege to fly across its territory without landing;
- (2) The privilege to land for non-traffic purposes.

<sup>1</sup> In accordance with article VI, the Agreement came into force as between the Netherlands and Norway on 30 January 1945, the date on which the Government of the United States of America received the second notification of acceptance thereof, the first such notification having been received from the Netherlands on 12 January 1945. For each State having subsequently notified its acceptance the Agreement came into force on the date of receipt of such notification.

The list of States parties to the Agreement is as follows :

Afghanistan . . . . .	17 May 1945	Liberia . . . . .	19 March 1945
Argentina . . . . .	4 June 1946	Luxembourg . . . . .	28 April 1948
Australia . . . . .	28 August 1945	Mexico . . . . .	25 June 1946
Belgium . . . . .	19 July 1945	Netherlands . . . . .	30 January 1945
Bolivia . . . . .	4 April 1947	New Zealand . . . . .	19 April 1945
Canada . . . . .	10 February 1945	Nicaragua . . . . .	28 December 1945
Cuba . . . . .	20 June 1947	Norway . . . . .	30 January 1945
Czechoslovakia . . . . .	18 April 1945	Pakistan* . . . . .	15 August 1947
Denmark . . . . .	1 December 1948	Paraguay . . . . .	27 July 1945
Egypt . . . . .	13 March 1947	Philippines . . . . .	22 March 1946
El Salvador . . . . .	1 June 1945	Poland . . . . .	6 April 1945
Ethiopia . . . . .	22 March 1945	Spain . . . . .	30 July 1945
France . . . . .	24 June 1948	Sweden . . . . .	19 November 1945
Greece . . . . .	21 September 1945	Switzerland . . . . .	6 July 1945
Guatemala . . . . .	28 April 1947	Thailand . . . . .	6 March 1947
Honduras . . . . .	13 November 1945	Turkey . . . . .	6 June 1945
Iceland . . . . .	21 March 1947	Union of South Africa . . . . .	30 November 1945
India . . . . .	2 May 1945	United Kingdom . . . . .	31 May 1945
Iran . . . . .	19 April 1950	United States . . . . .	8 February 1945
Iraq . . . . .	15 June 1945	Venezuela . . . . .	28 March 1946
Jordan . . . . .	18 March 1947		

\* In a notification given to the Government of the United States of America by Pakistan on 24 March 1948 it is advised that : " ...by virtue of the provisions in Clause 4 of the Schedule of the Indian Independence (International Arrangements) Order, 1947, the International Air Services Transit Agreement signed by United India continues to be binding after the partition on the Dominion of Pakistan."

The privileges of this section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. In areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities.

#### Section 2

The exercise of the foregoing privileges shall be in accordance with the provisions of the Interim Agreement<sup>1</sup> on International Civil Aviation and, when it comes into force, with the provisions of the Convention<sup>2</sup> on International Civil Aviation, both drawn up at Chicago on December 7, 1944.

#### Section 3

A contracting State granting to the airlines of another contracting State the privilege to stop for non-traffic purposes may require such airlines to offer reasonable commercial service at the points at which such stops are made.

Such requirement shall not involve any discrimination between airlines operating on the same route, shall take into account the capacity of the aircraft, and shall be exercised in such a manner as not to prejudice the normal operations of the international air services concerned or the rights and obligations of a contracting State.

#### Section 4

Each contracting State may, subject to the provisions of this Agreement,

(1) Designate the route to be followed within its territory by any international air service and the airports which any such service may use;

(2) Impose or permit to be imposed on any such service just and reasonable charges for the use of such airports and other facilities; these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council of the International Civil Aviation Organization established under the above-mentioned Convention, which

<sup>1</sup> International Civil Aviation Conference, Chicago, Illinois, 1 November to 7 December 1944. *Final Act and Related Documents*, United States of America, Department of State publication 2282, Conference Series 64.

<sup>2</sup> United Nations, *Treaty Series*, Vol. 15, p. 295; Vol. 26, p. 420; Vol. 32, p. 402; Vol. 33, p. 352; Vol. 44, p. 346 and Vol. 51, p. 336.

shall report and make recommendations thereon for the consideration of the State or States concerned.

#### *Section 5*

Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.

### ARTICLE II

#### *Section 1*

A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it, may request the Council to examine the situation. The Council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve the difficulty, the Council may make appropriate findings and recommendations to the contracting States concerned. If thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the Assembly of the above-mentioned Organization that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State.

#### *Section 2*

If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the above-mentioned Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention.

## ARTICLE III

This Agreement shall remain in force as long as the above-mentioned Convention; provided, however, that any contracting State, a party to the present Agreement, may denounce it on one year's notice given by it to the Government of the United States of America, which shall at once inform all other contracting States of such notice and withdrawal.

## ARTICLE IV

Pending the coming into force of the above-mentioned Convention, all references to it herein, other than those contained in Article II, Section 2, and Article V, shall be deemed to be references to the Interim Agreement on International Civil Aviation drawn up at Chicago on December 7, 1944; and references to the International Civil Aviation Organization, the Assembly, and the Council shall be deemed to be references to the Provisional International Civil Aviation Organization, the Interim Assembly, and Interim Council, respectively.

## ARTICLE V

For the purposes of this Agreement, "territory" shall be defined as in Article 2 of the above-mentioned Convention.

## ARTICLE VI

## SIGNATURES AND ACCEPTANCES OF AGREEMENT

The undersigned delegates to the International Civil Aviation Conference, convened in Chicago on November 1, 1944, have affixed their signatures to this Agreement with the understanding that the Government of the United States of America shall be informed at the earliest possible date by each of the governments on whose behalf the Agreement has been signed whether signature on its behalf shall constitute an acceptance of the Agreement by that government and an obligation binding upon it.

Any State a member of the International Civil Aviation Organization may accept the present Agreement as an obligation binding upon it by notification of its acceptance to the Government of the United States, and such acceptance shall become effective upon the date of the receipt of such notification by that Government.

This Agreement shall come into force as between contracting States upon its acceptance by each of them. Thereafter it shall become binding as to each

other State indicating its acceptance to the Government of the United States on the date of the receipt of the acceptance by that Government. The Government of the United States shall inform all signatory and accepting States of the date of all acceptances of the Agreement, and of the date on which it comes into force for each accepting State.

IN WITNESS WHEREOF, the undersigned, having been duly authorized, sign this Agreement on behalf of their respective governments on the dates appearing opposite their respective signatures.

DONE at Chicago the seventh day of December, 1944, in the English language. A text drawn up in the English, French, and Spanish languages,<sup>1</sup> each of which shall be of equal authenticity, shall be opened for signature at Washington, D.C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign and accept this Agreement.

For Afghanistan :

A. HOSAYN AZIZ

For the Government of the Commonwealth of Australia :

F. W. EGGLESTON

July 4, 1945

<sup>1</sup> The Agreement was signed in the English original version formulated at the International Civil Aviation Conference which took place at Chicago from 1 November to 7 December 1944. No trilingual text, as provided for in the Agreement, has been opened for signature.

The Government of the United States of America, in the note of the State Department of 22 September 1947 addressed to the Chiefs of Mission of the Governments concerned, after having drawn their attention to the various problems involved in this respect and to the fact that the Agreement, as well as all other documents drawn up at the Chicago Conference, did not place a specific responsibility upon the United States Government, as depository of the documents, to prepare the trilingual text, concluded : "The Department of State considers that it is not advisable to proceed at this time with preparations to open for signature at Washington trilingual texts of those documents. On the contrary, the United States Government proposes to present the question to the Council of the International Civil Aviation Organization with a request that the question be placed on the agenda for the next meeting of the Assembly of that Organization. It is believed that this procedure will afford the most efficacious means by which the Governments concerned may, after due consideration of all the factors and problems involved, make such decisions with respect thereto as they deem appropriate."

The following further information was furnished by the Permanent Representative of the United States of America to the United Nations in his note transmitting the Agreement for filing and recording :

"In this connection it may also be pointed out that the problem relating to French and Spanish texts of the Convention on International Civil Aviation, one of the other Chicago documents referred to in the above-mentioned circular note, was included on the agenda of the Third Assembly of the International Civil Aviation Organization held at Montreal in June 1949. Pursuant to a resolution (A3-2) adopted by the Assembly at that time, the Council of ICAO undertook to provide texts of the 1944 Convention in French and Spanish to be used only for the internal purposes of this Organization. It is the understanding of the Department of State, however, that no steps to provide similar translations of the text of the 1944 Air Services Transit Agreement have been taken."



### **Annex 3**

Pact of the League of Arab States,  
signed at Cairo on 22 March 1945

70 United Nations, *Treaty Series* 237

**No. 241**

---

**EGYPT, IRAQ, TRANSJORDAN, LEBANON,  
SAUDI ARABIA, SYRIA, YEMEN**

**Pact of the League of Arab States. Signed at Cairo, on  
22 March 1945**

*Official text : Arabic.*

*Filed and recorded at the request of Egypt on 29 August 1950.*

---

**ÉGYPTE, IRAK, TRANSJORDANIE, LIBAN,  
ARABIE SAOUDITE, SYRIE, YÉMEN**

**Pacte de la Ligue des États arabes. Signé au Caire, le  
22 mars 1945**

*Texte officiel arabe.*

*Classé et inscrit au répertoire à la demande de l'Égypte le 29 août 1950.*



## ملحق خاص بالتعاون مع البلاد العربية غير المشتركة في مجلس الجامعة

نظراً لأن الدول المشتركة في الجامعة ستباشر في مجلسها وفي لجانها شؤوناً يعود خيرها وأثرها على العالم العربي كله ولأن أمانى البلاد العربية غير المشتركة في المجلس ينبغي له أن يربعاها وأن يعمل على تحقيقها .

فان الدول الموقعة على ميثاق الجامعة العربية يعينها بوجه خاص أن توصى مجلس الجامعة ، عند النظر في إشراك تلك البلاد في اللجان المشار إليها في الميثاق ، بأن يذهب في التعاون معها إلى أبعد مدى مستطاع ، وفيما عدا ذلك ، ألا يدخر جهداً لتعرف حاجاتها وتفهم أمانيتها وآمالها ، وبأن يعمل بعد ذلك على صلاح أحوالها وتأمين مستقبلها بكل ما تهيئه الوسائل السياسية من أسباب .

## ملحق خاص بتعيين الأمين العام للجامعة

اتفقت الدول الموقعة على هذا الميثاق على تعيين سعادة عبد الرحمن عزام بك أميناً عاماً لجامعة الدول العربية .

ويكون تعيينه لمدة سنتين. ويحدد مجلس الجامعة فيما بعد النظام المستقبل للائمانه العامة .

### ملحق خاص بفلسطين

منذ نهاية الحرب العظمى الماضية، سقطت عن البلاد العربية المنسلخة من الدولة العثمانية، ومنها فلسطين، ولاية تلك الدولة، وأصبحت مستقلة بنفسها، غير تابعة لأي دولة أخرى، وأعلنت معاهدة لوزان أن أمرها لأصحاب الشأن فيها وإذا لم تكن قد مكنت من تولى أمورها فان ميثاق العصبة في سنة ١٩١٩ لم يمتز النظام الذي وضعه لها الأعلى أساس الاعتراف باستقلالها. فوجودها واستقلالها الدولي من الناحية الشرعية أمر لا شك فيه، كما أنه لا شك في استقلال البلاد العربية الأخرى، وإذا كانت المظاهر الخارجية لذلك الاستقلال ظلت محجوبة لأسباب قاهرة، فلا يسوغ أن يكون ذلك حائلا دون اشتراكها في أعمال مجلس الجامعة.

ولذلك ترى الدول الموقعة على ميثاق الجامعة العربية انه نظرا لظروف فلسطين الخاصة وإلى أن يتمتع هذا القطر بممارسة استقلاله فعلا يتولى مجلس الجامعة أمر اختيار مندوب عربي من فلسطين للاشتراك في أعماله.

مادة ١٨ — إذا رأت إحدى دول الجامعة أن تـدسحب منها أبلغت المجلس عزمها على الانسحاب قبل تنفيذـه بسنة .

وللمجلس الجامعة أن يعتبر أية دولة لا تقوم بواجبات هذا الميثاق منفصلة عن الجامعة وذلك بقرار يصدره بإجماع الدول عدا الدولة المشار إليها .

مادة ١٩ — يجوز بموافقة ثلثي دول الجامعة تعديل هذا الميثاق وعلى الخصوص لجعل الروابط بينها أمتن وأوثق ولإنشاء محكمة عدل عربية ولتنظيم صلات الجامعة بالهيئات الدولية التي قد تنشأ في المستقبل لكفالة الأمن والسلام .

ولا يـت في التعديل إلا في دور الانعقاد التالي للدور الذي يقدم فيه الطلب .

وللدولة التي لا تقبل التعديل أن تـدسحب عند تنفيذـه دون التقيد بأحكام المادة السابقة .

مادة ٢٠ — يصدق على هذا الميثاق وملاحقته وفقاً للنظم الأساسية المرعية في كل من الدول المتعاقدة :

وتودع وثائق التصديق لدى الأمانة العامة ويصبح الميثاق نافذاً قبل من صدق عليه بعد انقضاء خمسة عشر يوماً من تاريخ استلام الأمين العام وثائق التصديق من أربع دول .

حـرر هذا الميثاق باللغة العربية في القاهرة بتاريخ ٨ ربيع الثاني سنة ١٣٦٤ ( ٢٢ مارس سنة ١٩٤٥ ) من نسخة واحدة تحفظ في الأمانة العامة .

وتسلم صورة منها مطابقة للأصل لكل دولة من دول الجامعة .

مادة ١٣ — يعدّ الأمين العام مشروع ميزانية الجامعة ويعرضه على المجلس للموافقة عليه قبل بدء كل سنة مالية .

ويحدد المجلس نصيب كل دولة من دول الجامعة في النفقات ويجوز أن يعيد النظر فيه عند الاقتضاء .

مادة ١٤ — يتمتع أعضاء مجلس الجامعة وأعضاء بلانها ووظيفوها الذين ينص عليهم في النظام الداخلي بالامتيازات والحصانة الدبلوماسية أثناء قيامهم بعملهم .

وتكون مصنونة حرمة المباني التي تشغلها هيئات الجامعة .

مادة ١٥ — ينعقد المجلس للمرة الأولى بدعوة من رئيس الحكومة المصرية وبعد ذلك بدعوة من الأمين العام .

ويتناوب ممثلو دول الجامعة رئاسة المجلس في كل انعقاد عادي .

مادة ١٦ — فيما عدا الأحوال المنصوص عليها في هذا الميثاق يكفئ بأغلبية الآراء لاتخاذ المجلس قرارات نافذة في الشؤون الآتية :

( أ ) شؤون الموظفين .

( ب ) إقرار ميزانية الجامعة .

( ج ) وضع نظام داخلي لكل من المجلس واللجان والأمانة العامة .

( د ) تقرير رفض أدوار الاجتماع .

مادة ١٧ — تودع الدول المشتركة في الجامعة الأمانة العامة نسخاً من جميع المعاهدات والاتفاقات التي عقدها أو تعقدتها مع أية دولة أخرى من دول الجامعة أو غيرها .

مادة ٧ - ما يقرره المجلس بالاجماع يكون ملزماً لجميع الدول المشتركة في الجامعة ، وما يقرره المجلس بالأكثرية يكون ملزماً لمن يقبله .

وفي الحالتين تنفذ قرارات المجلس في كل دولة وفقاً لنظمها الأساسية .

مادة ٨ - تحترم كل دولة من الدول المشتركة في الجامعة نظام الحكم القائم في دول الجامعة الأخرى وتعتبره حقاً من حقوق تلك الدول وتتعهد بأن لاتقوم بعمل يرمى إلى تغيير ذلك النظام فيها .

مادة ٩ - لدول الجامعة العربية الرغبة فيما بينها في تعاون أوثق وروابط أقوى مما نص عليه هذا الميثاق أن تعقد بينها من الاتفاقات ما تشاء لتحقيق هذه الأغراض .

والمعاهدات والاتفاقات التي سبق أن عقدها أو التي تعتمدها فيما بعد دولة من دول الجامعة مع أية دولة أخرى لاتلزم ولا تقيد الأعضاء الآخرين .

مادة ١٠ - تكون القاهرة المقر الدائم لجامعة الدول العربية ، وللمجلس الجامعة أن يجتمع في أى مكان آخر يعينه .

مادة ١١ - ينعقد مجلس الجامعة انعقاداً عادياً مرتين في العام في كل من شهرى مارس وأكتوبر ، وينعقد بصفة غير عادية كلما دعت الحاجة إلى ذلك بناء على طلب دولتين من دول الجامعة .

مادة ١٢ - يكون للجامعة أمانة عامة دائمة تتألف من أمين عام وأمناء مساعدين وعدد كاف من الموظفين .

ويعين مجلس الجامعة بأكثرية ثلثي دول الجامعة الأمين العام . ويعين الأمين العام بموافقة المجلس الأمناء المساعدين والموظفين الرئيسيين في الجامعة .

ويضع مجلس الجامعة نظاماً داخلياً لأعمال الأمانة العامة وشؤون الموظفين .

ويكون الأمين العام في درجة سفير والأمناء المساعدون في درجة

وزراء مفوضين .

ويعين في ملحق لهذا الميثاق أول أمين عام للجامعة .

ويجوز أن يشترك في اللجان المتقدم ذكرها أعضاء يمثلون البلاد العربية الأخرى . ويجدد المجلس الأحوال التي يجوز فيها اشتراك أولئك الممثلين وقواعد التمثيل .

مادة ٥ — لا يجوز الالتجاء إلى القوة لفض المنازعات بين دولتين أو أكثر من دول الجامعة ، فإذا نشب بينها خلاف لا يتعلق باستقلال الدولة أو سيادتها أو سلامة أراضيها ولجأ المتنازعون إلى المجلس لفض هذا الخلاف كان قراره عندئذ نافذا وملزما .

وفي هذه الحالة لا يكون للدول التي وقع بينها الخلاف الاشتراك في مداولات المجلس وقراراته .

ويتوسط المجلس في الخلاف الذي يخشى منه وقوع حرب بين دولة من دول الجامعة وبين أية دولة أخرى من دول الجامعة أو غيرها للتوفيق بينهما .  
وتصدر قرارات التحكيم والقرارات الخاصة بالتوسط بأغلبية الآراء .

مادة ٦ — إذا وقع اعتداء من دولة على دولة من أعضاء الجامعة أو خشي وقوعه فللدولة المعتدى عليها أو المهتدة بالاعتداء أن تطلب دعوة المجلس للانعقاد فوراً .

ويقرر المجلس التدابير اللازمة لدفع هذا الاعتداء ويصدر القرار بالإجماع فإذا كان الاعتداء من إحدى دول الجامعة لا يدخل في حساب الإجماع رأى الدولة المعتدىة .

وإذا وقع الاعتداء بحيث يجعل حكومة الدولة المعتدى عليها عاجزة عن الاتصال بالمجلس فلممثل تلك الدولة فيه أن يطلب انعقاده لل غاية المبينة في الفقرة السابقة ، وإذا تعذر على الممثل الاتصال بمجلس الجامعة حق لأية دولة من أعضائها أن تطلب انعقاده .

كذلك من أغراضها تعاون الدول المشتركة فيها تعاوناً وثيقاً بخسب نظم كل دولة منها وأحوالها في الشؤون الآتية :

( أ ) الشؤون الاقتصادية والمالية ويدخل في ذلك التبادل التجاري والجمارك والعملية وأمور الزراعة والصناعة .

( ب ) شؤون المواصلات ويدخل في ذلك السكك الحديدية والطرق والطيران والملاحة والبرق والبريد .

( ج ) شؤون الثقافة .

( د ) شؤون الجنسية والجوازات والتأشيرات وتنفيذ الأحكام وتسليم المجرمين .

( هـ ) الشؤون الاجتماعية .

( و ) الشؤون الصحية .

مادة ٣ — يكون للجامعة مجلس يتألف من ممثل الدول المشتركة في الجامعة ويكون لكل منها صوت واحد مهما يكن عدد ممثليها .

وتكون مهمته القيام على تحقيق أغراض الجامعة ومراعاة تنفيذ ما تبرمه الدول المشتركة فيها من اتفاقات في الشؤون المشار إليها في المادة السابقة وفي غيرها .

ويدخل في مهمة المجلس كذلك تقرير وسائل التعاون مع الهيئات الدولية التي قد تنشأ في المستقبل لكفالة الأمن والسلام ولتنظيم العلاقات الاقتصادية والاجتماعية .

مادة ٤ — تؤلف لكل من الشؤون المبينة في المادة الثانية لجنة خاصة تمثل فيها الدول المشتركة في الجامعة وتتولى هذه اللجان وضع قواعد التعاون ومداه وصياغتها في شكل مشروعات اتفاقات تعرض على المجلس للنظر فيها تمهيداً لعرضها على الدول المذكورة .

### حضرة صاحب الجلالة ملك مصر

قد أناب عن مصر :

- حضرة صاحب الدولة محمود فهمى النقراشى باشا ، رئيس مجلس الوزراء .
- حضرة صاحب السعادة محمد حسين هيكل باشا ، رئيس مجلس الشيوخ .
- حضرة صاحب المعالي عبد الحميد بدوى باشا ، وزير الخارجية .
- حضرة صاحب المعالي مكرم عبيد باشا ، وزير المالية .
- حضرة صاحب المعالي محمد حافظ رمضان باشا ، وزير العدل .
- حضرة صاحب المعالي عبد الرزاق أحمد السنهورى بك ، وزير المعارف العمومية .
- حضرة صاحب العزة عبد الرحمن عنزام بك ، الوزير المفوض بوزارة الخارجية .

### حضرة صاحب الجلالة ملك اليمن

قد أناب عن اليمن :

الذين بعد تبادل وثائق تفويضهم التي تخوّلهم سلطة كاملة والتي وجدت صحيحة ومستوفاة الشكل ، قد اتفقوا على ما يأتى :

مادة ١ — تتألف جامعة الدول العربية من الدول العربية المستقلة الموقوفة على هذا الميثاق .

ولكل دولة عربية مستقلة الحق فى أن تنضم إلى الجامعة ، فاذا رغبت فى الانضمام قدمت طلبا بذلك يودع لدى الأمانة العامة الدائمة ويعرض على المجلس فى أول اجتماع يعقد بعد تقديم الطلب .

مادة ٢ — الغرض من الجامعة توثيق الصلات بين الدول المشتركة فيها وتنسيق خططها السياسية تحقيقا للتعاون بينها وصيانة لاستقلالها وسيادتها والنظر بصفة عامة فى شؤون البلاد العربية ومصالحها .



### حضرة صاحب السمو الملكي أمير شرق الأردن .

قد أناب عن شرق الأردن :

- حضرة صاحب الفخامة سمير الرفاعي باشا ، رئيس الوزراء .
- حضرة صاحب المعالي سعيد المفتي باشا ، وزير الداخلية .
- صاحب العزة سليمان التابلسي بك ، نائب سر الحكومة .

### حضرة صاحب الجلالة ملك العراق .

قد أناب عن العراق :

- حضرة صاحب المعالي السيد أرشد العمري ، وزير الخارجية .
- حضرة صاحب الفخامة السيد علي جودة الأيوبي ، وزير العراق المفوض  
بواشنطن .
- حضرة صاحب المعالي السيد تحسين العسكري وزير العراق المفوض بالقاهرة .

### حضرة صاحب الجلالة ملك المملكة العربية السعودية .

قد أناب عن المملكة العربية السعودية :

- سعادة الشيخ يوسف ياسين ، نائب وزير خارجية المملكة العربية السعودية .
- سعادة السيد خير الدين الزركلي ، مستشاره مفوضية المملكة العربية السعودية  
بالقاهرة .

### حضرة صاحب الفخامة رئيس الجمهورية اللبنانية .

قد أناب عن لبنان :

- حضرة صاحب الدولة السيد عبد الحميد كرامي ، رئيس الوزراء .
- سعادة السيد يوسف سالم ، وزير لبنان المفوض بالقاهرة .

N° 241. ARABIC TEXT — TEXTE ARABE

## ميثاق جامعة الدول العربية

إن حضرة صاحب الفخامة رئيس الجمهورية السورية ،  
 وحضرة صاحب السمو الملكي أمير شرق الأردن ،  
 وحضرة صاحب الجلالة ملك العراق ،  
 وحضرة صاحب الجلالة ملك المملكة العربية السعودية ؛  
 وحضرة صاحب الفخامة رئيس الجمهورية اللبنانية ؛  
 وحضرة صاحب الجلالة ملك مصر ؛  
 وحضرة صاحب الجلالة ملك اليمن ؛

تثبيتاً للعلاقات الوثيقة والروابط العديدة التي تربط بين الدول العربية ،  
 وحرصاً على دعم هذه الروابط وتوطيدها على أساس احترام استقلال تلك  
 الدول وسيادتها ، وتوجيهها لجهودها إلى ما فيه خير البلاد العربية قاطبة  
 وصلاح أحوالها وتأمين مستقبلها وتحقيق أمانها وآمالها ، واستجابة للرأى  
 العربى العام فى جميع الأقطار العربية ؛

قد اتفقوا على عقد ميثاق لهذه الغاية وأنابوا عنهم المفوضين الآتية  
 أسماءهم :

حضرة صاحب الفخامة رئيس الجمهورية السورية

قد أناب عن سوريا :

حضرة صاحب الدولة السيد فارس الخورى ، رئيس مجلس الوزراء .

حضرة صاحب الدولة السيد جميل مردم بك ، وزير الخارجية .

TRANSLATION <sup>1</sup> — TRADUCTION <sup>2</sup>No. 241. PACT<sup>3</sup> OF THE LEAGUE OF ARAB STATES.  
SIGNED AT CAIRO, ON 22 MARCH 1945

HIS EXCELLENCY THE PRESIDENT OF THE SYRIAN REPUBLIC,  
HIS ROYAL HIGHNESS THE EMIR OF TRANSJORDAN,  
HIS MAJESTY THE KING OF IRAQ,  
HIS MAJESTY THE KING OF SAUDI-ARABIA,  
HIS EXCELLENCY THE PRESIDENT OF THE LEBANESE REPUBLIC,  
HIS MAJESTY THE KING OF EGYPT,  
HIS MAJESTY THE KING OF YEMEN,

With a view to strengthen the close relations and numerous ties which bind the Arab States,

And out of concern for the cementing and reinforcing of these bonds on the basis of respect for the independence and sovereignty of these States,

And in order to direct their efforts toward the goal of the welfare of all the Arab States, their common weal, the guarantee of their future and the realization of their aspirations,

And in response to Arab public opinion in all the Arab countries,

Have agreed to conclude a pact to this effect and have delegated as their plenipotentiaries those whose names are given below :—

THE PRESIDENT OF THE SYRIAN REPUBLIC HAS DELEGATED FOR SYRIA :—  
H.E. FARIS AL KHURY, President of the Council of Ministers.  
H.E. JAMIL MARDAM BEY, Minister of Foreign Affairs.

<sup>1</sup> Translation by the Government of Egypt.

<sup>2</sup> Traduction du Gouvernement de l'Égypte.

<sup>3</sup> Came into force on 10 May 1945, fifteen days after the deposit of the fourth instrument of ratification with the Secretary-General of the League of Arab States, in accordance with article 20. Following are the dates of deposit of the instrument of ratification and of the entry into force of the Pact in respect of each Contracting Party :

	<i>Date of deposit of the instrument of ratification</i>		<i>Date of entry into force</i>	
Transjordan . . . . .	10 April	1945	10 May	1945
Egypt. . . . .	12 April	1945	10 May	1945
Saudi Arabia . . . . .	16 April	1945	10 May	1945
Iraq . . . . .	25 April	1945	10 May	1945
Lebanon. . . . .	16 May	1945	1 June	1945
Syria . . . . .	19 May	1945	4 June	1945
Yemen . . . . .	9 February	1946	24 February	1946

H.R.H. THE EMIR OF TRANSJORDAN HAS DELEGATED FOR TRANSJORDAN :—

H.E. SAMIR AL RIFAI PASHA, President of the Council of Ministers.

H.E. SAID AL MUFTI PASHA, Minister of the Interior.

SULAIMAN AL NABULSI BEY, Secretary of the Council of Ministers.

H.M. THE KING OF IRAQ HAS DELEGATED FOR IRAQ :—

H.E. ARSHAD AL UMARY, Minister of Foreign Affairs.

H.E. ALY JAWDAT AL AYYUBI, Minister Plenipotentiary of Iraq in Washington.

H.E. TAHSIN AL ASKARI, Minister Plenipotentiary of Iraq in Cairo.

H.M. THE KING OF SAUDI-ARABIA HAS DELEGATED FOR SAUDI-ARABIA :—

H.E. SHEIKH YUSUF YASIN, Assistant Minister of Foreign Affairs.

H.E. KHAIR AL DIN AL ZIRIKLY, Counsellor of the Saudi Arabian Legation in Cairo.

THE PRESIDENT OF THE LEBANESE REPUBLIC HAS DELEGATED FOR LEBANON :—

H.E. ABD ALHAMID KARAMI, President of the Council of Ministers.

H.E. YUSUF SALEM, Minister Plenipotentiary of Lebanon in Cairo.

H.M. THE KING OF EGYPT HAS DELEGATED FOR EGYPT :—

H.E. MAHMOUD FAHMY EL NOKRACHI PASHA, President of the Council of Ministers.

H.E. ABD EL HAMID BADAWI PASHA, Minister of Foreign Affairs.

H.E. MOHAMED HUSSEIN HEIKAL PASHA, President of the Senate.

H.E. MAKRAM EBEID PASHA, Minister of Finance.

H.E. MOHAMED HAFEZ RAMADAN PASHA, Minister of Justice.

H.E. ABD AL RAZZAK AHMAD AL SANHURY BEY, Minister of Education.

H.E. ABD AL RAHMAN AZZAM BEY, MINISTER Plenipotentiary in the Ministry of Foreign Affairs.

H.M. THE KING OF YEMEN HAS DELEGATED FOR YEMEN :—

Who after the exchange of the credentials granting them full authority, which were found valid and in proper form, have agreed upon the following:—

*Article 1.*—The League of Arab State shall be composed of the independent Arab States that have signed this Pact.

Every independent Arab State shall have the right to adhere to the

League. Should it desire to adhere, it shall present an application to this effect which shall be filed with the permanent General Secretariat and submitted to the Council at its first meeting following the presentation of the application.

*Article 2.*—The purpose of the League is to draw closer the relations between member States and co-ordinate their political activities with the aim of realizing a close collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries.

It also has among its purposes a close co-operation of the member States with due regard to the structure of each of these States and the conditions prevailing therein, in the following matters:—

- (a) Economic and financial matters, including trade, customs, currency, agriculture and industry.
- (b) Communications, including railways, roads, aviation, navigation, and posts and telegraphs.
- (c) Cultural matters.
- (d) Matters connected with nationality, passports, visas, execution of judgments and extradition.
- (e) Social welfare matters.
- (f) Health matters.

*Article 3.*—The League shall have a Council composed of the representatives of the member States. Each State shall have one vote, regardless of the number of its representatives.

The Council shall be entrusted with the function of realizing the purpose of the League and of supervising the execution of the agreements concluded between the member States on matters referred to in the preceding article or on other matters.

It shall also have the function of determining the means whereby the League will collaborate with the international organizations which may be created in the future to guarantee peace and security and organize economic and social relations.

*Article 4.*—A special Committee shall be formed for each of the categories enumerated in Article 2, on which the member States shall be represented. These committees shall be entrusted with establishing the basis and scope of co-operation in the form of draft agreements which shall be submitted to the Council for its consideration preparatory to their being submitted to the States referred to.

Delegates representing the other Arab countries may participate in these Committees as members. The Council shall determine the circumstances in which the participation of these representatives shall be allowed as well as the basis of the representation.

*Article 5.*—The recourse to force for the settlement of disputes between two or more member States shall not be allowed. Should there arise among them a dispute that does not involve the independence of a State, its sovereignty or its territorial integrity, and should the two contending parties apply to the Council for the settlement of this dispute, the decision of the Council shall then be effective and obligatory.

In this case, the States among whom the dispute has arisen shall not participate in the deliberations and decisions of the Council.

The Council shall mediate in a dispute which may lead to war between two member States or between a member State and another State in order to conciliate them.

The decisions relating to arbitration and mediation shall be taken by a majority vote.

*Article 6.*—In case of aggression or threat of aggression by a State against a member State, the attacked or threatened with attack may request an immediate meeting of the Council.

The Council shall determine the necessary measures to repel this aggression. Its decision shall be taken unanimously. If the aggression is committed by a member State the vote of that State will not be counted in determining unanimity.

If the aggression is committed in such a way as to render the Government of the State attacked unable to communicate with the Council, the representative of that State in the Council may request the Council to convene for the purpose set forth in the preceding paragraph. If the representative is unable to communicate with the Council, it shall be the right of any member State to request a meeting of the Council.

*Article 7.*—The decisions of the Council taken by a unanimous vote shall be binding on all the member States of the League; those that are reached by a majority vote shall bind only those that accept them.

In both cases the decisions of the Council shall be executed in each State in accordance with the fundamental structure of that State.

*Article 8.*—Every member State of the League shall respect the form of government obtaining in the other States of the League, and shall recognize the form of government obtaining as one of the rights of those States, and shall pledge itself not to take any action tending to change that form.

*Article 9.*—The States of the Arab League that are desirous of establishing among themselves closer collaboration and stronger bonds than those provided for in the present Pact, may conclude among themselves whatever agreements they wish for this purpose.

The treaties and agreements already concluded or that may be concluded in the future between a member State and any other State, shall not be binding on the other members.

*Article 10.*—The permanent seat of the League of Arab States shall be Cairo. The Council of the League may meet at any other place it designates.

*Article 11.*—The Council of the League shall meet in ordinary session twice a year, during the months of March and October. It shall meet in extraordinary session at the request of two member States whenever the need arises.

*Article 12.*—The League shall have a permanent General Secretariat, composed of a Secretary-General, Assistant Secretaries and an adequate number of officials.

The Secretary-General shall be appointed by the Council upon the vote of two-thirds of the States of the League. The Assistant Secretaries and the principal officials shall be appointed by the Secretary-General with the approval of the Council.

The Council shall establish an internal organization for the General Secretariat as well as the conditions of service of the officials.

The Secretary-General shall have the rank of Ambassador; and the Assistant Secretaries the rank of Ministers Plenipotentiary.

The first Secretary-General of the League is designated in an annex to the present Pact.

*Article 13.*—The Secretary-General shall prepare the draft of the budget of the League and submit it for approval to the Council before the beginning of each fiscal year.

The Council shall determine the share of each of the States of the League in the expenses. It shall be allowed to revise the share if necessary.

*Article 14.*—The members of the Council of the League, the members of its Committees and such of its officials as shall be designated in the internal organization, shall enjoy, in the exercise of their duties, diplomatic privileges and immunities.

The premises occupied by the institutions of the League shall be inviolable.

*Article 15.*—The Council shall meet the first time at the invitation of the Head of the Egyptian Government. Later meetings shall be convoked by the Secretary-General.

In each ordinary session the representatives of the States of the League shall assume the chairmanship of the Council in rotation.

*Article 16.*—Except for the cases provided for in the present Pact, a majority shall suffice for decisions by the Council effective in the following matters :—

- (a) Matters concerning the officials.
- (b) The approval of the budget of the League.
- (c) The internal organization of the Council, the Committees and the General Secretariat.
- (d) The termination of the sessions.

*Article 17.*—The member States of the League shall file with the General Secretariat copies of all treaties and agreements which they have concluded or will conclude with any other State, whether a member of the League or otherwise.

*Article 18.*—If one of the member States intends to withdraw from the League, the Council shall be informed of its intention one year before the withdrawal takes effect.

The Council of the League may consider any State that is not fulfilling the obligations resulting from this Pact as excluded from the League, by a decision taken by a unanimous vote of all the States except the State referred to.

*Article 19.*—The present Pact may be amended with the approval of two-thirds of the members of the League in particular for the purpose of strengthening the ties between them, of creating an Arab Court of Justice, and of regulating the relations of the League with the international organizations that may be created in the future to guarantee security and peace.

No decision shall be taken as regards an amendment except in the session following that in which it is proposed.

Any State that does not approve an amendment may withdraw from the League when the amendment becomes effective, without being bound by the provisions of the preceding article.

*Article 20.*—The present Pact and its annexes shall be ratified in accordance with the fundamental form of government in each of the contracting States.



The instruments of ratification shall be filed with the General Secretariat and the present Pact shall become binding on the States that ratify in fifteen days after the Secretary-General receives instruments of ratification from four States.

The present Pact has been drawn up in the Arabic language in Cairo and dated 8 Rabi al Thani 1364 (March 22, 1945),<sup>1</sup> in a single text which shall be deposited with the General Secretariat.

A certified copy shall be sent to each of the States of the League.

#### ANNEX ON PALESTINE

At the end of the last Great War, Palestine, together with the other Arab States, was separated from the Ottoman Empire. She became independent, not belonging to any other State.

The Treaty of Lausanne proclaimed that her fate should be decided by the parties concerned in Palestine.

Even though Palestine was not able to control her own destiny, it was on the basis of the recognition of her independence that the Covenant of the League of Nations determined a system of government for her.

Her existence and her independence among the nations can, therefore, no more be questioned *de jure* than the independence of any of the other Arab States.

Even though the outward signs of this independence have remained veiled as a result of *force majeure*, it is not fitting that this should be an obstacle to the participation of Palestine in the work of the League.

Therefore, the States signatory to the Pact of the Arab League, consider that in view of Palestine's special circumstances, the Council of the League should designate an Arab delegate from Palestine to participate in its work until this country enjoys actual independence.

#### ANNEX ON CO-OPERATION WITH ARAB COUNTRIES NOT MEMBERS OF THE COUNCIL OF THE LEAGUE

Whereas the member States of the League will have to deal either in the Council or in the Committees with questions affecting the interests of the entire Arab world,

And whereas the Council cannot fail to take into account the aspirations of the Arab countries not members of the Council and to work toward their realization,

<sup>1</sup> The Pact was signed on 22 March 1945 by the Contracting Parties, with the exception of Yemen, which signed on 5 May 1945.

The States signatory to the Pact of the Arab League strongly urge that the Council of the League should co-operate with them as far as possible in having them participate in the Committees referred to in the Pact, and in other matters should not spare any effort to learn their needs and understand their aspirations and should moreover work for their common weal and the guarantee of their future by whatever political means available.

ANNEX ON THE APPOINTMENT OF SECRETARY-  
GENERAL OF THE LEAGUE

The States signatory to the present Pact have agreed to appoint Abd Al Rahman Azzam Bey Secretary-General of the League of Arab States.

His appointment shall be for a term of two years. The Council of the League shall later determine the future organization of the General Secretariat.

## **Annex 4**

Agreement between the United Nations and the International Civil Aviation Organization, signed at New York on 1 October 1947

8 United Nations, *Treaty Series* 315

**No. 45**

---

**UNITED NATIONS  
and  
INTERNATIONAL CIVIL AVIATION ORGANIZATION**

**Protocol concerning the entry into force of the Agreement  
between the United Nations and the International Civil  
Aviation Organization. Signed at New York, on 1 Octo-  
ber 1947**

*English and French official texts communicated by the Secretary-General of the  
United Nations. The filing and recording took place on 1 October 1947.*

---

**ORGANISATION DES NATIONS UNIES  
et  
ORGANISATION DE L'AVIATION CIVILE  
INTERNATIONALE**

**Protocole relatif à l'entrée en vigueur de l'accord conclu entre  
les Nations Unies et l'Organisation de l'aviation civile  
internationale. Signé à New-York, le 1er octobre 1947**

*Textes officiels anglais et français communiqués par le Secrétaire général de  
l'Organisation des Nations Unies. Le classement et l'inscription au réper-  
toire ont eu lieu le 1er octobre 1947.*

No. 45. PROTOCOL CONCERNING THE ENTRY INTO FORCE OF THE AGREEMENT<sup>1</sup> BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL CIVIL AVIATION ORGANIZATION. SIGNED AT NEW YORK, ON 1 OCTOBER 1947

---

Article 57 of the Charter of the United Nations provides that specialized agencies established by inter-governmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields shall be brought into relationship with the United Nations. Article 63 of the Charter provides that the Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations, and specifies that such agreements shall be subject to approval by the General Assembly.

Article 64 of the Convention on International Civil Aviation provides that the International Civil Aviation Organization may, with respect to air matters within its competence directly affecting world security, enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace. Article 65 of the Convention provides that the Organization may enter into agreements with international bodies for the maintenance of common services, for common arrangements concerning personnel and for the facilitation of its work.

The Economic and Social Council on 21 June 1946 directed its Committee on Negotiations with Specialized Agencies to enter into negotiations with the Provisional International Civil Aviation Organization for the purpose of bringing it into relationship with the United Nations and to submit a report of the negotiations to the third session of the Council, including therein a draft preliminary agreement based on these negotiations.

The Interim Council of the Provisional International Civil Aviation Organization, having been informed of the decision of the Economic and Social Council aforementioned, appointed a committee to enter into negotiations with the Committee on Negotiations with Specialized Agencies to prepare a draft agreement.

---

<sup>1</sup> Came into force on 13 May 1947, in accordance with Article XXI having been approved by the General Assembly of the United Nations on 14 December 1946 and by the Assembly of the International Civil Aviation Organization on 13 May 1947.

Negotiations between the Committee on Negotiations with Specialized Agencies of the Economic and Social Council and the Negotiating Committee of the Interim Council took place at Lake Success on 27 and 28 September 1946 and resulted in a draft agreement between the United Nations and the International Civil Aviation Organization. In this draft agreement a decision regarding relations with the International Court of Justice was deferred pending further consideration thereof by the Economic and Social Council.

This draft agreement was signed on 30 September 1946 by Mr. Roland Lebeau, Acting Chairman of the Committee of the Economic and Social Council on Negotiations with Specialized Agencies, and Sir James Cotton, Chairman of the Negotiations Delegation of the Provisional International Civil Aviation Organization. On 3 October 1946 the Economic and Social Council recommended that the Agreement between the United Nations and the International Civil Aviation Organization be approved by the General Assembly with the insertion in the Agreement of the authorization regarding relations with the International Court of Justice.

The Interim Council of the Provisional International Civil Aviation Organization decided on 29 October 1946 to recommend to the Assembly of the International Civil Aviation Organization the approval of the draft agreement.

The General Assembly of the United Nations decided on 14 December 1946 to approve the Agreement with the International Civil Aviation Organization, provided that "that Organization complies with any decision of the General Assembly regarding Franco Spain".

The General Assembly decided to recommend "that the Franco Government of Spain be debarred from membership in international agencies established by or brought into relationship with the United Nations, and from participation in conferences or other activities which may be arranged by the United Nations or by these agencies, until a new and acceptable government is formed in Spain".

On 13 May 1947 the Assembly of the International Civil Aviation Organization approved an agreement between it and the United Nations by a resolution, of which a certified copy is appended to this Protocol as Annex A. On the same date the Assembly of the International Civil Aviation Organization acted to comply with the recommendation contained in the aforesaid resolution of the General Assembly of the United Nations relating to debarment of the Franco Government of Spain from membership in international agencies, a certified copy of which is appended to this Protocol as Annex B.

Article XXII of the Agreement provides that the Agreement shall come into force on its approval by the General Assembly of the United Nations and by the Assembly of the International Civil Aviation Organization. The Agreement accordingly came into force on 13 May 1947. A copy of the authentic text of the Agreement is attached heretc.

IN FAITH WHEREOF we have appended our signatures this first day of October one thousand nine hundred and forty-seven to two original copies of the present Protocol, the text of which consists of versions in the English and French languages, which are equally authentic. One of the original copies will be filed and recorded with the Secretariat of the United Nations, and the other will be deposited in the archives of the International Civil Aviation Organization.

(Signed) Trygve LIE  
Secretary-General of the United Nations

(Signed) Edward WARNER  
President of the Council of the  
International Civil Aviation Organization

## ANNEXES TO THE PROTOCOL

### A N N E X A

#### RESOLUTION ADOPTED BY THE FIRST ASSEMBLY OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

*Whereas* the Interim Council of PICAO has negotiated a draft agreement of relationship between ICAO and the United Nations in accordance with resolution XXI of the Interim Assembly of PICAO and has submitted this Agreement to the Assembly of ICAO for approval; and

*Whereas* it is the wish of the Assembly of ICAO to enter into an agreement with the United Nations in the terms submitted by the Interim Council of PICAO;

*Now, therefore, the Assembly of ICAO* hereby approves the Agreement of relationship with the United Nations and resolves:

(a) To authorize the Council to enter into such supplementary arrangements with the Secretary-General of the United Nations for the implementation of the Agreement, in accordance with article XIX thereof, as may be found desirable in the light of the operating experience of the two Organizations;

(b) To authorize the Council to enter into negotiations with the United Nations for the conclusion of further appropriate arrangements between ICAO and the United Nations with respect to air matters within the competence of ICAO, as provided for in article XX. Such arrangements, however, shall be subject to final approval by the Assembly;

(c) To authorize the President of the Council to sign with the appropriate official of the United Nations a protocol bringing the agreement of relationship between the United Nations and ICAO into force;

(d) To authorize the Council to enter into negotiations with the United Nations for revising the agreement of relationship, as provided for in article XXI thereof. Revisions negotiated by the Council shall be subject to the final approval of the Assembly.

## ANNEX B

### RESOLUTION ADOPTED BY THE FIRST ASSEMBLY OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

*Whereas* the General Assembly of the United Nations has recommended that the Franco Government of Spain be debarred from membership in specialized agencies established by or brought into relationship with the United Nations and from participation in conferences or other activities which may be arranged by the United Nations or by these agencies until a new and acceptable government is formed in Spain; and

*Whereas* the General Assembly, in approving the draft agreement between the United Nations and ICAO, made it a condition of its approval that ICAO comply with any decision of the General Assembly regarding Franco Spain;

*Now, therefore, the Assembly of ICAO*, wishing to conform with the recommendation of the General Assembly and to comply with the condition of the General Assembly to its approval of the draft agreement between the United Nations and ICAO, hereby approves the following proposed amendment to the Convention on International Civil Aviation, in accordance with article 94 of the Convention:

#### *Article 93 bis*

“(a) Notwithstanding the provision of articles 91, 92 and 93 above,

“(1) A State whose government the General Assembly of the United Nations has recommended be debarred from membership in international agencies established by or brought into relationship with the United Nations shall automatically cease to be a member of the International Civil Aviation Organization.



“(2) A State which has been expelled from membership in the United Nations shall automatically cease to be a member of the International Civil Aviation Organization unless the General Assembly of the United Nations attaches to its act of expulsion a recommendation to the contrary.

“(b) A State which ceases to be a member of the International Civil Aviation Organization as a result of the provisions of paragraph (a) above may, after approval by the General Assembly of the United Nations, be readmitted to the International Civil Aviation Organization upon application and upon approval by a majority of the Council.

“(c) Members of the Organization which are suspended from the exercise of the rights and privileges of membership in the United Nations shall, upon request of the latter, be suspended from the rights and privileges of membership in this Organization.”

## AGREEMENT BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

### PREAMBLE

Article 57 of the Charter of the United Nations makes provision for bringing the specialized agencies, established by inter governmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields, into relationship with the United Nations.

Article 64 of the Convention on International Civil Aviation provides that the International Civil Aviation Organization may, with respect to air matters within its competence, directly affecting world security, enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace. Article 65 of the Convention provides that the Organization may enter into agreements with international bodies for the maintenance of common service, for common arrangements concerning personnel and for the facilitation of its work.

Therefore the United Nations and the International Civil Aviation Organization agree as follows:

### *Article I*

The United Nations recognizes the International Civil Aviation Organization as the specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein.

*Article II*

## APPLICATIONS FOR MEMBERSHIP BY CERTAIN STATES

Any application submitted to the International Civil Aviation Organization by States other than those provided for in articles 91 and 92 (*a*) of the Convention on International Civil Aviation to become parties to the Convention, shall be immediately transmitted by the secretariat of the Organization to the General Assembly of the United Nations. The General Assembly may recommend the rejection of such application, and any such recommendation shall be accepted by the Organization. If no such recommendation is made by the General Assembly at the first session following receipt of the application, the application shall be decided upon by the Organization in accordance with the procedure established in article 93 of the Convention.

*Article III*

## RECIPROCAL REPRESENTATION

1. Representatives of the United Nations shall be invited to attend the meetings of the Assembly of the International Civil Aviation Organization, the Council of the Organization and their commissions and committees and such general regional or other special meetings as the Organization may convene, and to participate, without vote, in the deliberations of these bodies.

2. Representatives of the International Civil Aviation Organization shall be invited to attend meetings of the Economic and Social Council and of its own commissions and committees and to participate, without vote, in the deliberations of these bodies with respect to items on their agenda relating to civil aviation matters.

3. Representatives of the International Civil Aviation Organization shall be invited to attend meetings of the General Assembly of the United Nations for the purposes of consultation on civil aviation matters.

4. Representatives of the International Civil Aviation Organization shall be invited to attend meetings of the main Committees of the General Assembly when civil aviation matters are under discussion, and to participate, without vote, in such discussions.

5. Representatives of the International Civil Aviation Organization shall be invited to attend meetings of the Trusteeship Council of the United Nations and to participate, without vote, in the deliberations thereof, with respect to items on its agenda relating to civil aviation matters.

6. Written statements submitted by the International Civil Aviation Organization on matters relating to civil aviation shall be distributed as soon as possible by the Secretariat of the United Nations to all members of the principal and subsidiary organs of the United Nations, and their commissions or committees as appropriate. Similarly, written statements of any of the principal or subsidiary organs of the United Nations and their commissions or committees shall be distributed as soon as possible by the secretariat of the Organization to all members of the Assembly or Council of the Organization as appropriate.

#### *Article IV*

##### PROPOSAL OF AGENDA ITEMS

After such preliminary consultation as may be necessary, the International Civil Aviation Organization shall include on the agenda of the Assembly or Council of the Organization items proposed to it by the United Nations. Reciprocally the Economic and Social Council and its commissions, and the Trusteeship Council shall include on their agenda items proposed by the Assembly or Council of the Organization.

#### *Article V*

##### RECOMMENDATIONS OF THE UNITED NATIONS

1. The International Civil Aviation Organization, having regard to the obligation of the United Nations to promote the objectives set forth in Article 55 of the Charter and the function and power of the Economic and Social Council, under Article 62 of the Charter, to make or initiate studies and reports with respect to international, economic, social, cultural, educational, health and related matters and to make recommendations concerning these matters to the specialized agencies concerned, and having regard also to the responsibility of the United Nations, under Articles 58 and 63 of the Charter, to make recommendations for the co-ordination of the policies and activities of such specialized agencies, agrees to arrange for the submission, as soon as possible, to its appropriate organ of all formal recommendations which the United Nations may make to it.

2. The International Civil Aviation Organization agrees to enter into consultation with the United Nations upon request, with respect to such recommendations, and in due course to report to the United Nations on the action taken by the Organization or by its members to give effect to such recommendations, or on the other results of their consideration.

3. The International Civil Aviation Organization affirms its intention of co-operating in whatever measures may be necessary to make co-ordination of the activities of specialized agencies and those of the United Nations fully effective. In particular, it agrees to participate in, and to co-operate with any body or bodies which the Economic and Social Council may establish for the purpose of facilitating such co-ordination, and to furnish such information as may be required for the carrying out of this purpose.

#### *Article VI*

##### EXCHANGE OF INFORMATION AND DOCUMENTS

1. Subject to such arrangements as may be necessary for the safeguarding of confidential material, the fullest and promptest exchange of information and documents shall be made between the United Nations and the International Civil Aviation Organization.

2. Without prejudice to the generality of the provisions of paragraph 1:

(a) The International Civil Aviation Organization agrees to transmit to the United Nations regular reports on its activities;

(b) The International Civil Aviation Organization agrees to comply to the fullest extent practicable with any request which the United Nations may make for the furnishing of special reports, studies or information, subject to the condition set forth in article XVI; and

(c) The Secretary-General of the United Nations shall, upon request, consult with the appropriate officer of the Organization with respect to the furnishing to the Organization of such information as may be of special interest to it.

#### *Article VII*

##### ASSISTANCE TO THE SECURITY COUNCIL

The International Civil Aviation Organization agrees to co-operate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security.

#### *Article VIII*

##### ASSISTANCE TO THE TRUSTEESHIP COUNCIL

The International Civil Aviation Organization agrees to co-operate with the Trusteeship Council in the carrying out of its functions, and in particular

agrees that it will to the greatest extent possible render such assistance as the Trusteeship Council may request in regard to matters with which the Organization is concerned.

*Article IX*

NON-SELF-GOVERNING TERRITORIES

The International Civil Aviation Organization agrees to co-operate with the United Nations in giving effect to the principles and obligations set forth in Chapter XI of the Charter with regard to matters affecting the well-being and development of the peoples of Non-Self-Governing Territories.

*Article X*

RELATIONS WITH THE INTERNATIONAL COURT OF JUSTICE

1. The International Civil Aviation Organization agrees to furnish any information which may be requested by the International Court of Justice in pursuance of Article 34 of the Statute of the Court.

2. The General Assembly of the United Nations authorizes the International Civil Aviation Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the International Civil Aviation Organization and the United Nations or other specialized agencies.

3. Such request may be addressed to the Court by the Assembly or the Council of the International Civil Aviation Organization.

4. When requesting the International Court of Justice to give an advisory opinion, the International Civil Aviation Organization shall inform the Economic and Social Council of the request.

*Article XI*

HEADQUARTERS AND REGIONAL OFFICES

1. The International Civil Aviation Organization, having regard to the desirability of the headquarters of specialized agencies being situated at the permanent seat of the United Nations and to the advantages that flow from such centralization, agrees to consult the United Nations before making any further decision concerning the location of its permanent headquarters.

2. Having due regard to the special needs of international civil aviation, any regional or branch offices which the International Civil Aviation Organiza-

tion may establish shall, so far as is practicable, be closely associated with such regional or branch offices as the United Nations may establish.

### *Article XII*

#### PERSONNEL ARRANGEMENTS

1. The United Nations and the International Civil Aviation Organization recognize that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination, and with this end in view agree to develop common personnel standards, methods and arrangements designed to avoid unjustified differences in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate interchange of personnel in order to obtain the maximum benefit from their services.

2. The United Nations and the International Civil Aviation Organization agree to co-operate to the fullest extent possible in achieving these ends and in particular they agree:

(a) To consult together concerning the establishment of an International Civil Service Commission to advise on the means by which common standards of recruitment in the secretariats of the United Nations and of the specialized agencies may be ensured;

(b) To consult together concerning other matters relating to the employment of their officers and staff, including conditions of service, duration of appointments, classification, salary scales and allowances, retirement and pension rights and staff regulations and rules, with a view to securing as much uniformity in these matters as shall be found practicable;

(c) To co-operate in the interchange of personnel, when desirable, on a temporary or a permanent basis, making due provision for the retention of seniority and pension rights;

(d) To co-operate in the establishment and operation of suitable machinery for the settlement of disputes arising in connexion with the employment of personnel and related matters.

### *Article XIII*

#### STATISTICAL SERVICES

1. The United Nations and the International Civil Aviation Organization agree to strive for maximum co-operation, the elimination of all undesirable dupli-

cation between them, and the most efficient use of their technical personnel in their respective collection, analysis, publication, standardization, improvement and dissemination of statistical information. They agree to combine their efforts to secure the greatest possible usefulness and utilization of statistical information and to minimize the burdens placed upon national Governments and other organizations from which such information may be collected.

2. The International Civil Aviation Organization recognizes the United Nations as the central agency for the collection, analysis, publication, standardization, improvement and dissemination of statistics serving the general purposes of international organizations.

3. The United Nations recognizes the International Civil Aviation Organization as the central agency responsible for the collection, analysis, publication, standardization, improvement and dissemination of statistics within its special sphere, without prejudice to the rights of the United Nations to concern itself with such statistics so far as they may be essential for its own purposes or for the improvement of statistics throughout the world.

4. The United Nations shall, in consultation with the International Civil Aviation Organization and with the other specialized agencies where appropriate, develop administrative instruments and procedures through which effective statistical co-operation may be secured between the United Nations and the agencies brought into relationship with it.

5. It is recognized as desirable that the collection of statistical information shall not be duplicated by the United Nations or any of its specialized agencies whenever it is practicable for any of them to utilize information or material which another may have available.

6. In order to build up a central collection of statistical information for general use, it is agreed that data supplied to the International Civil Aviation Organization for incorporation in its basic statistical series or special reports should, so far as practicable, be made available to the United Nations.

7. It is agreed that data supplied to the United Nations for incorporation in its basic statistical series or special reports should, so far as practicable and appropriate, be made available to the International Civil Aviation Organization.

*Article XIV*

## ADMINISTRATIVE AND TECHNICAL SERVICES

1. The United Nations and the International Civil Aviation Organization recognize the desirability, in the interest of administrative and technical uniformity and of the most efficient use of personnel and resources, of avoiding whenever possible the establishment and operation of competitive or overlapping facilities and services among the United Nations and the specialized agencies.

2. Accordingly, the United Nations and the International Civil Aviation Organization agree to consult together concerning the establishment and use of common administrative and technical services and facilities in addition to those referred to in articles XII, XIII and XV, in so far as the establishment and use of such services may from time to time be found practicable and appropriate.

3. Arrangements shall be made between the United Nations and the International Civil Aviation Organization with regard to the registration and deposit of official documents.

*Article XV*

## BUDGETARY AND FINANCIAL ARRANGEMENTS

1. The International Civil Aviation Organization recognizes the desirability of establishing close budgetary and financial relationships with the United Nations in order that the administrative operations of the United Nations and of the specialized agencies shall be carried out in the most efficient and economical manner possible, and that the maximum measure of co-ordination and uniformity with respect to these operations shall be secured.

2. The United Nations and the International Civil Aviation Organization agree to co-operate to the fullest extent possible in achieving these ends, and to consult together concerning the desirability of making appropriate arrangements for the inclusion of the budget of the Organization within a general budget of the United Nations. Any such arrangements which may be made shall be defined in a supplementary agreement between the two Organizations.

3. The Secretary-General of the United Nations and the appropriate officer of the International Civil Aviation Organization shall arrange for consultation in connexion with the preparation of the budget.

4. The International Civil Aviation Organization agrees to transmit its proposed budget to the United Nations annually at the same time as such budget is transmitted to its members. The General Assembly shall examine the administrative budget or proposed budget of the Organization and may make such recommendations as it may consider necessary.



5. Representatives of the International Civil Aviation Organization shall be entitled to participate, without vote, in the deliberations of the General Assembly or any Committee thereof at all times when the budget of the Organization or general administrative or financial questions affecting the Organization are under consideration.

6. The United Nations may undertake the collection of contributions from those members of the International Civil Aviation Organization which are also Members of the United Nations, in accordance with such arrangements as may be defined by a later agreement between the United Nations and the Organization.

7. The United Nations shall, upon its own initiative or upon the request of the International Civil Aviation Organization, arrange for studies to be undertaken concerning other financial and fiscal questions of interest to the Organization and to other specialized agencies, with a view to the provision of common services and the securing of uniformity in such matters.

8. The International Civil Aviation Organization agrees to conform, as far as may be practicable, to standard practices and forms recommended by the United Nations.

#### *Article XVI*

##### FINANCING OF SPECIAL SERVICES

1. In the event of the International Civil Aviation Organization's being faced with the necessity of incurring substantial extra expense as a result of any request which the United Nations may make for special reports, studies or assistance in accordance with articles VI, VII, VIII, or with other provisions of this Agreement, consultation shall take place with a view to determining the most equitable manner in which such expense shall be borne.

2. Consultation between the United Nations and the International Civil Aviation Organization shall similarly take place with a view to making such arrangements as may be found equitable for covering the cost of central administrative, technical or fiscal services or facilities or other special assistance provided by the United Nations.

#### *Article XVII*

##### INTER-AGENCY AGREEMENTS

The International Civil Aviation Organization agrees to inform the Economic and Social Council of the nature and scope of any formal agreement between the Organization and any other specialized agency, inter-governmental

or non-governmental organization, and to inform the Economic and Social Council before any such agreement is concluded.

### *Article XVIII*

#### LIAISON

1. The United Nations and the International Civil Aviation Organization agree to the foregoing provisions in the belief that they will contribute to the maintenance of effective liaison between the two Organizations. They affirm their intention of taking whatever further measure may be necessary to make this liaison fully effective.

2. The liaison arrangements provided for in the foregoing articles of this Agreement shall apply as far as appropriate to the relations between such branch or regional offices as may be established by the two Organizations, as well as between their headquarters.

### *Article XIX*

#### IMPLEMENTATION OF THE AGREEMENT

The Secretary-General of the United Nations and the appropriate officer of the International Civil Aviation Organization may enter into such supplementary arrangements for the implementation of this Agreement as may be found desirable, in the light of the operating experience of the two Organizations.

### *Article XX*

#### OTHER ARRANGEMENTS

The present Agreement shall not preclude the conclusion of further appropriate arrangements between the International Civil Aviation Organization and the United Nations with respect to air matters within the competence of the Organization directly affecting world security as contemplated in the Convention on International Civil Aviation.

### *Article XXI*

#### REVISION

This Agreement shall be subject to revision by agreement between the United Nations and the International Civil Aviation Organization.

### *Article XXII*

#### ENTRY INTO FORCE

This Agreement shall come into force on its approval by the General Assembly of the United Nations and the Assembly of the International Civil Aviation Organization.

## **Annex 5**

International Law Commission, Commentary on the Draft  
Convention on Arbitral Procedure adopted by the ILC at  
its Fifth Session (1955); Excerpt, Articles 14 and 30,  
pp. 55-56, 105-110

United Nations document A/CN.4/92

Document:-  
**A/CN.4/92**

**Commentary on the Draft Convention on Arbitral Procedure Adopted by the International  
Law Commission at its Fifth Session, prepared by the Secretariat**

Topic:  
**Arbitral Procedure**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

Copyright © United Nations

**COMMENTARY**  
**ON THE**  
**DRAFT CONVENTION**  
**ON ARBITRAL PROCEDURE**

**ADOPTED**  
**BY THE INTERNATIONAL LAW COMMISSION**  
**AT ITS FIFTH SESSION**

**Prepared by the Secretariat**



**UNITED NATIONS**  
**International Law Commission**  
**New York, 1955**

## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

A/CN.4/92
April 1955

UNITED NATIONS PUBLICATION
Sales No. : 1955. V. 1

Price: \$ U.S. 2.00 ; 15/- stg. ; Sw. fr. 8.00  
(or equivalent in other currencies)

counted as a negative vote".<sup>42</sup> See also article 51 of the Hague Convention of 1899 which provided for recording of any abstention in the minutes of the tribunal.

Paragraph 2 of the present article supplements the provisions of article 9, paragraph (3), and provides for the case where procedural rules are lacking in the *compromis* and have not otherwise been agreed upon by the parties. The paragraph is declaratory of the inherent power of arbitral tribunals to formulate their own rules of procedure, even in the absence of any express authorization in the *compromis*. The existence of such a power is recognized in prior codes of arbitral procedure<sup>43</sup> and by jurists.<sup>44</sup> It is essential that the various steps incidental to the pleading and argument of the case and the processes of the tribunal be regulated either by the parties or by the tribunal; without orderly procedure there can be no judicial process.

#### *Article 14*

The parties are equal in any proceedings before the tribunal.

#### *Comment*

This article expresses a fundamental norm of procedure the observance of which is essential to the proper functioning of the tribunal. Implicit in the article is the principle that the treatment of the parties during the conduct of a case before the tribunal must be fully impartial. Yet something more than the notion of impartiality is involved; there is in addition the notion that there are certain basic principles of procedure which are indispensable conditions of the exercise by the tribunal of its jurisdiction. Thus a State is entitled to rely upon certain fundamental procedural rights in any international arbitration, of which no State would consent to be deprived. The procedural rights involved must, however, be fundamental in the sense that the interests of a party are materially affected, so as to go to the very root of the award. Thus, it is an elementary rule of proper judicial procedure: *audire alteram partem*. In this connexion the words of Bluntschli may be quoted:

"The arbitrators being invested with quasi-judicial functions, should respect the fundamental principles of procedure. Their decision cannot be brought into question on account of mere defects of form. But it will be of no effect if they have manifestly violated the general principles of procedure; if they have, for example, not given an opportunity to the parties to present their case or to refute

<sup>42</sup> Hudson, *International Tribunals*, p. 115.

<sup>43</sup> Hague Convention of 1907, art. 74; *Projet*, 1875, art. 12 and 15; Mexican Peace Code, art. 44.

<sup>44</sup> Ralston, p. 204; D. V. Sandifer, *Evidence before International Tribunals* (Chicago, 1939), pp. 28-29.

the contentions of the opposite side, the parties cannot be bound to accept such an arbitrary decision.”<sup>46</sup>

Likewise Fauchille writes :

“ Must it be said, therefore, that the decision of an arbitrator is always and in all circumstances completely obligatory ? Not at all : it is absolutely necessary that the decision should be in itself valid and properly given. The authors [citing Mérignhac, *Traité de l'arbitrage international* (Paris, 1893), p. 306, where several other authors are cited] are generally in agreement that the decision is not binding :

“ 1. . . .

“ 2. If one of the parties has not been heard and allowed an opportunity to prove his case.”<sup>46</sup>

The principle of the present article may be illustrated by the so-called *Umpire* cases which arose before the United States-Colombian Commission. This Commission was established under a convention of 10 February 1864 to adjudicate upon certain claims, including certain decisions of the umpire under an earlier commission, the validity of which was contested by Colombia. It was alleged by Colombia that such decisions were rendered without an opportunity for the Colombian Commissioner to consider them on their merits. They were consequently contended to be “ null and void according to the stipulations of the treaty and to the universal principle of justice that no party can be condemned before having been heard in defence ”. This contention appears to have been accepted by the umpire in the 1864 commission and four of the five cases in question were reconsidered and formally disallowed.<sup>47</sup>

The consequences of a failure to observe the principle set forth in the above article are dealt with by article 30 (c).<sup>48</sup>

### *Article 15*

1. The tribunal shall be the judge of the admissibility and the weight of the evidence presented to it.

2. The parties shall co-operate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.

3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.

<sup>46</sup> Bluntschli, *Le droit international codifié* (Paris, 1886), p. 289.

<sup>46</sup> Fauchille, *Traité de droit international public* (Paris, 1926), Vol. 1, Part 3, p. 552.

<sup>47</sup> Moore, Vol. 2, pp. 1396-1409.

<sup>48</sup> See comment thereon *infra*.



CHAPTER VII  
ANNULMENT OF THE AWARD

*Article 30*

The validity of an award may be challenged by either party on one or more of the following grounds :

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.

*Comment*

An international tribunal is not a court of general jurisdiction nor is it a court free from the established rules of law governing any judicial proceeding. The jurisdiction of the tribunal is determined by the agreement of the parties; it may decide only the questions submitted to it. The tribunal must decide under the rules of law applicable to it. It must conduct its proceedings in a judicial manner and with due observance of the fundamental rules of procedure.

Such is the classic theory of the process of international arbitration. It is in the context of that theory that the principle of *res judicata* is to be considered. It is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding,<sup>1</sup> the circumstance that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings, these are the ultimate sources of the binding authority of an international arbitral award. States are required to take all necessary measures to carry into effect an award so rendered.<sup>2</sup>

The converse of the foregoing is that an award rendered in violation of such fundamental principles is not binding upon the parties. Theory and practice abundantly demonstrate that when one or more of the

<sup>1</sup> Mérygnac, p. 299; Carlston, p. 211.

<sup>2</sup> Witenberg, pp. 352-353; J. Limburg, *L' Autorité de chose jugée des décisions des juridictions internationales* in *Rec. A.D.I.* (1929), Vol. 30, p. 566.

fundamental conditions for the validity of an award are lacking, the State concerned is not bound to carry it into effect. Among the earliest of authorities who have affirmed this principle is Pufendorf, who said :

“ But the statement that one has to abide by the decision of the arbitrator, whether it be just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been made against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator.”<sup>3</sup>

Some two centuries later the *Projet*, 1875, stated in article 27 :

“ The arbitral award is void when the *compromis* is void, or when the Tribunal has exceeded its jurisdiction, or in case of proved corruption of one of the arbitrators, or in case of essential error.”

Bluntschli set forth the applicable principles as follows :

“ The decision of the arbitral tribunal can be considered void :

- “ (a) To the extent that the arbitral tribunal has exceeded its jurisdiction;
- “ (b) In case of lack of devotion to duty and denial of justice on the part of the arbitrators;
- “ (c) If the arbitrators have refused to hear the parties or have violated any other fundamental principle of procedure;
- “ (d) If the arbitral award is contrary to international law.

“ But the decision of the arbitrators cannot be attacked on the ground that it is wrong or unjust. Errors in calculation are excepted from this statement.”<sup>4</sup>

Finally the views of Hall may be quoted :

“ An arbitral decision may be disregarded in the following cases : *viz.* when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal.”<sup>5</sup>

See generally the collection of authorities and precedents in A. Balasko *Causes de nullité de la sentence arbitrale en droit international public* (Paris, 1938), and Carlston.

<sup>3</sup> S. Pufendorf, *De Jure Naturae et Gentium*, Oldfather Translation, 1688 edition (Oxford, 1934), Vol. II, book V, chap. XIII, sect. 4, p. 829.

<sup>4</sup> Bluntschli, *Le droit international codifié* (Paris, 1886), sect. 495, p. 289.

<sup>5</sup> W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, 1924), p. 420.

The classification of the various grounds upon which an award may be contended to be null has been essayed by numerous writers, whose studies will be found analysed in the works of Balasko and Carlston *supra*. The problem for the jurist is to determine those grounds which theory and practice will clearly and abundantly demonstrate are valid grounds for attacking an arbitral award as being null. The problem of the present draft convention would, however, appear to be a twofold one, first, to base itself on the established principles of international law applicable to this question, and second, to adopt a regulation of the problem which would be consistent with such law and yet best serve the interests of the development of international law and the international community.

An examination of views of writers upon the subject of the nullity of arbitral awards will reveal that these range, on the one hand, from Fiore,<sup>6</sup> who finds some nine grounds for nullity, to which he adds three of other authors, and Goldschmidt,<sup>7</sup> who lists eleven grounds for nullity, to such authors as Hall *supra*, on the other hand, whose list of grounds for nullity is brief. It is interesting to note that the *Institut de Droit International* in its *Projet*, 1875, article 27, reduced Goldschmidt's eleven grounds for nullity to only four. It is not surprising, therefore, that Balasko vigorously attacks efforts to set forth long lists of causes of nullity of an award.<sup>8</sup>

The present draft convention adopts the point of view that only a limited number of grounds for nullity should be recognized. However, the meaning and scope of each of the grounds listed is left open for practice to determine.

*Paragraph (a).* The first ground for annulment listed in the article is that "the tribunal has exceeded its powers". This is perhaps the oldest and most universally recognized ground for nullity. The maxim of Roman law *arbiter nihil extra compromissum facere potest* has been adopted in international law.<sup>9</sup> Vattel is amongst the earliest authors to refer to the example of "arbitrators exceeding their power and deciding upon that which was not in fact submitted to them".<sup>10</sup> One of the first instances in which the validity of an arbitral award was attacked, namely, the *Northeastern Boundary* dispute between the United States and Canada, raised this issue. In this case, the King of the Netherlands was asked to choose as an arbiter between two boundary lines as claimed respectively by the parties. Instead, refraining from giving a

<sup>6</sup> P. Fiore, *Le droit international codifié et sa sanction juridique* (Paris, 1911), pp. 619-620.

<sup>7</sup> L. Goldschmidt, *Projet de règlement pour tribunaux arbitraux internationaux*, art. 32, in *R.D.I.L.C.* (1874), Vol. 6, pp. 446-447.

<sup>8</sup> *Op. cit.*, p. 98.

<sup>9</sup> See W. Schätzel, *Rechtskraft und Anfechtung von Entscheidungen internationaler Gerichte* (Leipzig, 1928), p. 56; D. Guermanoff, *L'excès de pouvoir de l'arbitre* (Paris, 1929), pp. 40-44.

<sup>10</sup> E. de Vattel, *Le droit des gens*, 1758 ed. (Carnegie, Washington, 1916), Vol. 1, sect. 329, p. 520.

decision,<sup>11</sup> he recommended by award of 10 January 1931 a third line.<sup>12</sup> Two more examples may be cited here. In the *Aves Island* case, decided on 30 June 1865 by the Queen of Spain, the question was raised whether an arbitrator charged with the decision of "the question of the right of dominion and of sovereignty over the Island of Aves" as between the parties to the dispute could enter into the collateral question of the existence of a servitude.<sup>13</sup> The award rendered on 15 June 1911 in the case of the *Chamizal tract*<sup>14</sup> was protested because it divided the tract instead of deciding title to the entire tract.<sup>15</sup>

The question of excess of power or jurisdiction is, in essence, a question of treaty interpretation. It is a question which is to be answered by a careful comparison of the award or other contested action by the tribunal with the relevant provisions of the *compromis*. A departure from the terms of submission or excess of jurisdiction should be clear and substantial and not doubtful and frivolous.<sup>16</sup>

The relation between excess of jurisdiction and the tribunal's traditional power to decide itself upon its own competence<sup>17</sup> has been studied by Verdross.<sup>18</sup> In his opinion, no charge of nullity can be raised on the ground of *excès de pouvoir* in case the tribunal has explicitly decided upon its competence and has based its decision on the interpretation of the treaty or treaties constituting the tribunal. This, Verdross holds, flows directly from article 73 of the Hague Convention of 1907 authorizing the tribunal to declare its competence "in interpreting the *compromis*, as well as the other papers and documents which may be invoked".<sup>19</sup> According to Castberg<sup>20</sup> it is a general principle of international adjudication that any decision of an international tribunal upon its competence is binding and leaves no room for objections concerning the validity of the award from a standpoint of *excès de pouvoir*, unless otherwise agreed upon by the parties. Balasko<sup>21</sup> on the other hand, takes the view that nullity on the ground of *excès de pouvoir* is excluded only when the parties expressly agreed upon the

<sup>11</sup> See comment on article 12, *supra*.

<sup>12</sup> Lapradelle-Politis, Vol. 1, p. 371.

<sup>13</sup> *Ibid.*, Vol. 2, p. 412.

<sup>14</sup> *Am. J. Int. Law*, 1911, Vol. 5, p. 785; *Papers Relating to the Foreign Relations of the United States 1911* (Washington, 1918), pp. 586-587.

<sup>15</sup> See comment on article 9, paragraph (a), *supra*, quotation from the United States-Mexican Convention of 24 June 1910.

<sup>16</sup> Carlston, pp. 85-86.

<sup>17</sup> See article 11 *supra* and comment.

<sup>18</sup> *Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte und Gerichte über ihre Zuständigkeit* in *Zeitschrift für öffentliches Recht*, Vol. 7 (1928), p. 439 *et seq.*

<sup>19</sup> *Ibid.*, p. 444; to the same effect see Schätzkel, *op. cit.*, p. 86 *et seq.*

<sup>20</sup> *L'excès de pouvoir dans la justice internationale*, *Rec. A. D. I.* (1931), Vol. 35, p. 431.

<sup>21</sup> *Op. cit.*, pp. 188-189.

binding force of the tribunal's decision with regard to its own powers.

Distinctions between lack of jurisdiction (*incompétence*) and excess of jurisdiction (*excès de pouvoir*) have occupied a number of authors.<sup>22</sup> It has been observed, however, that little juridical purpose is served by transferring such distinctions from the field of domestic law into the international sphere.<sup>23</sup> As R. Erich states: "A precise and practical distinction between the two terms is not easy to establish."<sup>24</sup>

*Paragraph (b).* Among the recognized principles of law is the principle that an award vitiated by fraud or corruption may be challenged in appropriate proceedings.<sup>25</sup> Such fraud or corruption may lie in the tribunal itself,<sup>26</sup> or it may lie in fraudulent practices of the parties.<sup>27</sup> Paragraph (b) lists only "corruption on the part of a member of the tribunal" as a ground of annulment. In the case of fraud by one of the parties, the discovery of the fraud would be considered as a new fact affording a ground for application for the revision of the award. This case is dealt with in the Comment to article 29 *supra*.

*Paragraph (c).* This paragraph affirms the principle that the tribunal must function in the manner of a judicial body and with respect for the fundamental rules governing the proceedings of any judicial body. The paragraph is concerned with *error in procedendo*, not with the *error in iudicando*.<sup>28</sup> It is, further, concerned with serious departures from fundamental procedural rules rather than minor departures.<sup>29</sup>

It is clear that not all failures to observe procedural stipulations contained in the *compromis* will lead to nullity of the award. Carlston<sup>30</sup> advances the view that:

"The legal effect of such a failure is not to be judged upon the purely abstract basis of whether it constitutes a departure from the

<sup>22</sup> E.g., F. Castberg, *La compétence des tribunaux internationaux* in R.D.I.L.C. (1925, 3d ser.), Vol. 6, pp. 342-343, and *L'excès de pouvoir dans la justice internationale*, cited *supra*, pp. 360-361; N. Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux* in Rec. A.D.I. (1925), Vol. 6, p. 84 (distinction between excess of jurisdiction (*excès de pouvoir*) and usurpation of jurisdiction (*usurpation de pouvoir*); R. Erich, *Le projet de conférer à la Cour Permanente de Justice Internationale des fonctions à une instance de recours* in R.D.I.L.C. (1931, 3d ser.), Vol. 12, p. 276.

<sup>23</sup> Carlston, pp. 84-85.

<sup>24</sup> R. Erich, *op. cit.*, p. 276.

<sup>25</sup> See Carlston, sect. 9 and 66.

<sup>26</sup> United States-Venezuelan Claims Commission under the convention of 25 April 1866, see Moore, Vol. 2, pp. 1660-1687.

<sup>27</sup> *Weil* and *La Abra* cases, Carlston, sect. 19, and *Mannesmann* case, P. Fauchille, *Traité de droit international public* (Paris, 1926), Vol. 1, part III, p. 567.

<sup>28</sup> S. Rundstein, *La Cour permanente de Justice internationale comme instance de recours* in Rec. A.D.I. (1933), Vol. 43, p. 91.

<sup>29</sup> Borel, *Les voies de recours contre les sentences arbitrales* in Rec. A.D.I. (1935), Vol. 52, pp. 98-99; Witenberg, p. 368.

<sup>30</sup> Citing Schätzel, *op. cit.*, p. 68.

terms of submission. The question is rather : Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and the resulting award to lose its judicial character? Unless its effect is to prejudice materially the interests of a party, the charge of nullity should not be open to a party.”<sup>31</sup>

Among the fundamental procedural rights of parties to an international arbitration, denial of which will lead to the nullity of any award rendered therein, are following :

(1) Right to a judgment accompanied by a statement of reasons. Fiore states that an award will be null “if it is totally lacking in reasons both as to fact and as to law”.<sup>32</sup> Numerous authorities are in accord.<sup>33</sup> This view has been adopted by the present draft which, in order to exclude every possible doubt, explicitly refers to “failure to state the reasons for the award” as a ground of nullity.<sup>34</sup>

(2) The right to be heard, including due opportunity to present proofs and arguments. Heffter refers to the case where “one or both of the parties have not been heard”.<sup>35</sup> Goldschmidt mentions the instance where “the tribunal has decided without giving the party any hearing whatever”.<sup>36</sup> Carnazza-Amari speaks of the case where “the arbitrators have refused to hear the parties”.<sup>37</sup> Bluntschli states that the award is null “if the arbitrators have refused to hear the parties or have violated any other fundamental principle of procedure”.<sup>38</sup> Fauchille states that authorities are generally in accord that an award is not binding “if one of the parties has not been heard and allowed an opportunity to prove his case”.<sup>39</sup>

(3) Right of parties to equal and impartial treatment. This fundamental principle has been dealt with in comment on article 14 above.

### *Article 31*

1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.

2. In cases covered by paragraphs (a) and (c) of article 30, the application must be made within sixty days of the rendering of

<sup>31</sup> Carlston, pp. 38-39.

<sup>32</sup> Op. cit., p. 619.

<sup>33</sup> See collection in Carlston, pp. 50-51.

<sup>34</sup> Cf. art. 24, para. 2, of this draft and comment thereon.

<sup>35</sup> A. G. Heffter, *Le droit international de l'Europe*, 3rd Fr. ed. (Paris, 1873), p. 210

<sup>36</sup> Op. cit. in *R.D.I.L.C.* (1874), Vol. 6, p. 447.

<sup>37</sup> G. Carnazza-Amari, *Traité de droit international public* (Paris, 1882), Vol. 2, p. 564.

<sup>38</sup> Op. cit., p. 289.

<sup>39</sup> Op. cit., p. 552.

## **Annex 6**

ICAO, Rules for the Settlement of Differences, approved on 9 April 1957;  
amended on 10 November 1975

ICAO document 7782/2

**RULES  
FOR THE  
SETTLEMENT OF DIFFERENCES**

**Approved by the Council on 9 April 1957  
and amended on 10 November 1975**



*Approved by the Council and published by its decision*

**SECOND EDITION – 1975**

**INTERNATIONAL CIVIL AVIATION ORGANIZATION**



*Published in separate English, French, Spanish and Russian editions by the International Civil Aviation Organization. All correspondence, except orders and subscriptions, should be addressed to the Secretary General of ICAO, P.O. Box 400, Succursale: Place de l'Aviation internationale, 1000 Sherbrooke Street West, Montreal, Quebec, Canada H3A 2R2.*

Orders for this publication should be sent to one of the following addresses, together with the appropriate remittance (by bank draft or post office money order) in U.S. dollars or the currency of the country in which the order is placed or in a freely convertible currency:

**Canada:** Information Canada, Ottawa, Ontario.

**Egypt (Arab Republic of):** ICAO Representative, Middle East and Eastern African Office, 16 Hassan Sabri, Zamalek, Cairo.

**France:** Représentant de l'OACI, Bureau Europe, 3<sup>bis</sup>, villa Emile-Bergerat, 92 Neuilly-sur-Seine.

**India:** Oxford Book and Stationery Co., Scindia House, New Delhi or 17 Park Street, Calcutta.

**Japan:** Japan Civil Aviation Promotion Foundation, No. 38 Shiba Kotohira-Cho, Minato-Ku, Tokyo.

**Mexico:** Representante de la OACI, Oficina Norteamérica y Caribe, Apartado postal 5-377, México 5, D.F.

**Peru:** Representante de la OACI, Oficina Sudamérica, Apartado 4127, Lima.

**Senegal:** Représentant de l'OACI, Bureau Afrique, Boite postale 2356, Dakar.

**Sweden:** C.E. Fritzes Kungl. Hovbokhandel, Fredsgatan 2, Box 16356, Stockholm 16.

**Thailand:** ICAO Representative, Far East and Pacific Office, P.O. Box 614, Bangkok.

**United Kingdom:** Civil Aviation Authority, Printing and Publications Services, Greville House, 37 Gratton Road, Cheltenham Glos., GL50 2BN.

**International Civil Aviation Organization** (Attention: Distribution Officer), P.O. Box 400, Succursale: Place de l'Aviation internationale, 1000 Sherbrooke Street West, Montreal, Quebec, Canada H3A 2R2.

---

**RULES  
FOR THE  
SETTLEMENT OF DIFFERENCES**

**Approved by the Council on 9 April 1957  
and amended on 10 November 1975\***

CHAPTER I

SCOPE OF RULES

*Article 1*

(1) The Rules of Parts I and III shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:

(a) Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation (hereinafter called "the Convention") and its Annexes (Articles 84 to 88 of the Convention);

(b) Any disagreement between two or more Contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called "Transit Agreement" and "Transport Agreement") (Article II, Section 2 of the Transit Agreement; Article IV, Section 3 of the Transport Agreement).

(2) The Rules of Parts II and III shall govern the consideration of any complaint regarding an action taken by a State party to the Transit Agreement and under that Agreement, which another State party to the same Agreement deems to cause injustice or hardship to it (Article II, Section 1), or regarding a similar action under the Transport Agreement (Article IV, Section 2).

**Part I**

CHAPTER II

DISAGREEMENTS

*Article 2*

Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as "the applicant") shall file an application to which shall be attached a memorial containing:

---

\* *Amendment of Article 29 approved by the Council on 10 November 1975.*

(a) The name of the applicant and the name of any Contracting State with which the disagreement exists (the latter hereinafter referred to as "the respondent");

(b) The name of an agent authorized to act for the applicant in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

(c) A statement of relevant facts;

(d) Supporting data related to the facts;

(e) A statement of law;

(f) The relief desired by action of Council on the specific points submitted;

(g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful.

### CHAPTER III

#### ACTION UPON RECEIPT OF APPLICATIONS

##### *Article 3*

##### *Action by Secretary General.*

(1) Upon receipt of an application, the Secretary General shall:

(a) Verify that it complies in form with the requirements of Article 2, and, if necessary, require the applicant to supply any deficiencies appearing therein;

(b) Immediately thereafter notify all parties to the instrument the interpretation or application of which is in question, as well as all Members of the Council, that the application has been received;

(c) Forward copies of the application and of the supporting documentation to the respondent, with an invitation to file a counter-memorial within a time-limit fixed by the Council.

(2) Copies of all subsequent pleadings or other documents submitted by a party to the Council shall similarly be forwarded by the Secretary General to the other party or parties in the case.

*Article 4*

*Counter-memorial*

(1) The counter-memorial shall contain:

(a) The name of an agent authorized to act for the respondent in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

(b) Answer to points raised in the applicant's memorial under Article 2 (c) to (g);

(c) Any additional facts and supporting data;

(d) Statement of law.

(2) In the counter-memorial there may be presented a counter-claim directly connected with the subject matter of the application provided it comes within the jurisdiction of the Council. The Council shall, after hearing the parties, direct whether or not the question thus presented shall be joined to the original proceedings.

*Article 5*

*Preliminary objection and action thereon*

(1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.

(2) Such preliminary objection shall be filed in a special pleading at the latest before the expiry of the time-limit set for delivery of the counter-memorial.

(3) Upon a preliminary objection being filed, the proceedings on the merits shall be suspended and, with respect to the time-limit fixed under Article 3 (1)(c), time shall cease to run from the moment the preliminary objection is filed until the objection is decided by the Council.

(4) If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules.

*Article 6*

*Action of Council on procedure*

(1) Upon the filing of the counter-memorial by the respondent, the Council shall decide whether at this stage the parties should be invited to enter into direct negotiations as provided in Article 14.

(2) If it is decided not to invite direct negotiations at this stage, without prejudice to a later invitation as provided in Article 14, the Council shall decide which procedure under these Rules is applicable. Unless the Council decides to undertake the preliminary examination of the matter itself, it shall appoint a Committee (hereinafter referred to as "the Committee") of five individuals who shall be Representatives on the Council of Member States not concerned in the disagreement, and shall designate one of them as Chairman.

(3) The decisions under (2), in cases where negotiations are invited, may be postponed until the parties have either refused to enter into negotiations or reported that the negotiations have failed to solve the dispute.

## CHAPTER IV

### PROCEEDINGS

#### *Article 7*

##### *Written proceedings*

(1) The additional pleadings which may be filed by the parties shall consist of:

- Reply to be filed by the applicant,
- Rejoinder to be filed by the respondent.

(2) The pleadings shall be filed with the Secretary General within time-limits fixed.

(3) There shall be annexed to every pleading, copies or originals of all the relevant documents which the party filing the pleading may wish to have considered.

(4) After the filing of the last pleading, save in the case of the submission of written evidence pursuant to Article 9 or of observations in writing pursuant to Article 19 (5), no further documents may be submitted by any party except with the consent of the other party or by permission of the Council granted after hearing the parties.

#### *Article 8*

##### *Investigations by Council*

(1) The Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion. In such cases it shall define the subject of enquiry or expert opinion and prescribe the procedure to be followed.

(2) A report incorporating the results of the investigation, together with the record of the enquiry and any expert opinion, shall be submitted to the Council in such form, if any, as the Council may have prescribed, and shall be communicated to the parties.

#### *Article 9*

##### *Evidence*

If the parties should desire to produce evidence in addition to any evidence produced with the pleadings, such evidence, including testimony of witnesses and experts, shall be submitted in writing, within a time-limit fixed by the Council, but on special application the Council may agree to receive oral testimony. The Council may also request the parties to call witnesses or experts to give testimony before it at an oral hearing.

#### *Article 10*

##### *Declaration by witnesses and experts*

(1) The testimony of a witness shall be verified by the following declaration:

“I solemnly declare upon my honour and conscience that my testimony contains the truth, the whole truth and nothing but the truth.”

(2) The statement of an expert shall be verified by the following declaration:

“I solemnly declare upon my honour and conscience that my statement is in accordance with my sincere belief.”

#### *Article 11*

##### *Questions*

At the oral hearing, any Member of the Council not a party to the dispute may put questions, through the President, to the agents of the parties or to any counsel or advocate appearing for them. Such questions, if any, may be answered immediately or at a later date to be fixed by the Council.

#### *Article 12*

##### *Arguments*

(1) Upon completion of the evidence, and after a reasonable period for preparation by the parties, they may present arguments to the Council within time-limits fixed by it.

(2) The final arguments shall be in writing, but oral arguments may be admitted at the discretion of the Council.

### *Article 13*

#### *Procedure before the Committee*

(1) If under Article 6 of the present Rules a Committee has been appointed, it shall, on behalf of the Council, receive and examine all documents submitted in accordance with these Rules and, in its discretion, hear evidence or oral arguments, and generally deal with the case with a view to action being taken by the Council under Article 15. The procedures governing the examination of the case by the Committee shall be those prescribed for the Council when it examines the matter itself. While the Committee has charge of the proceedings, the functions of the President of the Council under these Rules shall be exercised by the Chairman of the Committee.

(2) Thereafter the Committee shall, without undue delay, present to the Council a report which shall be a part of the record of the proceedings. The report shall include a summary of the evidence and other matters on record and the findings of facts and the recommendations of the Committee.

(3) The Council shall cause a copy of the report of the Committee to be delivered to each party in the case and each of the parties may, within a time-limit fixed by the Council, submit to the Council its written observations on the said report or, if permitted by the Council, its oral observations.

(4) When considering the report of the Committee, the Council may make such further enquiries as it may think fit or obtain additional evidence.

### *Article 14*

#### *Negotiations during proceedings*

(1) The Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered as provided in Article 15 (4), invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted.

(2) If the parties accept the invitation to negotiate, the Council may set a time-limit for the completion of such negotiations, during which other proceedings on the merits shall be suspended.

(3) Subject to the consent of the parties concerned, the Council may render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations.

(4) Any solution agreed through negotiations shall be recorded by Council. If no solution is found the parties shall so report to Council and the suspended proceedings shall be resumed.

*Article 15*

*Decision*

(1) After hearing arguments, or after consideration of the report of the Committee, as the case may be, the Council shall render its decision.

(2) The decision of the Council shall be in writing and shall contain:

(i) the date on which it is delivered;

(ii) a list of the Members of the Council participating;

(iii) the names of the parties and of their agents;

(iv) a summary of the proceedings;

(v) the conclusions of the Council together with its reasons for reaching them;

(vi) its decision, if any, in regard to costs;

(vii) a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

(3) Any Member of the Council who voted against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of Council.

(4) The decision of the Council shall be rendered at a meeting of the Council called for that purpose which shall be held as soon as practicable after the close of the proceedings.

(5) No Member of the Council shall vote in the consideration by the Council of any dispute to which it is a party.

*Article 16*

*Default of appearance or in defending*

(1) If one of the parties does not appear before the Council or the Committee, if any, set up under Article 6, or fails to defend its case, the other party may call upon the Council to decide in favour of its claim.

(2) The Council must, before doing so, satisfy itself not only that it has jurisdiction in the matter but also that the claim is well founded in fact and law.

*Article 17*

*Discontinuance*

(1) If in the course of the proceedings the applicant informs the Council in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Secretary General, the respondent has not yet taken any step in the proceedings, the Council, or its President if the



Council is not in session, will officially record the discontinuance of the proceedings, and the Secretary General shall inform the respondent accordingly.

(2) If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Council, or its President if the Council is not sitting, shall fix a time-limit within which the respondent must state whether it objects to the discontinuance of the proceedings. If no objection is so made, acquiescence will be presumed and the Council, or its President if the Council is not sitting, will officially record the discontinuance of the proceedings. If objection is made, the proceedings shall continue.

#### *Article 18*

##### *Notification and appeal*

(1) The decision of the Council shall be notified forthwith to all parties concerned and shall be published. A copy of the decision shall also be communicated to all States previously notified under Article 3 (1) (b).

(2) Decisions rendered on cases submitted under Article 1 (1) (a) and (b) are subject to appeal pursuant to Article 84 of the Convention. Any such appeal shall be notified to the Council through the Secretary General within sixty days of receipt of notification of the decision of the Council.

#### *Article 19*

##### *Intervention*

(1) Any State which is a party to the particular instrument, the interpretation or application of which has been made the subject of a dispute under these Rules, and which is directly affected by the dispute, has the right to intervene in the proceedings, but if it uses this right it shall undertake that the decision of the Council will be equally binding upon it.

(2) Any State which desires to intervene in a disagreement shall forthwith file a declaration to that effect with the Secretary General.

(3) Such declaration shall be communicated to the parties to the instrument concerned. If within a month of the despatch of this communication, any objection has been notified to the Secretary General with respect to the admissibility of an intervention under paragraph (1) of this Article, the decision shall rest with the Council.

(4) If no objection has been notified within the above-mentioned period or if the Council decides in favour of the admissibility of an intervention, as the case may be, the Secretary General shall take the necessary steps to make the documents of the case available to the intervening party who may file a memorial within a time-limit to be fixed by the Council, in no event later than the date fixed for the filing of the last pleading referred to in Article 7 (4).

(5) Any such memorial shall be communicated to the other parties to the disagreement who shall send to the Secretary General their observations in writing within a time-limit to be fixed by the Council. The memorial and observations may be discussed by the parties in the course of the subsequent proceedings in which the intervening party shall take part.

#### *Article 20*

##### *Dismissal of proceedings*

(1) (a) If at any time before a decision is reached the parties conclude an agreement for the settlement of the dispute, or agree to discontinue the proceedings, they shall so inform the Council in writing. The Council shall then officially record the conclusion of the settlement or the discontinuance of the proceedings.

(b) In the event that the original parties to a dispute conclude such an agreement, the Council shall terminate the proceedings notwithstanding the fact that additional parties have intervened. This provision does not affect the right of an intervening party to file an application on its own behalf respecting the subject matter of the original dispute.

(2) In case the termination of the proceedings is pursuant to a settlement between the parties, the terms of the settlement shall be transmitted to the President of the Council and he shall communicate such terms to all States previously notified under Article 3 (1) (b).

## **Part II**

### **CHAPTER V**

#### **COMPLAINTS**

#### *Article 21*

##### *Form of request*

Any Contracting State submitting a complaint to the Council regarding a situation defined in Article 1 (2) of these Rules shall file a request to which shall be attached a memorial containing the same particulars as in the case of an application submitted under Article 2.

#### *Article 22*

##### *Action upon receipt of requests*

Articles 3 (1) (a) and (c), 4 and 5 of Chapter III of Part I (*Action upon receipt of Applications*) shall apply correspondingly to a request submitted under the preceding Article.

### *Article 23*

#### *Appointment of Committee*

(1) Upon the filing of the counter-memorial the Council shall meet and formally decide whether the matter falls under the category of complaints under the provisions listed in Article 1 (2).

(2) The Council shall, if the answer under (1) is in the affirmative, appoint a Committee composed as the Committee described in Article 6 (2) of these Rules.

### *Article 24*

#### *Proceedings before Committee*

(1) The Committee shall thereupon inquire into the matter on behalf of the Council and shall call the States concerned into consultation.

(2) The Committee shall arrange the procedures for the consultation as far as possible in agreement with the parties, and on an informal basis in accordance with the circumstances of each case. It may request additional information and summon representatives of the parties to meet with the Committee at the seat of the Organization or in any other place.

### *Article 25*

#### *Report of Committee*

(1) The Committee shall report to Council on the outcome of the consultation held as expeditiously as possible.

(2) If the consultation has failed to resolve the difficulty the report may include proposed findings and recommendations to the States concerned.

### *Article 26*

#### *Council Action*

(1) After receiving the report of the Committee the Council shall consider it.

(2) If a settlement has been reached through consultation the terms of the settlement shall be recorded and communicated to all States notified of the proceedings.

(3) If consultation has failed to resolve the difficulty the Council may make appropriate findings and recommendations to the States concerned. Article 15 shall apply, *mutatis mutandis*, in this case.

### **Part III**

#### **CHAPTER VI**

#### **GENERAL PROVISIONS**

##### *Article 27*

###### *Agents*

(1) A State which becomes a party to the proceedings on disagreements or complaints under these Rules shall name an agent authorized to represent it and to act for it in the proceedings, provided that a Representative on the Council of any Member State shall not be nominated as an agent.

(2) The agent may have the assistance of counsel or advocates. The name of any assisting counsel or advocate shall be communicated to the Council in advance of any meeting where he will be present.

(3) The agents shall be invited to attend any meeting convened to discuss the case.

##### *Article 28*

###### *Procedural measures*

(1) The Council shall determine the time-limits to be applied, and other procedural questions related to the proceedings. Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned.

(2) The Council may at any time extend any time-limit that has been fixed under these Rules, either at the request of any of the parties or at its own discretion. It may also in special circumstances and after hearing objections from any party, decide that any step taken after the expiration of a time-limit shall be considered as valid.

(3) In respect of fixing or extending a time-limit under these Rules, the President of the Council shall act on behalf of the Council when it is not in session.

##### *Article 29*

###### *Languages*

(1) A party may make its submissions, written or oral, in any of the four working languages of the Organization and, at the request of any of the other parties, these shall be translated into each of the other languages under arrangements to be made by the Secretary General. The Council may at the request of any party authorize another language to be used by that party, in which case the necessary arrangements for translation shall be made by the party concerned.

(2) The text of the decision of the Council in case of a disagreement, or its findings and recommendations in case of a complaint, shall be rendered in the four working languages, and each of such texts shall be of equal authenticity unless all the parties agree that any of the texts shall be considered as the authentic one.

#### *Article 30*

##### *Records and publicity*

(1) The Secretary General shall keep a full record of the proceedings.

(2) A verbatim transcript shall be made of any oral testimony and any oral arguments and incorporated into the record of the proceedings.

(3) The record of the proceedings shall, unless otherwise ordered by the Council, be open to the public. The Council may open to the public any part of the record previously ordered to be withheld from the public.

#### *Article 31*

##### *Costs*

(1) Unless otherwise decided by the Council, each party shall bear its own costs.

(2) All other costs may be assessed to the parties in proportions fixed by the Council.

#### *Article 32*

##### *Suspension of the Rules*

Subject to agreement of the parties, any of these Rules may be varied or their application suspended when, in the opinion of the Council, such action would lead to a more expeditious or effective disposition of the case.

#### *Article 33*

##### *Amendments to the Rules*

The present Rules may, at any time, be amended by the Council. No amendment shall apply to a pending case except with the agreement of the parties.

**END**



## **Annex 7**

International Law Commission, Model Rules on Arbitral Procedure  
adopted by the ILC at its Tenth Session (1958)

United Nations, *Yearbook of the International Law Commission*,  
Vol. II, pp. 83-86

**Model Rules on Arbitral Procedure  
with a general commentary**

1958

Text adopted by the International Law Commission at its tenth session, in 1958, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 22). The report, which also contains a general commentary on the draft articles, appears in *Yearbook of the International Law Commission, 1958*, vol. II.



Copyright © United Nations  
2005



what exceptions, variations or additions seem good to them. In this respect, it is desirable to make it quite clear that, within the limits stated, the application of the present articles, in so far as adopted by the parties to a dispute, will always be subject to any special provisions in the arbitral agreement or *compromis d'arbitrage*. Consequently, although for reasons of convenience or emphasis certain of the articles contain phrases such as "Unless otherwise provided in the *compromis* . . .", this should not be taken to mean that the application of other articles is not equally subordinated to the will of the parties and to variation or even exclusion under the terms of the *compromis*.

21. Naturally, where in the preceding paragraph reference is made to the limitations implied by the principle of non-frustration, it is not intended to suggest that States can in practice be prevented from drawing up their arbitral agreement or *compromis* in such a way that it will be possible for one or other of them to frustrate the purpose of the arbitration. But (at any rate with the exception of those cases where the agreement or *compromis* expressly permits it) the party taking the frustrating action will be acting in a manner which, even if not actually contrary to the arbitral agreement as such, will be contrary to the basic principles of general international law governing the process of arbitration. The present articles are designed (and this is now one of their chief objects) to ensure that, if the parties draw up their arbitral agreement or *compromis* in such a way that its object can be frustrated, they will at least do so with open eyes. If two States, aware of what they are doing, choose to draft their agreement or *compromis* in this way, they are entitled—or at any rate they have the faculty—to do so. But if they wish to close the door to the possibility of frustration, the present articles indicate by what means this can be done.

## II. Text of the draft

22. The final text on arbitral procedure in the form of a set of model draft articles, as adopted by the Commission at its 473rd meeting, reads as follows:

### MODEL RULES ON ARBITRAL PROCEDURE

#### *Preamble*

The undertaking to arbitrate is based on the following fundamental rules:

1. Any undertaking to have recourse to arbitration in order to settle a dispute between States constitutes a legal obligation which must be carried out in good faith.
2. Such an undertaking results from agreement between the parties and may relate to existing disputes or to disputes arising subsequently.
3. The undertaking must be embodied in a written instrument, whatever the form of the instrument may be.
4. The procedures suggested to States parties to a dispute by these model rules shall not be compulsory unless the States concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.
5. The parties shall be equal in all proceedings before the arbitral tribunal.

#### THE EXISTENCE OF A DISPUTE AND THE SCOPE OF THE UNDERTAKING TO ARBITRATE

##### *Article 1*

1. If, before the constitution of the arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration, such preliminary question shall, at the request of

any of the parties and failing agreement between them upon the adoption of another procedure, be brought before the International Court of Justice for decision by means of its summary procedure.

2. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

#### THE COMPROMIS

##### *Article 2*

1. Unless there are earlier agreements which suffice for the purpose, for example in the undertaking to arbitrate itself, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, as a minimum:

(a) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;

(b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;

(c) The method of constituting the tribunal and the number of arbitrators.

2. In addition, the *compromis* shall include any other provisions deemed desirable by the parties, in particular:

(i) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;

(ii) The power, if any, of the tribunal to make recommendations to the parties;

(iii) Such power as may be conferred on the tribunal to make its own rules of procedure;

(iv) The procedure to be followed by the tribunal; provided that, once constituted, the tribunal shall be free to override any provisions of the *compromis* which may prevent it from rendering its award;

(v) The number of members required for the constitution of a *quorum* for the conduct of the hearings;

(vi) The majority required for the award;

(vii) The time limit within which the award shall be rendered;

(viii) The right of the members of the tribunal to attach dissenting or individual opinions to the award, or any prohibition of such opinions;

(ix) The languages to be employed in the course of the proceedings;

(x) The manner in which the costs and disbursements shall be apportioned;

(xi) The services which the International Court of Justice may be asked to render.

This enumeration is not intended to be exhaustive.

#### CONSTITUTION OF THE TRIBUNAL

##### *Article 3*

1. Immediately after the request made by one of the States parties to the dispute for the submission of the dispute to arbitration, or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, either by means of the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal.

2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on arbitrability, the President of the International Court of Justice shall, at the request of either party, appoint the arbitrators not yet designated. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties,

the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall, after consultation with the parties, be made in accordance with the provisions of the *compromis* or of any other instrument consequent upon the undertaking to arbitrate. In the absence of such provisions, the composition of the tribunal shall, after consultation with the parties, be determined by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

4. Where provision is made for the choice of a president of the tribunal by the other arbitrators, the tribunal shall be deemed to be constituted when the president is selected. If the president has not been chosen within two months of the appointment of the arbitrators, he shall be designated in accordance with the procedure prescribed in paragraph 2.

5. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law.

#### Article 4

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. Once the proceedings have begun, an arbitrator appointed by a party may not be replaced except by mutual agreement between the parties.

3. Arbitrators appointed by mutual agreement between the parties, or by agreement between arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 3, paragraph 2, may not be changed even by agreement between the parties.

4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first procedural order.

#### Article 5

If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of an arbitrator, it shall be filled in accordance with the procedure prescribed for the original appointment.

#### Article 6

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may only propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In either case, the decision shall be taken by the other members of the tribunal.

2. In the case of a sole arbitrator or of the president of the tribunal, the question of disqualification shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of one of them.

3. Any resulting vacancy or vacancies shall be filled in accordance with the procedure prescribed for the original appointments.

#### Article 7

Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral proceedings shall be recommenced from the beginning, if these have already been started.

#### POWERS OF THE TRIBUNAL AND THE PROCESS OF ARBITRATION

#### Article 8

1. When the undertaking to arbitrate or any supplementary agreement contains provisions which seem sufficient for the

purpose of a *compromis*, and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 2. In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the institution or continuation of the proceedings. In the contrary case, the tribunal shall order the parties to complete or conclude the *compromis* within such time limits as it deems reasonable.

2. If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal, within three months after the parties report failure to agree—or after the decision, if any, on the arbitrability of the dispute—shall proceed to hear and decide the case on the application of either party.

#### Article 9

The arbitral tribunal, which is the judge of its own competence, has the power to interpret the *compromis* and the other instruments on which that competence is based.

#### Article 10

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono*.

#### Article 11

The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied.

#### Article 12

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure.

2. All decisions shall be taken by a majority vote of the members of the tribunal.

#### Article 13

If the languages to be employed are not specified in the *compromis*, this question shall be decided by the tribunal.

#### Article 14

1. The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.

2. They may retain counsel and advocates for the prosecution of their rights and interests before the tribunal.

3. The parties shall be entitled through their agents, counsel or advocates to submit in writing and orally to the tribunal any arguments they may deem expedient for the prosecution of their case. They shall have the right to raise objections and incidental points. The decisions of the tribunal on such matters shall be final.

4. The members of the tribunal shall have the right to put questions to agents, counsel or advocates, and to ask them for explanations. Neither the questions put nor the remarks made during the hearing are to be regarded as an expression of opinion by the tribunal or by its members.

#### Article 15

1. The arbitral procedure shall in general comprise two distinct phases: pleadings and hearing.

## Report of the Commission to the General Assembly

85

2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of memorials, counter-memorials and, if necessary, of replies and rejoinders. Each party must attach all papers and documents cited by it in the case.

3. The time limits fixed by the *compromis* may be extended by mutual agreement between the parties, or by the tribunal when it deems such extension necessary to enable it to reach a just decision.

4. The hearing shall consist in the oral development of the parties' arguments before the tribunal.

5. A certified true copy of every document produced by either party shall be communicated to the other party.

*Article 16*

1. The hearing shall be conducted by the president. It shall be public only if the tribunal so decides with the consent of the parties.

2. Records of the hearing shall be kept and signed by the president, registrar or secretary; only those so signed shall be authentic.

*Article 17*

1. After the tribunal has closed the written pleadings, it shall have the right to reject any papers and documents not yet produced which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any such papers and documents which the agents, advocates or counsel of one or other of the parties may bring to its notice, provided that they have been made known to the other party. The latter shall have the right to require a further extension of the written pleadings so as to be able to give a reply in writing.

2. The tribunal may also require the parties to produce all necessary documents and to provide all necessary explanations. It shall take note of any refusal to do so.

*Article 18*

1. The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.

2. The parties shall co-operate with the tribunal in dealing with the evidence and in the other measures contemplated by paragraph 1. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

*Article 19*

In the absence of any agreement to the contrary implied by the undertaking to arbitrate or contained in the *compromis*, the tribunal shall decide on any ancillary claims which it considers to be inseparable from the subject-matter of the dispute and necessary for its final settlement.

*Article 20*

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

*Article 21*

1. When, subject to the control of the tribunal, the agents, advocates and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

2. The tribunal shall, however, have the power, so long as the award has not been rendered, to re-open the proceedings after their closure, on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or if it considers, after careful consideration, that there is a need for clarification on certain points.

*Article 22*

1. Except where the claimant admits the soundness of the defendant's case, discontinuance of the proceedings by the claimant party shall not be accepted by the tribunal without the consent of the defendant.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

*Article 23*

If the parties reach a settlement, it shall be taken note of by the tribunal. At the request of either party, the tribunal may, if it thinks fit, embody the settlement in an award.

*Article 24*

The award shall normally be rendered within the period fixed by the *compromis*, but the tribunal may decide to extend this period if it would otherwise be unable to render the award.

*Article 25*

1. Whenever one of the parties has not appeared before the tribunal, or has failed to present its case, the other party may call upon the tribunal to decide in favour of its case.

2. The arbitral tribunal may grant the defaulting party a period of grace before rendering the award.

3. On the expiry of this period of grace, the tribunal shall render an award after it has satisfied itself that it has jurisdiction. It may only decide in favour of the submissions of the party appearing, if satisfied that they are well-founded in fact and in law.

## DELIBERATIONS OF THE TRIBUNAL

*Article 26*

The deliberations of the tribunal shall remain secret.

*Article 27*

1. All the arbitrators shall participate in the decisions.

2. Except in cases where the *compromis* provides for a quorum, or in cases where the absence of an arbitrator occurs without the permission of the president of the tribunal, the arbitrator who is absent shall be replaced by an arbitrator nominated by the President of the International Court of Justice. In the case of such replacement the provisions of article 7 shall apply.

## THE AWARD

*Article 28*

1. The award shall be rendered by a majority vote of the members of the tribunal. It shall be drawn up in writing and shall bear the date on which it was rendered. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the tribunal who have voted for it. The arbitrators may not abstain from voting.

2. Unless otherwise provided in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or having been duly summoned to appear.

4. The award shall immediately be communicated to the parties.

*Article 29*

The award shall, in respect of every point on which it rules, state the reasons on which it is based.

*Article 30*

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has allowed a time limit for the carrying out of the award or of any part of it.

*Article 31*

During a period of one month after the award has been rendered and communicated to the parties, the tribunal may,

either of its own accord or at the request of either party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of a similar nature.

*Article 32*

The arbitral award shall constitute a definitive settlement of the dispute.

INTERPRETATION OF THE AWARD

*Article 33*

1. Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within three months of the rendering of the award, be referred to the tribunal which rendered the award.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within the above-mentioned time limit the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

3. In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request.

*Article 34*

Failing a request for interpretation, or after a decision on such a request has been made, all pleadings and documents in the case shall be deposited by the president of the tribunal with the International Bureau of the Permanent Court of Arbitration or with another depository selected by agreement between the parties.

VALIDITY AND ANNULMENT OF THE AWARD

*Article 35*

The validity of an award may be challenged by either party on one or more of the following grounds:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- (d) That the undertaking to arbitrate or the *compromis* is a nullity.

*Article 36*

1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party.

2. In the cases covered by article 35, sub-paragraphs (a) and (c), validity must be contested within six months of the rendering of the award, and in the cases covered by sub-paragraphs (b) and (d) within six months of the discovery of the corruption or of the facts giving rise to the claim of nullity, and in any case within ten years of the rendering of the award.

3. The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment.

*Article 37*

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement between the parties, or, failing such agreement, in the manner provided by article 3.

REVISION OF THE AWARD

*Article 38*

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, pro-

vided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact, and in any case within ten years of the rendering of the award.

3. In the proceedings for revision, the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application.

4. If the tribunal finds the application admissible, it shall then decide on the merits of the dispute.

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to the tribunal which rendered the award, it may, unless the parties otherwise agree, be made by either of them to the International Court of Justice.

7. The tribunal or the Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for revision.

III. Comments on particular articles

*Notes:*

(i) The following comments are not intended as an article-by-article commentary. Only those articles are commented upon which are either new or involve substantial changes not otherwise self-explanatory. Many of the changes made, as compared with the 1953 text, are only changes of a technical or drafting character or in the nature of re-arrangement.

(ii) No attempt is made to indicate the reason why in a number of cases no changes have been made in order to meet criticisms made in the General Assembly or elsewhere by Governments. In the first place, the reasons for and against the proposed changes are fully set out in the 1957<sup>22</sup> and 1958<sup>23</sup> reports of the special rapporteur, Mr. Georges Scelle. In the second place, the fact that the articles are now presented as a model draft rather than as a potential general convention of arbitration which would be binding upon States has the effect of placing these criticisms against a different background thus causing them to lose a good deal of their point.

23. *Preamble.* Subject to language changes, the first three paragraphs of this preamble correspond to article 1 of the 1953 text. Paragraph 4 is new, but merely states the position already set out earlier in the present commentary, according to which the articles have no binding effect unless specifically embodied by the parties in a *compromis* or other agreement. Paragraph 5 corresponds to article 14 of the 1953 text.

24. In view of the fact that all the provisions of the preamble relate to the substantive law of arbitration rather than to arbitral procedure as such, the Commission felt that in the present context of the draft it would be preferable to state them in preambular form and not keep them as substantive articles. In effect they govern any arbitration, but they govern it as principles of general international law rather than as deriving from the agreement of the parties.

25. *Article 1.* This article, like a number of others in the text, e.g. articles 3, 6, 27, 33, 36, 37 etc., involves the exercise of functions by the President of the Inter-

<sup>22</sup> See *Yearbook of the International Law Commission, 1957*, vol. II (A/CN.4/SER.A/1957/Add.1), document A/CN.4/109.  
<sup>23</sup> A/CN.4/113 of 6 March 1958.

national Court of Justice, or by the Court itself. Criticisms of similar provisions in the 1953 text were made on the ground that this set up the International Court of Justice as a sort of super-tribunal not subordinate to the agreement of the parties. Despite doubts expressed by certain of its members, the Commission did not consider these criticisms to be well-founded, particularly in the present context of the draft, according to which the articles in question will be binding upon the parties only in so far as they accept those articles and make them part of the arbitral agreement. On the other hand, the articles are necessary if the process of arbitration is not to be liable to possible frustration as described in paragraphs 18, 19, 20 and 21 above. The practice of conferring functions upon the President of the International Court, or even upon the Court itself, is a fairly common one and has never given rise to any difficulty. Further comments on this matter are contained in paragraphs 45 and 46 of the commentary to the 1953 text.

26. *Article 2.* There is now included, amongst the matters which a *compromis* must deal with, the specification of the undertaking to arbitrate in virtue of which the dispute is to be submitted to arbitration. The list of matters which ought if possible to be regulated by the *compromis* remains substantially unchanged.

27. *Article 4.* This article, as compared with the 1953 text, has been amplified so as to include possible cases not previously covered.

28. *Article 5.* This article covers the previous articles 6 and 7 of the 1953 text. The changes effected are based in particular on the feeling that it is not in practice possible to prevent an arbitrator from withdrawing or resigning if he wishes to do so, and that in such event it is not necessary to do more than provide for the filling of the vacancy by the same means as were employed for the original appointment.

29. *Article 7.* This article is new. It is obviously undesirable that the proceedings should have to start again from the beginning merely because a vacancy has occurred and has been filled. There is, moreover, no difficulty over the written proceedings, which the new arbitrator is able to read. On the other hand, if the oral proceedings have begun, the new arbitrator ought to have the right to require that these be started again.

30. *Article 8.* The first paragraph of this article does not differ substantially from the corresponding article 10 of the 1953 text, but embodies technical improvements and simplifications in what was a somewhat complicated provision. As regards paragraphs 2 and 3 of the previous article 10, various objections were felt to the idea of the tribunal itself drawing up the *compromis*; nor was this felt to be necessary. Whether or not there is a *compromis* in the technical sense of that term, there is always an undertaking to arbitrate, whether this has been completed by the drawing up of a *compromis* or not. Even if the parties are unable to draw up or complete the *compromis*, it is always possible for the tribunal to proceed with the case, so long as one of the parties requests it to do so. Either the nature of the dispute will have been defined in the original agreement to arbitrate or, alternatively, it will be defined in the application made to the tribunal to proceed with the case and in the subsequent written pleadings the deposit of which the tribunal will order.

31. *Article 9.* Despite the considerations set out in paragraph 42 of the commentary to the 1953 text, in favour of retaining the term "widest", which appeared in the corresponding article 11 of that text, the Commission

decided that the use of this term was unnecessary and might give rise to difficulties.

32. *Article 10.* The substance of this article, as compared with the corresponding article 12 of the 1953 text, remains the same; but as the phrase "shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice" was considered to be unsatisfactory, and no other general phrase referring to that provision seemed free from drafting difficulties, it was decided to set out the actual terms of Article 38, paragraph 1. Paragraph 2 of old article 12 (the question of *non liquet*) now appears, somewhat amended, as article 11.

33. *Articles 13 to 17.* These articles, as explained in paragraph 15 above, have been newly introduced, in order to meet certain wishes expressed in the course of the General Assembly's discussions. They are articles relating to the routine procedure of arbitration and call for no special comment, except with reference to article 17, which is based on the consideration that it is undesirable, once the written proceedings have been closed, for further documentary material to be presented or adduced in evidence by the parties. Nevertheless, it is equally not desirable to exclude all possibility of presenting such new material. The essential consideration is that, if new material presented by one of the parties is admitted, the other should have an opportunity of dealing with it in writing and should be able to require a prolongation of the written proceedings for that purpose. In this way the possibility of new written material being presented on the eve of the oral hearing, so that the other party has inadequate time to consider or reply to it in writing before the oral hearing takes place, can be eliminated.

34. *Article 19.* This article has been a good deal simplified in comparison with the corresponding article 16 of the 1953 text. In particular, the general reference to ancillary claims, in place of the phraseology used in the previous article 16, should get over a number of difficulties of definition which that phraseology might have entailed. The basic object is that the grounds of dispute between the parties arising out of the same subject-matter should be completely disposed of.

35. *Article 21.* Paragraph 2 of this article, which otherwise corresponds to article 18 of the 1953 text, is new. It seemed to the Commission desirable to give the tribunal this faculty in order to insure that no element material to its decision should be excluded.

36. *Article 22.* The corresponding article 21 of the 1953 text provided that in no case could discontinuance of the proceedings by the claimant party be accepted by the tribunal without the consent of the defendant party. It seemed to the Commission that this principle ought only to apply in those cases where the claimant party proposed to discontinue the proceedings without any recognition of the validity of the defendant's case, since in that event the defendant State may still have an interest in endeavouring to secure from the tribunal a positive pronouncement in its favour. Where, however, such recognition is given, it would obviously be unnecessary to require the consent of the defendant party before the proceedings could be discontinued.

37. *Article 25.* The drafting of the corresponding article 20 of the 1953 text was defective inasmuch as it seemed to imply that it would always be the defendant party which would fail to appear and defend the claim, and the claimant party whose case would accordingly be adjudged valid. It is, however, equally possible that the claimant party may fail to pursue its case, but that the

defendant party will not be content with anything short of an actual decision in favour of its own arguments in case the claimant should attempt to re-open the matter at a later date. The article has, therefore, been amended to take account of both possibilities. The second paragraph is new, but self-explanatory.

38. *Articles 26 and 27.* These articles include the matters previously dealt with by the single article 19 of the 1953 text. The second paragraph of article 27 is new. The Commission felt it undesirable to adhere to the somewhat rigid system of the previous article 19, which could be interpreted as involving the unremitting attendance on all occasions of all the members of the tribunal. It is, on the other hand, necessary to ensure that an arbitrator shall not, through his deliberate absence, be able to frustrate the rendering of the award.

39. *Article 28.* Paragraphs 1, 3 and 4 of this article correspond to the same paragraphs of article 24 of the 1953 text, and paragraph 2 corresponds to article 25 of that text. The first sentence of paragraph 1 is, however, new. Despite the general provision on the subject of majority decisions contained in article 12, it was felt desirable to repeat this requirement specifically in respect of the rendering of the award. Paragraph 2 of the previous article 24 concerning the statement of the reasons for the award now appears as article 29 of the present text.

40. *Article 32.* This article is new. It no doubt goes without saying that the award constitutes a final settlement of the dispute, but it seemed desirable to the Commission to emphasize this fact in view of the provisions concerning the possible interpretation, revision or annulment of the award. These possibilities do not alter the fact

that, subject to any necessity for interpreting, or to any eventual revision or annulment of the award, it constitutes, in principle, a definitive and final settlement.

41. The provisions concerning interpretation in article 33, which previously figured in article 28 of the 1953 text, remain substantially unchanged apart from re-wording and re-arrangement.

42. *Article 34.* This article is new. Its object is to ensure that the documents and written records of arbitral proceedings, which may be of great value for the study of international law and in other ways, should not become lost or forgotten. It goes without saying that the Secretary-General of the Permanent Court of Arbitration, or other depositary, would not permit any inspection of the records by a third party without obtaining the consent of the parties to the dispute.

43. *Article 35.* Sub-paragraph (d) is new as compared with the corresponding article 30 of the 1953 text. Despite the cogent considerations contained in paragraph 39 of the commentary to that text, the Commission decided to add the nullity of the undertaking to arbitrate or of the *compromis* as a ground of the nullity of the eventual award. It is difficult, in principle, to deny that the nullity of the original undertaking or *compromis*, if established, must automatically entail the nullity of the award. Such cases should, however, prove exceedingly rare. The principle at issue is the same as that which governs the essential validity of treaties, and it is noticeable that there are very few precedents involving the nullity of a treaty or other international agreement, when drawn up in proper form, and apparently regularly concluded between duly authorized plenipotentiaries or governmental organs empowered to act on behalf of the State.

## **Annex 8**

Charter of the Co-operation Council for the Arab States of the Gulf,  
concluded at Abu Dhabi on 25 May 1981

1288 United Nations, *Treaty Series* 131

**No. 21244**

---

**BAHRAIN, KUWAIT, OMAN, QATAR,  
SAUDI ARABIA AND UNITED ARAB EMIRATES**

**Charter of the Co-operation Council for the Arab States of  
the Gulf (with Rules of Procedures of the Supreme  
Council, of the Ministerial Council and of the Commis-  
sion for Settlement of Disputes). Concluded at Abu  
Dhabi on 25 May 1981**

*Authentic text: Arabic.*

*Registered by the Secretary-General of the Co-operation Council for the  
Arab States of the Gulf, acting on behalf of the Parties, on  
20 September 1982.*

---

**ARABIE SAOUDITE, BAHREÏN, ÉMIRATS  
ARABES UNIS, KOWEÏT, OMAN ET QATAR**

**Charte du Conseil de coopération des États arabes du Golfe  
(avec Règlement intérieur du Conseil suprême, du  
Conseil des Ministres et de la Commission de règlement  
des différends). Conclue à Abou Dhabi le 25 mai 1981**

*Texte authentique : arabe.*

*Enregistrée par le Secrétaire général du Conseil de coopération pour les  
États arabes du Golfe, agissant au nom des Parties, le 20 septembre  
1982.*



## المادة (٩)

## التوصيات والفتاوى

- ١ - تصدر الهيئة توصياتها أو فتاواها وفقا لأحكام النظام الأساسي لمجلس التعاون والمانون والعرف الدوليين ومبادئ الشريعة الإسلامية على أن ترفع تقاريرها بشأن الحالة المطروحة عليها إلى المجلس الأعلى لاتخاذ ما يراه مناسباً .
- ب - للهيئة أثناء النظر في أي نزاع أمامها . وإلى أن تصدر توصياتها النهائية فيه . أو توصي المجلس الأعلى باتخاذ التدابير المؤقتة التي تقتضيها الحاجة أو الظروف .
- ج - تبين توصيات الهيئة أو فتاواها الأسباب التي بنيت عليها وتوقع من الرئيس والمسجل .
- د - إذا لم يكن الرأي صادراً كله أو بعضه بأجماع الأعضاء فمن حق المخالفين تسجيل بيان بالرأي المخالف .

## المادة (١٠)

## الحصانات والامتيازات

- تتمتع الهيئة وأعضاؤها في إقليم كل دولة من الدول الأعضاء بالحصانات والامتيازات التي يتطلبها تحقيق أغراضها . طبقاً للمادة السابعة عشرة من النظام الأساسي لمجلس التعاون .

## المادة (١١)

## ميزانية الهيئة

- تعتبر ميزانية الهيئة جزءاً من ميزانية الامانة العامة ويحدد المجلس الأعلى مكافآت أعضاء الهيئة .

## المادة (١٢)

## التعديل

- أ - لأي دولة عضو طلب تعديل هذا النظام .
- ب - يقدم طلب التعديل للأمين العام الذي يتولى حالته للدول الأعضاء وذلك قبل عرضه على المجلس الوزاري بأربعة أشهر على الأقل .
- ج - يصبح التعديل نافذ المفعول إذا أقره المجلس الأعلى بالإجماع .

## المادة (١٣)

## سريان هذا النظام

يسري هذا النظام من تاريخ موافقة المجلس الأعلى عليه .  
تم التوقيع على هذا النظام في مدينة ابوظبي (دولة الامارات العربية المتحدة) ، بتاريخ ٢١ رجب ١٤٠١ هجرية الموافق ٢٥ أيار ١٩٨١ ميلادية .

دولة الامارات العربية المتحدة

دولة البحرين

المملكة العربية السعودية

سلطنة عمان

دولة قطر

دولة الكويت

**المادة (٢)****مقر الهيئة واجتماعاتها**

يكون مقر الهيئة مدينة الرياض بالمملكة العربية السعودية وتعد اجتماعاتها بدولة المقر ولها عند الاقتضاء أن تجتمع في أي مكان آخر .

**المادة (٣)****الاقتصاص**

تختص الهيئة عند تسميتها بالنظر فيما يحيله اليها المجلس الأعلى من :

- أ - منازعات بين الدول الاعضاء .
- ب - خلافات حول تفسير أو تطبيق النظام الاساسي لمجلس التعاون .

**المادة (٤)****عضوية الهيئة**

- أ - يتم تشكيل الهيئة من العدد المناسب من مواطني الدول الاعضاء غير الاطراف في النزاع الذين يرى المجلس اختيارهم في كل حالة على حدة بحسب طبيعة الخلاف على الا يقل عددهم عن ثلاث .
- ب - للهيئة أن تستعين بمن تشاء من الخبراء والمستشارين .
- ج - ما لم يقرر المجلس الأعلى خلاف ذلك . تنتهي مهمة الهيئة برفع توصياتها أو فتاواها الى المجلس الأعلى ، وله بعد انتهاء مهمتها استدعاؤها في أي وقت لتفسير أو توضيح ما جاء في توصياتها أو فتاواها .

**المادة (٥)****والإجراءات الداخلية**

- أ - يكون انعقاد الهيئة صحيحا بحضور جميع أعضائها .
- ب - تعد الأمانة العامة لمجلس التعاون نظام للإجراءات اللازمة لسير عمل الهيئة . ويسرى العمل به من تاريخ موافقة المجلس الوزاري عليه .
- ج - يكون لكل طرف من أطراف النزاع ممثلون عنه أمام الهيئة ولهم متابعة الاجراءات وابداء أوجه الدفاع .

**المادة (٦)****الرئاسة**

تختار الهيئة رئيسا لها من بين أعضائها .

**المادة (٧)****التصويت**

يكون لكل عضو في الهيئة صوت واحد وتصدر الهيئة توصياتها أو فتاواها بشأن الموضوعات المطروحة عليها بأغلبية أصوات الأعضاء . فاذا تساوت الأصوات يرجح الجانب الذي فيه الرئيس .

**المادة (٨)****سكرتارية الهيئة**

- أ - يتولى الأمين العام تعيين مسجل للهيئة وعدد كاف من الموظفين للقيام بأعمال سكرتاريتها .
- ب - للمجلس الأعلى انشاء جهاز مستقل للقيام بأعمال سكرتارية الهيئة اذا دعت الحاجة الى ذلك .

## مادة (٣٨)

- ١ - لاية دولة عضو وللأمين العام اقتراح تعديل هذا النظام .
- ٢ - لا يجوز النظر في طلب تعديل هذا النظام الا اذا أرسل الاقتراح الخاص بهذا التعديل الى الدول الاعضاء من طرف الامانة العامة قبل عرضه على المجلس بثلاثين يوما على الأقل .
- ٢ - لا يجوز ادخال تغييرات أساسية على اقتراح التعديل المشار اليه في الفقرة السابقة الا اذا كان نص هذه التغييرات المقترحة قد أرسل الى الدول الاعضاء من طرف الامانة العامة قبل عرضه على المجلس بخمسة عشر يوما على الأقل .
- ٤ - باستثناء المواد المستندة الى أحكام النظام الاساسي ومع مراعاة الفقرات السابقة يتم تعديل هذا النظام بقرار يتخذه المجلس بموافقة أغلبية أعضائه .

## مادة (٣٩)

## سريان هذا النظام

- يسرى هذا النظام من تاريخ موافقة المجلس عليه ولا يجوز تعديله الا وفق الاجراءات المتصوص عليها في المادة السابقة .
- تم التوقيع على هذا النظام في مدينة أبوظبي (الامارات العربية المتحدة) ، بتاريخ ٢١ رجب ١٤٠١ هجرية الموافق ٢٥ أيار ١٩٨١ ميلادية .
- دولة الامارات العربية المتحدة  
دولة البحرين  
المملكة العربية السعودية  
سلطنة عمان  
دولة قطر  
دولة الكويت

## النظام الاساسي لهيئة تسوية المنازعات

## دباجة

- استنادا الى نص المادة السادسة من النظام الاساسي لمجلس التعاون لدول الخليج العربية . وتنفيذا لنص المادة العاشرة من النظام الاساسي لمجلس التعاون .
- يتم تشكيل هيئة تسوية المنازعات ، التي يشار اليها فيما بعد بالهيئة ، وتحديد اختصاصاتها وقواعد اجراءاتها وفقا للنصوص التالية :

## الملحة (١)

## المصطلحات

- تكون للمصطلحات الواردة في هذا النظام نفس المعاني الواردة في النظام الاساسي لمجلس التعاون لدول الخليج العربية .

- ٣ - فيما عدا الاقتراحات المتعلقة بالصياغة او بالاجراءات ، لا تجوز مناقشة المشاريع المبينة في هذه المادة أو عرضها للتصويت قبل توزيع نصها على جميع الوفود .
- ٤ - لا يجوز اعادة النظر في اقتراح سبق البت فيه في نفس الدورة ما لم يقرر المجلس خلاف ذلك .

## مادة (٣٢)

يتابع الرئيس اعمال اللجان ويبلغ المجلس الرسائل الواردة اليه ويعلن رسميا امام الاعضاء القرارات والتوصيات التي تم التوصل اليها .

## مادة (٣٣)

## التصويت

- ١ - يتخذ المجلس قراراته باجماع الدول الاعضاء الحاضرة المشتركة في التصويت على أن يكتفى في البت في المسائل الاجرائية بالاغلبية وعلى العضو الممتنع عن التصويت أن يسجل عدم التزامه بالقرار .
- ٢ - اذا اختلف أعضاء المجلس في تعريف المسألة المعروضة على التصويت يقع البت في ذلك بأغلبية الدول الاعضاء الحاضرة المشتركة في التصويت .

## مادة (٣٤)

- ١ - لكل دولة عضو صوت واحد .
- ٢ - لا يجوز لاية دولة عضو أن تمثل دولة أخرى أو تصوت نيابة عنها .

## مادة (٣٥)

- ١ - يكون التصويت نداء بالأسم وفق الترتيب الهجائي لاسماء الدول أو برفع الايدي .
- ٢ - يتم التصويت بالاقتراع السري اذا طلبه عضو او يقرر من الرئيس والمجلس أن يقرر خلاف ذلك .
- ٣ - يدون صوت كل عضو في محضر الجلسة اذا كان التصويت بالمناداة وتدرج بالمحضر نتيجة التصويت اذا كان سريا أو برفع الايدي .
- ٤ - للدول الأعضاء أن توضح مواقفها بعد التصويت ويثبت ذلك كتابة بمحضر الجلسة .
- ٥ - لا تجوز مقاطعة التصويت اذا اعلن الرئيس عن بدئه ما لم يكن ذلك لنقطة نظام تتعلق بالتصويت أو بتأجيله وذلك وفق أحكام هذه المادة والمادة التي تليها .

## مادة (٣٦)

- ١ - يسعى رئيس المجلس بمساعدة الامين العام الى التوفيق بين وجهات نظر الدول الاعضاء في المسألة التي تختلف فيها والى الحصول على تراضيها حول مشروع قرار قبل احواله للتصويت .
- ٢ - لرئيس المجلس وللأمين العام ولاية دولة عضو طلب تأجيل التصويت لمدة معينة يتم اثناءها المزيد من التفاوض بشأن المسألة المعروضة على التصويت .

## مادة (٣٧)

- ١ - اذا طلب عضو تعديل اقتراح يتم التصويت على التعديل اولا فاذا كان هناك أكثر من تعديل يبدأ التصويت على التعديل الذي يرى الرئيس انه من حيث الموضوع أكثر التعديلات بعدا عن الاقتراح الاصلى . ثم يصوت على التعديل الذي يليه في البعد وهكذا حتى يتم التصويت على جميع التعديلات المقترحة فاذا أقر تعديل أو أكثر يجرى التصويت بعد ذلك على الاقتراح الاصلى المعدل .
- ٢ - يعتبر أى اقتراح جديد بمثابة تعديل للاقتراح الاصلى اذا تضمن مجرد اضافة أو حذف أو تغيير في أحد أجزاء الاقتراح الاصلى .

مادة (٢٥)

لا يجوز اعلان أو نشر نصوص القرارات والتوصيات التي يتخذها المجلس الا بقرار منه .

مادة (٢٦)

#### سير المحاولات

لكل دولة عضو أن تشترك في مداوات المجلس ولجانته الفرعية على النحو المبين في هذا النظام .

مادة (٢٧)

- ١ - يدير الرئيس المداوات في المسائل المعروضة للبحث بحسب ترتيبها في جدول أعمال المجلس .
- ٢ - يعطي الرئيس الكلمة بحسب ترتيب طلبها ويجوز أن تعطى الأسبقية في الكلام لرئيس أو مقرر لجنة ما لتقديم تقريرها أو ايضاح نقاط واردة فيه وتسنده الكلمة الى الأمين العام أو من يمثله كلما تطلب الأمر ذلك .
- ٣ - لرئيس المجلس أثناء المداولة تلاوة قائمة الاعضاء الذين طلبوا الكلمة ، وباتفاق مع المجلس اعلان اقفال القائمة ولا يستثنى من ذلك الاممارسة حق الرد .

مادة (٢٨)

يقرر المجلس سرية الجلسات أو علانيتها .

مادة (٢٩)

- ١ - لكل دولة عضو اثاره تقطة نظام بيت الرئيس فيها فوراً ويكون قراره نافذا ما لم ينقضه المجلس بأغلبية الدول الاعضاء .
- ٢ - لا يجوز لعضو اثاره تقطة نظام الخروج في حديثه عن نقطة النظام التي اثارها .

مادة (٣٠)

- ١ - لكل عضو أن يقترح أثناء مناقشة أية مسألة ، وقف الجلسة أو تأجيلها أو تأجيل المناقشة في المسألة المطروحة للبحث أو اقفال المناقشة ويطرح الرئيس الاقتراح مباشرة للتصويت اذا ثنى عليه عضو آخر ويكون اقراره بأغلبية الدول الاعضاء .
- ٢ - مع مراعاة ما ورد في الفقرة السابقة تعرض الاقتراحات المبينة فيها على التصويت حسب الترتيب الآتى :
  - أ - وقف الجلسة .
  - ب - تأجيل الجلسة .
  - ج - تأجيل المناقشة في المسألة قيد البحث .
  - د - اقفال باب المناقشة في المسألة قيد البحث .

مادة (٣١)

- ١ - للدول الاعضاء أن تقترح مشاريع قرارات وتوصيات ومشاريع تعديلات لها ، ولها حق سحبها ما لم يتم التصويت عليها .
- ٢ - تقدم المشاريع المنصوص عليها في الفقرة السابقة كتابة الى الامانة العامة لتتولى توزيعها على الوفود بأسرع وقت ممكن .

- ٣ - الاشراف على صياغة القرارات التي يعتمدها المجلس .
- ٤ - غير ذلك من المهام الواردة في هذا النظام أو الأعمال التي يكلفه بها المجلس .

مادة (١٥)

#### اللجان الفرعية :

- ١ - يستعين المجلس في أداء مهامه بلجان تحضيرية ولجان عمل .
- ٢ - تشترك الأمانة العامة في أعمال اللجان .

مادة (٢٠)

- ١ - للأمين العام أن يشكل بالتشاور مع رئيس الدورة لجانا تحضيرية يعهد اليها بدراسة مسائل مدرجة بجدول الأعمال .
- ٢ - تتألف اللجان التحضيرية من مندوبين عن الدول الأعضاء ولها أن تستعين بمن ترى من الخبراء عند الاقتضاء .
- ٣ - تجتمع كل لجنة تحضيرية ثلاثة أيام على الأقل قبل انعقاد الدورة بدعوة من الأمين العام وتنتهي أعمالها بانتهاء أعمال الدورة .

مادة (٢١)

- ١ - للمجلس أن يشكل في مستهل كل دورة لجان عمل يعهد اليها بمهام يحددها لها .
- ٢ - تستمر اجتماعات لجان العمل حتى الموعد المحدد لانتهاج الدورة .

مادة (٢٢)

- ١ - تستهل كل لجنة فرعية أعمالها بانتخاب رئيس ومقرر لها من بين أعضائها وفي حالة غياب الرئيس ينوب عنه مقرر اللجنة في ادارة الجلسات .
- ٢ - يقدم رئيس كل لجنة فرعية أو مقررها تقريراً عن أعمال لجنته الى المجلس .
- ٣ - على رئيس اللجنة الفرعية أو مقررها أن يقدم للمجلس كل ما يطلبه من ايضاحات حول ما ورد في تقرير اللجنة .

مادة (٢٣)

- ١ - تتولى الأمانة العامة تنظيم السكرتارية الفنية للمجلس ولجانه الفرعية .
- ٢ - تتولى الأمانة العامة تدوين محاضر بما دار من المناقشات وما اتخذ من القرارات والتوصيات وتعد محاضر لجميع جلسات المجلس ولجانه الفرعية .
- ٣ - يشرف الأمين العام على تنظيم علاقات المجلس مع وسائل الاعلام .
- ٤ - يرسل الأمين العام القرارات والتوصيات التي يتخذها المجلس والوثائق المتعلقة بها الى الدول الأعضاء خلال خمسة عشر يوماً من انتهاء الدورة .

مادة (٢٤)

تتولى سكرتارية المجلس ولجانه الفرعية تلقي وتوزيع وثائق وتقارير وقرارات وتوصيات المجلس ولجانه الفرعية وتحرير وتوزيع المحاضر والنشرات اليومية وحفظ الوثائق والقيام بجميع المهام الأخرى التي تتطلبها أعمال المجلس .

## مادة (12)

يقر المجلس جدول أعماله في مستهل كل دورة .

## مادة (13)

تنتهي كل دورة عادية للمجلس بعد الفراغ من بحق المسائل المدرجة بجدول أعماله وللمجلس عند الاقتضاء ان يقرر وقف جلساته مؤقتا قبل الانتهاء من بحث المسائل الواردة فيه واستئناف الجلسات في موعد آخر .

## مادة (14)

للمجلس أن يرجى النظر في بعض المسائل الواردة بجدول أعماله وأن يقرر ادراجها مع مسائل أخرى ان اقتضى الأمر بجدول أعمال دورة قادمة .

## مادة (15)

## رئاسة المجلس

- ١ - تسند رئاسة المجلس كل ستة أشهر الى أحد رؤساء الوفود بالتناوب بينهم على أساس الترتيب الهجائي لاسماء الدول وعند الاقتضاء الى الدولة التالية في الترتيب .
- ٢ - يمارس الرئيس مهامه الى أن تسند الرئاسة لخلفه .
- ٣ - يتولى الرئيس كذلك رئاسة الدورات الاستثنائية .
- ٤ - لا يجوز لممثل دولة طرف في نزاع قائم أن يرأس الدورة أو الجلسة التي تخصص لمناقشة هذه المسألة وفي هذه الحالة يعين المجلس رئيسا مؤقتا .

## مادة (16)

- ١ - يعلن الرئيس افتتاح الدورات والجلسات واختتامها ووقف الجلسات وقفل باب المناقشة ويكفل احترام أحكام النظام الأساسي وهذا النظام .
- ٢ - للرئيس حق الاشتراك في مداوات المجلس والتصويت نيابة عن الدولة التي يمثلها وله أن ينيب عنه في ذلك أحد أعضاء وفده .

## مادة (17)

## كتب المجلس :

- ١ - يضم مكتب المجلس رئيس المجلس والأمين العام ورؤساء لجان العمل الفرعية التي يقرر المجلس تشكيلها .
- ٢ - يتولى رئيس المجلس رئاسة المكتب .

## مادة (18)

## يقوم المكتب بالمهام التالية :

- ١ - مساعدة رئيس المجلس في ادارة أعمال الدورة .
- ٢ - تنسيق أعمال المجلس واللجان الفرعية .

## مادة (د)

## الدورات الاستثنائية :

- ١ - يُنعقد المجلس في دورات استثنائية بناء على طلب أى من الدول الأعضاء وتأييد عضو آخر .
- ٢ - يوجه الأمين العام الى الدول الأعضاء كتاب الدعوة لحضور الدورة الاستثنائية للمجلس ويكون مرفقا بمذكرة تتضمن طلب الدولة صاحبة الدعوة .
- ٣ - يحدد الأمين العام في كتاب الدعوة مكان الدورة وتاريخ افتتاحها وجدول أعمالها .
- ٤ - يعقد المجلس دورات استثنائية بقرار منه ويحدد في هذه الحالة جدول أعمال الدورة وتاريخها ومقر انعقادها .
- ٥ - يوجه الأمين العام الى الدول الأعضاء كتاب الدعوة لحضور الدورة الاستثنائية للمجلس ويكون مرفقا بمذكرة تتضمن قرار المجلس في هذا الشأن وتحدد مكان الدورة وتاريخ افتتاحها وجدول أعمالها .
- ٦ - تنعقد الدورة الاستثنائية خلال خمسة أيام على الأكثر من تاريخ توجيه الدعوة .

## مادة (هـ)

لا تدرج بجدول أعمال الدورة الاستثنائية مسائل غير التي عقدت الدورة من أجل النظر فيها .

## مادة (و)

## جدول الأعمال

يعد الأمين العام مشروعاً لجدول أعمال الدورة العادية للمجلس ويتضمن هذا المشروع ما يلي :

- ١ - تقرير الأمين العام عن أعمال مجلس التعاون .
- ٢ - المسائل التي يحيلها اليه المجلس الأعلى .
- ٣ - المسائل التي سبق للمجلس أن قرر ادراجها في جدول أعماله .
- ٤ - المسائل التي يرى الأمين العام عرضها على المجلس .
- ٥ - المسائل التي تقترحها دولة العضو .

## مادة (ز)

توجه الدول الاعضاء الى الأمين العام اقتراحاتها حول المسائل التي ترغب في ادراجها بجدول أعمال المجلس قبل انعقاد دورته العادية بثلاثين يوماً على الأقل .

## مادة (ح)

للدول الاعضاء وللأمين العام طلب ادراج مسائل اضافية في مشروع جدول أعمال المجلس وذلك قبل التاريخ المحدد لبدء الدورة العادية بعشرة أيام على الأقل ويتم ادراج هذه المسائل في جدول اضافي يرسل مع وثائقه الى الدول الاعضاء قبل خمسة أيام على الأقل من موعد الدورة .

## مادة (ط)

للدول الاعضاء وللأمين العام طلب ادراج مسائل اضافية في مشروع جدول أعمال الدورة العادية للمجلس حتى حلول الموعد المحدد لانعقاده اذا كانت لهذه المسائل صفة الأهمية والاستعجال معا .



## النظام الداخلي للمجلس الوزاري لمجلس التعاون لدول الخليج العربية

### مادة (١)

- ١ - يسمى هذا النظام النظام الداخلي للمجلس الوزاري لمجلس التعاون لدول الخليج العربية « ويتضمن القواعد الخاصة بإجراءات انعقاده وممارسة مهامه .
- ٢ - تكون للمسميات الآتية في هذا النظام الدلالات الواردة ازاء كل منها :  
مجلس التعاون : مجلس التعاون لدول الخليج العربية .  
النظام الأساسي : نظام انشاء مجلس التعاون لدول الخليج العربية .  
المجلس الأعلى : المجلس الأعلى لمجلس التعاون لدول الخليج العربية .  
المجلس : المجلس الوزاري لمجلس التعاون لدول الخليج العربية .  
الأمين العام : الأمين العام لمجلس التعاون لدول الخليج العربية .  
الامانة العامة : الامانة العامة لمجلس التعاون لدول الخليج العربية .  
الرئيس : رئيس المجلس الوزاري لمجلس التعاون لدول الخليج العربية .

### مادة (٢)

#### تمثيل الدول

- ١ - يتألف المجلس الوزاري من وزراء خارجية الدول الأعضاء أو من ينوب عنهم من الوزراء .
- ٢ - تزود كل دولة عضو الأمين العام قبل اسبوع على الأقل من انعقاد كل دورة عادية للمجلس بقائمة تتضمن أسماء أعضاء وفدتها أما بالنسبة للدورات الاستثنائية فيراعى أن يكون ذلك قبل ثلاثة أيام من انعقاد الدورة .

### مادة (٣)

#### الانعقاد

- ١ - يقرر المجلس الوزاري في كل اجتماع مكان انعقاد دورته التالية .
- ٢ - يحدد الأمين العام بالتشاور مع الدول الأعضاء مكان انعقاد الدورات الاستثنائية .
- ٣ - اذا طرأت ظروف خاصة لا تسمح بانعقاد دورة عادية أو استثنائية في المكان المقرر لها يتولى الأمين العام اخطار الدول الأعضاء بذلك ويحدد بالتشاور معها مكانا آخر لانعقادها .

### مادة (٤)

#### الدورات العادية

- ١ - ينعقد المجلس في دورة عادية مرة كل ثلاثة أشهر .
- ٢ - يحدد الأمين العام تاريخ افتتاح الدورة ويقترح موعد انتهائها .
- ٣ - يوجه الأمين العام الى الدول الأعضاء كتاب الدعوة لحضور الدورات العادية للمجلس قبل انعقادها بخمسة عشر يوما على الأقل ويحدد فيه موعد الدورة ومكان انعقادها ويرفق به جدول أعمال الدورة مع المذكرات التفسيرية وغيرها من الوثائق .

- الأصلي . ثم يصوت على التعديل الذي يليه في البعد . وهكذا حتى يتم التصويت على جميع التعديلات المقترحة فإذا أقر تعديل أو أكثر يجرى التصويت بعد ذلك على الاقتراح الأصلي المعدل .
- ٢ - يعتبر أى اقتراح جديد بمثابة تعديل للاقتراح الأصلي إذا تضمن مجرد إضافة أو حذف أو تغيير في أحد أجزاء الاقتراح الأصلي .

#### مادة (١٧)

- ١ - للمجلس الأعلى ان ينشئ لجانا فنية يعهد اليها بتقديم المشورة في اعداد وتنفيذ برامج المجلس الاعلى في مجالات معينة .
- ٢ - يعين المجلس الاعلى أعضاء اللجان الفنية من بين مواطنى الدول الأعضاء المتخصصين .
- ٣ - تجتمع اللجان الفنية بدعوة من الأمين العام وتضع بالتشاور معه خطة عملها .
- ٤ - يضع الأمين العام جدول أعمال اللجان الفنية بعد التشاور مع رئيس اللجنة المعنية .

#### مادة (١٨)

### تعديل النظام

- ١ - لأية دولة عضو اقتراح تعديل هذا النظام .
- ٢ - لا يجوز النظر في طلب تعديل هذا النظام الا اذا أرسل الاقتراح الخاص بهذا التعديل الى الدول الأعضاء من طرف الأمانة العامة قبل عرضه على المجلس الوزارى بثلاثين يوما على الأقل .
- ٣ - لا يجوز ادخال تغييرات أساسية على اقتراح التعديل المشار اليه في الفقرة السابقة الا اذا كان نص هذه التغييرات المقترحة قد أرسل الى الدول الاعضاء من طرف الأمانة العامة قبل عرضه على المجلس الوزارى بخمسة عشر يوما على الأقل .
- ٤ - باستثناء المواد المستندة الى أحكام النظام الأساسى ومع مراعاة الفقرات السابقة يتم تعديل هذا النظام الداخلى بقرار يتخذه المجلس الأعلى بموافقة أغلبية أعضائه .

#### مادة (١٩)

### سريان هذا النظام

يسرى هذا النظام من تاريخ موافقة المجلس الأعلى عليه ولا يجوز تعديله الا وفق الاجراءات المنصوص عليها في المادة السابقة .

تم التوقيع على هذا النظام في مدينة أبوظبي ( الامارات العربية المتحدة ) بتاريخ ٢١ رجب ١٤٠١ هجرية الموافق ٢٥ ايار ١٩٨١ ميلادية .

دولة الامارات العربية المتحدة

دولة البحرين

المملكة العربية السعودية

سلطنة عمان

دولة قطر

دولة الكويت

- ٣ - يعطى الرئيس الكلمة بحسب ترتيب طلبها ويجوز ان تعطى الأسبقية في الكلام لرئيس أو مقرر لجنة ما لتقديم تقريرها أو ايضاح نقاط واردة فيه .
- ٤ - لكل عضو ان يثير أثناء المداولة نقطة نظام بيت الرئيس فيها فوراً ويكون قرار الرئيس نافذاً ما لم ينقضه المجلس الأعلى بأغلبية الدول الأعضاء .

مادة (١٢)

- ١ - لكل عضو ان يقترح أثناء مناقشة أى موضوع وقف الجلسة أو تأجيلها أو تأجيل المناقشة في الموضوع المطروح للبحث أو اقفال باب المناقشة . ولا تجوز مناقشة هذه الاقتراحات بل يطرحها الرئيس للتصويت اذا اثنى عليها عضو آخر ويكون اقرارها بأغلبية الدول الأعضاء .
- ٢ - مع مراعاة ما ورد في الفقرة (٤) من المادة السابقة ، تعطى الاقتراحات المبينة في الفقرة (١) من هذه المادة الأسبقية على كل ما عداها وذلك حسب الترتيب الآتي :
- أ - وقف الجلسة .
- ب - تأجيل الجلسة .
- ج - تأجيل المناقشة في الموضوع قيد البحث .
- د - اقفال باب المناقشة في الموضوع قيد البحث .
- ٣ - فيما عدا الاقتراحات المتعلقة بالصياغة أو بأمور إجرائية ، تقدم مشروعات القرارات والتعديلات الجوهريّة كتابة الى الأمين العام أو من يمثله ليتولى توزيعها على الوفود بأسرع وقت ممكن . ولا تجوز مناقشة مشروع قرار أو طرحه على التصويت قبل توزيع نصه على جميع الوفود .
- ٤ - لا يجوز إعادة النظر في اقتراح سبق البت فيه في نفس الدورة ما لم يقرر المجلس خلاف ذلك .

مادة (١٣)

يتابع الرئيس أعمال اللجان ويبلغ المجلس الأعلى الرسائل الواردة اليه ويعلن رسمياً أمام الأعضاء القرارات والتوصيات التي تم التوصل اليها .

مادة (١٤)

التصويت :

لكل دولة عضو صوت واحد ولا يجوز لأية دولة ان تمثل دولة أخرى أو تصوت عنها .

مادة (١٥)

- ١ - يكون التصويت نداءً بالاسم وفقاً للترتيب الهجائي لأسماء الدول أو برفع اليد ويتم التصويت بالاقتراع السري اذا طلبه عضو أو بقرار من الرئيس ، وللمجلس الأعلى أن يقرر خلاف ذلك ويدون صوت كل عضو في محضر الجلسة اذا كان الاقتراع بالمناداة . وتدرج بالمحضر نتيجة الاقتراع اذا كان سرياً أو برفع اليد .
- ٢ - لكل عضو ان يمتنع عن التصويت أو ان يتحفظ على قرار اجرائي أو على جزء منه ويتلى التحفظ عند اعلان القرار ويثبت كتابة ، وللأعضاء ان يقدموا ايضاحات عن مواقفهم في التصويت بعد انتهائه .
- ٣ - اذا أعلن الرئيس بدء التصويت فلا يجوز مقاطعته ما لم يكن ذلك لنقطة نظام تتعلق بالتصويت .

مادة (١٦)

- ١ - اذا طلب عضو تعديل اقتراح ، يتم التصويت على التعديل أولاً فاذا كان هناك أكثر من تعديل يبدأ التصويت على التعديل الذي يرى الرئيس أنه من حيث الموضوع أكثر التعديلات بعداً عن الاقتراح

- ٢ - لكل دولة عضو طلب ادراج مسائل اضافية في مشروع جدول أعمال المجلس وذلك قبل التاريخ المحدد لبدء الدورة بخمسة عشر يوماً على الأقل ويتم ادراج هذه المسائل في جدول اضافي يرسل مع وثائقه الى الدول الاعضاء قبل خمسة أيام على الأقل من موعد الدورة .
- ٤ - لأية دولة عضو طلب ادراج مسائل اضافية في مشروع جدول أعمال الدورة حتى حلول الموعد المحدد لافتتاحها اذا كانت لهذه المسائل صفة الأهمية والاستعجال معا .
- ٥ - يصادق المجلس على جدول أعماله في بداية كل دورة .
- ٦ - للمجلس أثناء الدورة اضافة مسائل جديدة لها صفة الاستعجال .
- ٧ - تنتهي الدورة العادية بعد الفراغ من بحث المواد المدرجة في جدول الأعمال للمجلس الأعلى ان يقرر وقف جلسات الدورة مؤقتاً قبل الانتهاء من بحث الجدول واستئناف الجلسات في موعد لاحق .

سادة (٩)

#### مكتب المجلس الأعلى ولجانه :

- ١ - يشكل مكتب المجلس الأعلى في كل دورة عادية من رئيس المجلس ورئيس المجلس الوزاري والأمين العام . يتولى رئيس المجلس الأعلى رئاسة المكتب .
- ٢ - يقوم المكتب بالمهام التالية :
  - أ - مراجعة صياغة القرارات التي يعتمدها المجلس الأعلى دون المساس بمضمونها .
  - ب - مساعدة رئيس المجلس الأعلى في ادارة اعمال الدورة بصفة عامة .
  - ج - غير ذلك من المهام الواردة في هذا النظام أو الأعمال التي يكلفه بها المجلس الأعلى .

سادة (١٠)

- ١ - للمجلس في مستهل كل دورة عادية ان ينشئ ما يراه ضروريا من اللجان على نحو يتيح دراسة وافية للمسائل المدرجة في جدول الأعمال ويشترك في أعمال هذه اللجان مندوبون عن الدول الاعضاء .
- ٢ - تستمر اجتماعات اللجان لانجاز أعمالها أخذاً في الاعتبار الموعد المحدد لانتهاء الدورة وتصدر توصياتها بالأغلبية .
- ٣ - تستهل كل لجنة أعمالها بانتخاب رئيس ومقرر من بين أعضائها . وفي حالة غياب الرئيس ينوب عنه مقرر اللجنة في ادارة جلساتها . وعلى الرئيس ، أو المقرر في حالة غياب الرئيس ، ان يقدم للمجلس كل ما يطلبه من الايضاحات حول ما ورد في تقرير اللجنة ويجوز له بموافقة رئيس الدورة ان يشترك في المداولة دون الاقتراع ما لم يكن عضواً في المجلس .
- ٤ - للمجلس ان يحيل ما يراه من المسائل المدرجة في جدول الأعمال الى اللجان بحسب اختصاصها لدراسة هذه المسائل وتقديم تقارير عنها ويجوز احالة مسألة واحدة الى أكثر من لجنة .
- ٥ - لا يجوز للجان ان تبحث أية مسائل ما لم يقرر المجلس احوالها اليها كما لا يجوز لها ان تتخذ أية توصية في شأن أية مسألة مدرجة على جدول أعمالها يترتب على اعتمادها من المجلس التزام مالي قبل أن يصلها تقرير من الأمين العام عن الآثار المالية والادارية المترتبة على اتخاذ التوصية .

سادة (١١)

#### سير المحاولات والاقتراحات

- ١ - لكل دولة عضو ان تشترك في مداولات المجلس الأعلى ولجانه على النحو المبين في هذا النظام .
- ٢ - يدير الرئيس المداولة في المسائل المعروضة للبحث بحسب ترتيبها في جدول أعمال الجلسة وله عند الاقتضاء ان يدعو الأمين العام أو من يمثله في الاجتماع لايضاح ما يراه .

## مادة (٥)

- ١ - يقرر المجلس الأعلى في بداية كل دورة سرية الجلسات أو إعلانيتها .
- ٢ - يكون انعقاد المجلس الأعلى صحيحا اذا حضره رؤساء ثلثي الدول الأعضاء ويتخذ قراراته في المسائل الموضوعية باجماع الدول الأعضاء الحاضرة المشتركة في التصويت وفي المسائل الاجرائية بالأغلبية وعلى العضو الممتنع عن التصويت ان يسجل عدم التزامه بالقرار .

## مادة (٦)

- ١ - ينعقد المجلس الأعلى في دورة استثنائية :
  - أ - بناء على قرار سبق اصداره في دورة سابقة .
  - ب - بناء على طلب دولة من الدول الأعضاء وتأييد دولة أخرى وفي هذه الحالة ينعقد المجلس خلال خمسة أيام على الأكثر من تاريخ توجيه الدعوة للدورة الاستثنائية .
- ٢ - لا تدرج في جدول أعمال الدورات الاستثنائية مسائل غير التي عقدت الدورة من أجل النظر فيها .

## مادة (٧)

## رئاسة المجلس الأعلى :

- ١ - تسند رئاسة المجلس الأعلى عند بدء كل دورة عادية الى رؤساء الدول الأعضاء بالتناوب بينهم على أساس الترتيب الهجائي لأسماء الدول ويظل الرئيس يمارس أعمال الرئاسة الى ان تسند لخلفه في مستهل أعمال الدورة العادية التالية .
- ٢ - لا يجوز لرئيس دولة طرف في نزاع قائم ان يرأس الدورة أو الجلسة التي تخصص لمناقشة هذه المسألة وفي هذه الحالة يعين المجلس رئيسا مؤقتا .
- ٣ - يعلن الرئيس افتتاح واختتام الدورات والجلسات ووقف الجلسات واقفال باب المناقشات ويكفل مراعاة احكام النظام الاساسي لمجلس التعاون وهذا النظام ، ويعطى الكلمة حسب ترتيب طلبها وي طرح الاقتراحات لأخذ الرأي فيها ويدير التصويت ويبت في نقاط النظام ويعلن القرارات ويتابع أعمال اللجان ويبلغ المجلس الرسائل الواردة اليه .
- ٤ - للرئيس حق الاشتراك في المداولات والاقتراح نيابة عن الدولة التي يمثلها وله ان ينيب عنه في ذلك احد أعضاء وفده .

## مادة (٨)

## جدول أعمال المجلس الأعلى :

- ١ - يعد المجلس الوزاري مشروع جدول أعمال المجلس الأعلى ويقوم الأمين العام بتعيينه مع المذكرات التفسيرية والوثائق للدول الأعضاء مع كتاب الدعوة للاجتماع قبل انعقاده بثلاثين يوما على الأقل .
- ٢ - يتضمن مشروع جدول الأعمال :
  - أ - تقرير الأمين العام عن أعمال المجلس الأعلى بين الدورتين والاجراءات المتخذة لتنفيذ قراراته .
  - ب - التقارير والمسائل الواردة من المجلس الوزاري والأمانة العامة .
  - ج - المسائل التي سبق للمجلس الأعلى ان قرر ادراجها في جدول أعماله .
  - د - المسائل التي تقترحها دولة عضو وترى ضرورة عرضها على المجلس الأعلى .

## النظام الداخلي للمجلس الأعلى لمجلس التعاون لدول الخليج العربية

مادة (١)

### تعريف

يسمى هذا النظام « النظام الداخلي للمجلس الأعلى لمجلس التعاون لدول الخليج العربية » ويتضمن القواعد المنظمة لاجراءات انعقاد المجلس وممارسة مهامه .

مادة (٢)

### عضوية المجلس الأعلى ومهامه :

- ١ - يتألف المجلس الأعلى من رؤساء الدول الأعضاء بمجلس التعاون وتكون رئاسته دورية حسب الترتيب الهجائي لأسماء الدول .
- ٢ - تبلغ كل دولة عضو الأمين العام بأسماء وفدها الى اجتماع المجلس قبل موعد افتتاحه بسبعة أيام على الأقل .

مادة (٣)

- مع مراعاة أهداف مجلس التعاون واختصاصات المجلس الأعلى المنصوص عليها في المادتين ٤ ، ٨ من النظام الأساسي ، للمجلس ان يقوم بما يأتي :
- ١ - انشاء لجان فنية واختيار أعضائها من مرشحي الدول الأعضاء المختصين في مجالات عملها .
  - ٢ - ان يعهد الى واحد أو أكثر من أعضائه بدراسة موضوع معين وتقديم تقرير عنه يوزع على الأعضاء قبل الجلسة التي يبحث فيها الموضوع بوقت كاف .

مادة (٤)

### انعقاد المجلس الأعلى :

- ١ - أ - يجتمع المجلس الأعلى في دورة عادية في السنة ويجوز عقد دورات استثنائية بناء على طلب أى من الأعضاء وتأييد عضو آخر .
- ب - يعقد المجلس الأعلى دوراته على مستوى رؤساء الدول .
- ج - يعقد المجلس الأعلى دوراته في بلدان الدول الأعضاء .
- د - يدعو الأمين العام قبل انعقاد المجلس الأعلى الى اجتماع يحضره مندوبون عن الدول الأعضاء من أجل التشاور في الأمور المتعلقة بأعمال دورته .
- ٢ - أ - يحدد الأمين العام تاريخ بدء الدورات كما يقترح موعد انتهائها .
- ب - يوجه الأمين العام الدعوة لحضور الدورة العادية قبل موعد الاجتماع بثلاثين يوماً على الأقل وللدورة الاستثنائية قبل موعد الاجتماع بخمسة أيام على الأكثر .

٢ - الى ان يتم وضع ونفاذ الاتفاقيتين المشار اليهما في الفقرة ٢ من هذه المادة يتمتع ممثلو الدول أعضاء مجلس التعاون وموظفوه بالامتيازات والحصانات الدبلوماسية الثابتة للهيئات المماثلة .

#### المادة الثامنة عشرة

يكون للأمانة العامة ميزانية تساهم فيها الدول الأعضاء بنسب متساوية .

#### المادة التاسعة عشرة

##### نفاذ النظام الأساسي :

- ١ - يدخل هذا النظام حيز التنفيذ من تاريخ التوقيع عليه من قبل رؤساء الدول الست المشار اليها في ديباجة هذا النظام .
- ٢ - تودع النسخة الأصلية من هذا النظام لدى وزارة خارجية المملكة العربية السعودية كجهة ايداع تقوم بتسليم صورة طبق الأصل منه لكل دولة من الدول الأعضاء ، لحين قيام الأمانة العامة التي تصبح مودعا لديها .

#### المادة العشرون

##### تعديل النظام الأساسي :

- ١ - لأي دولة عضو طلب تعديل هذا النظام .
- ٢ - يقدم طلب التعديل للأمين العام الذي يتولى احواله للدول الأعضاء وذلك قبل عرضه على المجلس الوزاري بأربعة أشهر على الأقل .
- ٣ - يصبح التعديل نافذ المفعول اذا أقره المجلس الأعلى بالاجماع .

#### المادة الحادية والعشرون

##### أحكام ختامية :

لا يجوز ابداء تحفظ على أحكام هذا النظام .

#### المادة الثانية والعشرون

تقوم الأمانة العامة بايداع وتسجيل نسخ من هذا النظام لدى الجامعة العربية والأمم المتحدة بقرار من المجلس الوزاري .  
تم التوقيع على هذا النظام في مدينة أبوظبي ( الامارات العربية المتحدة ) بتاريخ ٢١ رجب ١٤٠١ هجرية الموافق ٢٥ أيار ١٩٨١ ميلادية من نسخة واحدة باللغة العربية .

دولة الامارات العربية المتحدة

دولة البحرين

المملكة العربية السعودية

سلطنة عمان

دولة قطر

دولة الكويت

## المادة الرابعة عشرة

## الأمانة العامة :

- ١ - تتكون الأمانة العامة من أمين عام يعاونه أمناء مساعدون وما تستدعيه الحاجة من موظفين .
- ٢ - يعين المجلس الأعلى الأمين العام من مواطنى دول مجلس التعاون لمدة ثلاث سنوات قابلة للتجديد مرة واحدة .
- ٣ - يرشح الأمين العام الأمناء المساعدين .
- ٤ - يعين الأمين العام موظفى الأمانة من بين مواطنى الدول الأعضاء ولا يجوز له الاستثناء الا بموافقة المجلس الوزارى .
- ٥ - يكون الأمين العام مسئولاً مباشرة عن أعمال الأمانة العامة وعن حسن سير العمل فى مختلف قطاعاتها ويمثل مجلس التعاون لدى الغير وذلك فى حدود الصلاحيات المخولة له .

## المادة الخامسة عشرة

## اختصاصات الأمانة العامة :

تتولى الأمانة العامة المهام التالية :

- ١ - اعداد الدراسات الخاصة بالتعاون والتنسيق والخطط والبرامج المتكاملة للعمل المشترك لدول مجلس التعاون .
- ٢ - اعداد التقارير الدورية عن أعمال مجلس التعاون .
- ٣ - متابعة تنفيذ قرارات وتوصيات المجلس الأعلى والمجلس الوزارى من قبل الدول الأعضاء .
- ٤ - اعداد التقارير والدراسات التى يطلبها المجلس الأعلى أو المجلس الوزارى .
- ٥ - اعداد مشروعات اللوائح الادارية والمالية التى تتمشى مع نمو مجلس التعاون وتزايد مسؤولياته .
- ٦ - اعداد الميزانيات والحسابات الختامية لمجلس التعاون .
- ٧ - التحضير للاجتماعات واعداد جدول أعمال المجلس الوزارى ومشروعات القرارات .
- ٨ - الاقتراح على رئيس المجلس الوزارى الدعوة لعقد دورة استثنائية للمجلس الوزارى اذا دعت الحاجة الى ذلك .
- ٩ - أية مهام أخرى تسند اليها من المجلس الأعلى أو المجلس الوزارى .

## المادة السادسة عشرة

يمارس الأمين العام والأمناء المساعدون وكافة موظفى الأمانة العامة مهام وظائفهم باستقلال تام وللصالح المشترك للدول الأعضاء .  
وعليهم ان يمتنعوا عن أى تصرف يتنافى وواجبات ووظائفهم والا يفضوا بأسرار أعمالهم سواء أثناء الخدمة أو بعدها .

## المادة السابعة عشرة

## الامتيازات والحصانات :

- ١ - يتمتع مجلس التعاون وأجهزته فى اقليم كل دولة من الدول الاعضاء بالأهلية القانونية وبالامتيازات والحصانات التى يتطلبها تحقيق أغراضه والقيام بوظائفه .
- ٢ - يتمتع ممثلو الدول الأعضاء فى المجلس وموظفوه بالامتيازات والحصانات التى تحددها اتفاقية تعقد لهذا الغرض بين الدول الأعضاء كما تنظم العلاقة بين المجلس ودولة المقر باتفاقية خاصة .



## المادة الحادية عشرة

## المجلس الوزاري :

- ١ - يتكون المجلس الوزاري من وزراء خارجية الدول الأعضاء أو من ينوب عنهم من الوزراء وتكون رئاسته دورية لمدة ستة أشهر حسب الترتيب الهجائي للدول .
- ٢ - يعقد المجلس الوزاري اجتماعاته مرة كل ثلاثة أشهر ويجوز له عقد دورات استثنائية بناء على دعوة من أى من الدول الأعضاء وتأييد عضو آخر .
- ٣ - يقر المجلس الوزاري مكان اجتماع دورته التالية .
- ٤ - يعتبر انعقاد المجلس صحيحا إذا حضر ثلثا الدول الأعضاء .

## المادة الثانية عشرة

## اختصاصات المجلس الوزاري :

- ١ - اقتراح السياسات ووضع التوصيات والدراسات والمشاريع التي تهدف الى تطوير التعاون والتنسيق بين الدول الأعضاء في مختلف المجالات واتخاذ ما يلزم بشأنها من قرارات أو توصيات .
- ٢ - العمل على تشجيع وتطوير وتنسيق الأنشطة القائمة بين الدول الأعضاء في مختلف المجالات وتحال القرارات المتخذة في هذا الشأن الى المجلس الوزاري الذي يرفعها بتوصية الى المجلس الأعلى لاتخاذ القرار المناسب بشأنها .
- ٣ - تقديم التوصيات للوزراء المختصين لرسم السياسات الكفيلة بوضع قرارات مجلس التعاون موضع التنفيذ .
- ٤ - تشجيع أوجه التعاون والتنسيق بين الأنشطة المختلفة للقطاع الخاص وتطوير التعاون القائم بين غرف تجارة وصناعة الدول الاعضاء وتشجيع انتقال الأيدي العاملة من مواطني الدول الأعضاء فيما بينها .
- ٥ - احالة أى وجه من أوجه التعاون المختلفة الى لجنة أو أكثر فنية أو متخصصة لدراسته وتقديم الاقتراحات المناسبة بشأنه .
- ٦ - النظر في الاقتراحات المتعلقة بتعديل هذا النظام ورفع التوصيات المناسبة بشأنها الى المجلس الأعلى .
- ٧ - اقرار نظامه الداخلي وكذلك النظام الداخلي للأمانة العامة .
- ٨ - بترشيح من الأمين العام يعين المجلس الوزاري الأمناء المساعدين لمدة ثلاث سنوات قابلة للتجديد .
- ٩ - اعتماد التقارير الدورية وكذلك الأنظمة واللوائح الداخلية المتعلقة بالشئون الادارية والمالية المقترحة من الأمين العام وكذلك التوصية للمجلس الأعلى بالتصديق على ميزانية الأمانة العامة .
- ١٠ - التهيئة لاجتماعات المجلس الأعلى واعداد جدول أعماله .
- ١١ - النظر فيما يحال اليه من المجلس الأعلى .

## المادة الثالثة عشرة

## التصويت في المجلس الوزاري :

- ١ - يكون لكل عضو من أعضاء المجلس الوزاري صوت واحد .
- ٢ - تصدر قرارات المجلس الوزاري في المسائل الموضوعية باجماع الدول الأعضاء الحاضرة المشتركة في التصويت وتصدر قراراته في المسائل الاجرائية والتوصيات بالأغلبية .

## المادة السابعة

## المجلس الأعلى :

- ١ - المجلس الأعلى هو السلطة العليا لمجلس التعاون ويتكون من رؤساء الدول الأعضاء وتكون رئاسته دورية حسب الترتيب الهجائي لأسماء الدول .
- ٢ - يجتمع المجلس في دورة عادية كل سنة ويجوز عقد دورات استثنائية بناء على دعوة أى من الدول الأعضاء وتأييد عضو آخر .
- ٣ - يعقد المجلس الأعلى دوراته في بلدان الدول الأعضاء .
- ٤ - يعتبر انعقاد المجلس صحيحا إذا حضر ثلثا الدول الأعضاء .

## المادة الثامنة

## اختصاصات المجلس الأعلى :

- يقوم المجلس الأعلى بالعمل على تحقيق أهداف مجلس التعاون خاصة فيما يلي :
- ١ - النظر في القضايا التي تهم الدول الأعضاء .
  - ٢ - وضع السياسة العليا لمجلس التعاون والخطوط الأساسية التي يسير عليها .
  - ٣ - النظر في التوصيات والتقارير والدراسات والمشاريع المشتركة التي تعرض عليه من المجلس الوزاري تمهيدا لاعتمادها .
  - ٤ - النظر في التقارير والدراسات التي يكلف الأمين العام بإعدادها .
  - ٥ - اعتماد أسس التعامل مع الدول الأخرى والمنظمات الدولية .
  - ٦ - اقرار نظام هيئة تسوية المنازعات وتسمية أعضائها .
  - ٧ - تعيين الأمين العام .
  - ٨ - تعديل النظام الأساسي لمجلس التعاون .
  - ٩ - اقرار نظامه الداخلي .
  - ١٠ - التصديق على ميزانية الامانة العامة .

## المادة التاسعة

## التصويت في المجلس الأعلى :

- ١ - يكون لكل عضو من أعضاء المجلس الأعلى صوت واحد .
- ٢ - تصدر قرارات المجلس الأعلى في المسائل الموضوعية باجماع الدول الأعضاء الحاضرة المشتركة في التصويت وتصدر قراراته في المسائل الاجرائية بالأغلبية .

## المادة العاشرة

## هيئة تسوية المنازعات :

- ١ - يكون لمجلس التعاون هيئة تسمى «هيئة تسوية المنازعات» وتتبع المجلس الأعلى .
- ٢ - يتولى المجلس الأعلى تشكيل الهيئة في كل حالة على حدة بحسب طبيعة الخلاف .
- ٣ - اذا نشأ خلاف حول تفسير أو تطبيق النظام الأساسي ولم تتم تسويته في اطار المجلس الوزاري أو المجلس الأعلى ، فللمجلس الأعلى احواله الى هيئة تسوية المنازعات .
- ٤ - ترفع الهيئة تقريرها متضمنا توصياتها أو فتاها بحسب الحال الى المجلس الأعلى لاتخاذ ما يراه مناسبا .

## المادة الثالثة

## اجتماعات مجلس التعاون :

يعقد المجلس اجتماعاته بدولة المقر وله ان يجتمع فلا أى من الدول الأعضاء .

## المادة الرابعة

## الأهداف :

- تتمثل أهداف مجلس التعاون الأساسية فيما يلي :
- ١ - تحقيق التنسيق والتكامل والترابط بين الدول الأعضاء في جميع الميادين وصولاً الى وحدتها .
  - ٢ - تعميق وتوثيق الروابط والصلات وأوجه التعاون القائمة بين شعوبها في مختلف المجالات .
  - ٣ - وضع أنظمة متماثلة في مختلف الميادين بما في ذلك الشؤون الآتي:
    - أ - الشؤون الاقتصادية والمالية .
    - ب - الشؤون التجارية والجمارك والمواصلات .
    - ج - الشؤون التعليمية والثقافية .
    - د - الشؤون الاجتماعية والصحية .
    - هـ - الشؤون الاعلامية والسياحية .
    - و - الشؤون التشريعية والادارية .
  - ٤ - دفع عجلة التقدم العلمي والتقنى في مجالات الصناعة والتعدين والزراعة والثروات المائية والحيوانية وانشاء مراكز بحوث علمية واقامة مشاريع مشتركة وتشجيع تعاون القطاع الخاص بما يعود بالخير على شعوبها .

## المادة الخامسة

## عضوية مجلس التعاون :

يتكون مجلس التعاون من الدول الست التي اشتركت في اجتماع وزراء الخارجية في الرياض بتاريخ ١٩٨١/٢/٤ .

## المادة السادسة

## أجهزة مجلس التعاون :

- يتكون مجلس التعاون من الأجهزة الرئيسية التالية :
- ١ - المجلس الأعلى وتتبعه هيئة تسوية المنازعات .
  - ٢ - المجلس الوزاري .
  - ٣ - الأمانة العامة .
- ولكل من هذه الأجهزة انشاء ما تقتضيه الحاجة من أجهزة فرعية .

[ARABIC TEXT — TEXTE ARABE]

## النظام الأساسي لمجلس التعاون لدول الخليج العربية

ان :

دولة الامارات العربية المتحدة

دولة البحرين

المملكة العربية السعودية

سلطنة عمان

دولة قطر

دولة الكويت

ادراكا منها لما يربط بينها من علاقات خاصة وسمات مشتركة وأنظمة متشابهة أساسها العقيدة  
الاسلامية .

وايمانا بالمصير المشترك ووحدة الهدف التي تجمع بين شعوبها .

ورغبة في تحقيق التنسيق والتكامل والترابط بينها في جميع الميادين .

واقتراناً بأن التنسيق والتعاون والتكامل فيما بينها انما يخدم الاهداف السامية للامة العربية .

واستهدافاً لتقوية أوجه التعاون وتوثيق عرى الروابط فيما بينها .

واستكمالاً لما بدأت من جهود في مختلف المجالات الحيوية التي تهم شعوبها وتحقق طموحاتها نحو  
مستقبل أفضل وصولاً الى وحدة دولها .

وتمشياً مع ميثاق جامعة الدول العربية الداعي الى تحقيق تقارب أوثق وروابط أقوى .

وتوجيهها لجهودها الى ما فيه دعم وخدمة القضايا العربية والاسلامية وافقت فيما بينها على ما يلي :

### المادة الأولى

**انشاء المجلس :**

ينشأ بمقتضى هذا النظام مجلس يسمى مجلس التعاون لدول الخليج العربية ويشار اليه فيما بعد

بمجلس التعاون .

### المادة الثانية

**المقر :**

يكون مقر مجلس التعاون بمدينة الرياض بالمملكة العربية السعودية .

[TRANSLATION<sup>1</sup> — TRADUCTION<sup>2</sup>]

## CHARTER<sup>3</sup> OF THE CO-OPERATION COUNCIL FOR THE ARAB STATES OF THE GULF

The States of United Arab Emirates, State of Bahrain, Kingdom of Saudi Arabia, Sultanate of Oman, State of Qatar, State of Kuwait,

Being fully aware of their mutual bonds of special relations, common characteristics and similar systems founded on the Creed of Islam; and

Based on their faith in the common destiny and destination that link their peoples; and

In view of their desire to effect coordination, integration and interconnection between them in all fields; and

Based on their conviction that coordination, cooperation and integration between them serve the higher goals of the Arab Nation; and

In order to strengthen their cooperation and reinforce their common links; and

In an endeavor to complement efforts already begun in all vital scopes that concern their peoples and realize their hopes in a better future on the path to unity of their States; and

In conformity with the Charter of the League of Arab States which calls for the realization of closer relations and stronger bonds; and

In order to channel their efforts to reinforce and serve Arab and Islamic causes

Have agreed as follows:

### *Article One.* ESTABLISHMENT OF COUNCIL

A council shall be established hereby to be named the Cooperation Council for the Arab States of the Gulf, hereinafter referred to as Cooperation Council.

### *Article Two.* HEADQUARTERS

The Cooperation Council shall have its headquarters in Riyadh, Saudi Arabia.

### *Article Three.* COOPERATION COUNCIL MEETINGS

The Council shall hold its meetings in the state where it has its headquarters, and may convene in any member state.

### *Article Four.* OBJECTIVES

The basic objectives of the Cooperation Council are:

1. To effect coordination, integration and interconnection between member states in all fields in order to achieve unity between them.

<sup>1</sup> Translation supplied by the Co-operation Council for the Arab States of the Gulf.

<sup>2</sup> Traduction fournie par le Conseil de coopération pour les Etats arabes du Golfe.

<sup>3</sup> Came into force on 25 May 1981 by the signature of all the member States, in accordance with article 19 (1).

2. Deepen and strengthen relations, links and scopes of cooperation now prevailing between their peoples in various fields.
3. Formulate similar regulations in various fields including the following:
  - a. Economic and financial affairs
  - b. Commerce, customs and communications
  - c. Education and culture
  - d. Social and health affairs
  - e. Information and tourism
  - f. Legislation and administrative affairs.
4. Stimulate scientific and technological progress in the fields of industry, minerology, agriculture, water and animal resources; the establishment of scientific research centers; implementation of common projects, and encourage cooperation by the private sector for the good of their peoples.

*Article Five.* COUNCIL MEMBERSHIP

The Cooperation Council shall be formed of the six states that participated in the Foreign Ministers' meeting held at Riyadh on 4 February 1981.

*Article Six.* ORGANIZATIONS OF THE COOPERATION COUNCIL

The Cooperation Council shall have the following main organizations:

1. Supreme Council to which shall be attached the Commission for Settlement of Disputes.
2. Ministerial Council.
3. Secretariat-General.

Each of these organizations may establish branch organs as necessary.

*Article Seven.* SUPREME COUNCIL

1. The Supreme Council is the highest authority of the Cooperation Council and shall be formed of heads of member states. Its presidency shall be rotatory based on the alphabetical order of the names of the member states.

2. The Supreme Council shall hold one regular session every year. Extraordinary sessions may be convened at the request of any member seconded by another member.

3. The Supreme Council shall hold its sessions in the territories of member states.

4. A Supreme Council's meeting shall be considered valid if attended by two thirds of the member states.

*Article Eight.* SUPREME COUNCIL'S FUNCTIONS

The Supreme Council shall endeavour to achieve the objectives of the Cooperation Council, particularly as concerns the following:

1. Review matters of interest to the member states.
2. Lay down the higher policy for the Cooperation Council and the basic lines it should follow.
3. Review the recommendations, reports, studies and common projects submitted by the Ministerial Council for approval.

4. Review reports and studies which the Secretary-General is charged to prepare.
5. Approve the bases for dealing with other states and international organizations.
6. Approve the rules of procedures of the Commission for Settlement of Disputes and nominate its members.
7. Appoint the Secretary-General.
8. Amend the Charter of the Cooperation Council.
9. Approve the Council's Internal Rules.
10. Approve the budget of the Secretariat-General.

*Article Nine.* VOTING IN SUPREME COUNCIL

1. Each member of the Supreme Council shall have one vote.
2. Resolutions of the Supreme Council in substantive matters shall be carried by unanimous approval of the member states participating in the voting, while resolutions on procedural matters shall be carried by majority vote.

*Article Ten.* COMMISSION FOR SETTLEMENT OF DISPUTES

1. The Cooperation Council shall have a commission called "Commission for Settlement of Disputes" and shall be attached to the Supreme Council.
2. The Supreme Council shall form the Commission for every case separately based on the nature of the dispute.
3. If a dispute arises over interpretation or implementation of the Charter and such dispute is not resolved within the Ministerial Council or the Supreme Council, the Supreme Council may refer such dispute to the Commission for Settlement of Disputes.
4. The Commission shall submit its recommendations or opinion, as applicable, to the Supreme Council for appropriate action.

*Article Eleven.* MINISTERIAL COUNCIL

1. The Ministerial Council shall be formed of the Foreign Ministers of the member states or other delegated Ministers. The Council's presidency shall rotate among members every three months by alphabetical order of the states.
2. The Ministerial Council shall convene every three months and may hold extraordinary sessions at the invitation of any member seconded by another member.
3. The Ministerial Council shall decide the venue of its next session.
4. A Council's meeting shall be deemed valid if attended by two thirds of the member states.

*Article Twelve.* FUNCTIONS OF THE MINISTERIAL COUNCIL

The Ministerial Council's functions shall include the following:

1. Propose policies, prepare recommendations, studies and projects aimed at developing cooperation and coordination between member states in the

- various fields and adopt required resolutions or recommendations concerning thereof.
2. Endeavor to encourage, develop and coordinate activities existing between member states in all fields. Resolutions adopted in such matters shall be referred to the Ministerial Council for further submission, with recommendations, to the Supreme Council for appropriate action.
  3. Submit recommendations to the Ministers concerned to formulate policies whereby the Cooperation Council's resolutions may be put into action.
  4. Encourage means of cooperation and coordination between the various private sector activities, develop existing cooperation between the member states' chambers of commerce and industry, and encourage the flow of working citizens of the member states among them.
  5. Refer any of the various facets of cooperation to one or more technical or specialized committee for study and presentation of relevant proposals.
  6. Review proposals related to amendments to this Charter and submit appropriate recommendations to the Supreme Council.
  7. Approve the Ministerial Council's Rules of Procedures as well as the Rules of Procedures of the Secretariat General.
  8. Appoint the Assistant Secretaries-General, as nominated by the Secretary-General, for a renewable period of three years.
  9. Approve periodic reports as well as internal rules and regulations related to administrative and financial affairs proposed by the Secretary General, and submit recommendations to the Supreme Council for approval of the budget of the Secretariat General.
  10. Make arrangements for the Supreme Council's meetings and prepare its agenda.
  11. Review matters referred to it by the Supreme Council.

*Article Thirteen.* VOTING AT MINISTERIAL COUNCIL

1. Every member of the Ministerial Council shall have one vote.
2. Resolutions of the Ministerial Council in substantive matters shall be carried by unanimous vote of the member states present and participating in the vote, and in procedural matters by majority vote.

*Article Fourteen.* SECRETARIAT-GENERAL

1. The Secretariat General shall be composed of a Secretary-General who shall be assisted by assistants and a number of staff as required.
2. The Supreme Council shall appoint the Secretary-General, who shall be a citizen of one of the Cooperation Council states, for a period of three years which may be renewed for one time only.
3. The Secretary-General shall nominate the assistant secretaries general.
4. The Secretary-General shall appoint the Secretariat General's staff from among the citizens of member states, and may not make exceptions without the approval of the Ministerial Council.



5. The Secretary-General shall be directly responsible for the work of the Secretariat General and the smooth flow of work in its various organizations. He shall represent the Cooperation Council with other parties within the powers vested in him.

*Article Fifteen.* FUNCTIONS OF THE SECRETARIAT GENERAL

The Secretariat General shall undertake the following functions:

1. Prepare studies related to cooperation and coordination, and to integrated plans and programs for member states' common action.
2. Prepare periodic reports on the Cooperation Council's work.
3. Follow up the execution by the member states of the resolutions and recommendations of the Supreme Council and Ministerial Council.
4. Prepare reports and studies ordered by the Supreme Council or Ministerial Council.
5. Prepare the draft of administrative and financial regulations commensurate with the growth of the Cooperation Council and its expanding responsibilities.
6. Prepare the Cooperation Council's budgets and closing accounts.
7. Make preparations for meetings and prepare agendas and draft resolutions for the Ministerial Council.
8. Recommend to the Chairman of the Ministerial Council the convocation of an extraordinary session of the Council whenever necessary.
9. Any other tasks entrusted to it by the Supreme Council or Ministerial Council.

*Article Sixteen*

The Secretary General and the assistant secretaries general and all the Secretariat General's staff shall carry out their duties in complete independence and for the common interest of the member states.

They shall refrain from any action or behavior that is incompatible with their duties and from divulging the secrets of their jobs either during or after their tenure of office.

*Article Seventeen.* PRIVILEGES AND IMMUNITIES

1. The Cooperation Council and its organizations shall enjoy on the territories of all member states such legal competence, privileges and immunities as required to realize their objectives and carry out their functions.

2. Representatives of the member states on the Council, and the Council's employees, shall enjoy such privileges and immunities as are specified in agreements to be concluded for this purpose between the member states. A special agreement shall organize the relation between the Council and the state in which it has its headquarters.

3. Until such time as the two agreements mentioned in item 2 above are prepared and put into effect, the representatives of the member states in the Cooperation Council and its staff shall enjoy the diplomatic privileges and immunities established for similar organizations.

*Article Eighteen.* BUDGET OF THE SECRETARIAT GENERAL

The Secretariat General shall have a budget to which the member states shall contribute equal amounts.

*Article Nineteen.* CHARTER IMPLEMENTATION

1. This Charter shall go into effect as of the date it is signed by the heads of states of the six member states named in this Charter's preamble.

2. The original copy of this Charter shall be deposited with Saudi Arabia's Ministry of Foreign Affairs which shall act as custodian and shall deliver a true copy thereof to every member state, pending the establishment of the Secretariat General at which time the latter shall become depository.

*Article Twenty.* AMENDMENTS TO CHARTER

1. Any member state may request an amendment of this Charter.

2. Requests for Charter amendments shall be submitted to the Secretary-General who shall refer them to the member states at least four months prior to submission to the Ministerial Council.

3. An amendment shall become effective if unanimously approved by the Supreme Council.

*Article Twenty-One.* CLOSING PROVISIONS

No reservations may be voiced in respect of the provisions of this Charter.

*Article Twenty-Two*

The Secretariat General shall arrange to deposit and register copies of this Charter with the League of Arab States and the United Nations, by resolution of the Ministerial Council.

This Charter is signed on one copy in Arabic language at Abu Dhabi City, United Arab Emirates, on 21 Rajab 1401 corresponding to 25 May 1981.

United Arab Emirates

[SHEIKH ZAYED BIN SULTAN AL-NAHAYAN]

State of Bahrain

[SHEIKH ISSA BIN SALMAN AL-KHALIFA]

Kingdom of Saudi Arabia

[KHALID BIN ABDUL AZIZ]

Sultanate of Oman

[QABOOS BIN SAID]

State of Qatar

[SHEIKH KHALIFA BIN HAMAD AL-THANI]

State of Kuwait

[SHEIKH JABER AL-AHMAD AL-JABER AL-SABAH]

## THE COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF

## RULES OF PROCEDURES OF THE SUPREME COUNCIL

*Article One. DEFINITIONS*

These regulations shall be called Rules of Procedures of the Supreme Council of the Gulf Arab States Cooperation Council and shall encompass the rules that govern procedures for convening the Council and the exercise of its functions.

*Article Two. MEMBERSHIP*

1. The Supreme Council shall be composed of the heads of state of the Cooperation Council member states. The Presidency shall be rotatory based on the alphabetical order of the states' names.

2. Each member state shall notify the Secretary-General of the names of the members of its delegations to the Council meeting, at least seven days prior to the date set for opening the meeting.

*Article Three*

With due regard to the objectives of the Cooperation Council and the jurisdiction of the Supreme Council as specified in articles 4 and 8 of the Charter, the Supreme Council may perform the following:

1. Form technical committees and select their members from member states' nominees who specialize in the committees' respective fields.
2. Call one or more of its members to a specific subject and submit a report thereon to be distributed to the members sufficiently in advance of the meeting set for discussing that subject.

*Article Four. CONVENING THE SUPREME COUNCIL*

1. *a.* The Supreme Council shall hold one regular session every year, and may hold extraordinary sessions at the request of any one member seconded by another member.

*b.* The Supreme Council shall hold its sessions at the heads of state level.

*c.* The Supreme Council shall hold its sessions in the member states territories.

*d.* Prior to convening the Supreme Council, the Secretary-General shall hold a meeting to be attended by delegates of the member states for consultation on matters related to the session's agenda.

2. *a.* The Secretary-General shall set the opening date of the Council's session and suggest a closing date.

*b.* The Secretary-General shall issue the invitations for convening a regular session no less than thirty days in advance, and for convening an extraordinary session, within no more than five days.

*Article Five*

1. The Supreme Council shall at the start of every session decide whether the meetings shall be secret or public.

2. A meeting shall be considered valid if attended by heads of state of two thirds of the member states. Its resolutions in substantive matters shall be carried by unanimous agreement of the member states present and participating in the vote, while resolutions in procedural matters shall be carried by majority vote. Any member abstaining shall document his being not bound by the resolution.

*Article Six*

1. The Council shall hold an extraordinary session based on:
  - a. Resolution issued in a previous session.
  - b. Request of a member state seconded by another state. In this case, the Council shall convene within no more than five days from the date of issue of the invitation for holding the extraordinary session.
2. No matters may be placed on the extraordinary session's agenda other than those for which the session was convened to discuss.

*Article Seven*

1. Presidency of the Supreme Council shall, at the opening of each regular session, go to a head of state by rotation based on the alphabetical order of the member states' names. The President shall continue to exercise the functions of the Presidency until such functions are entrusted to his successor at the beginning of the next regular session.
2. The head of a state that is party to an outstanding dispute may not preside over a session or meeting called to discuss the subject of the dispute. In such case, the Council shall designate a temporary president.
3. The President shall declare the opening and closing of sessions and meetings, the suspension of meetings, and clotures, and shall see that the Cooperation Council Charter and these Rules of Procedures are duly complied with. He shall give the floor to speakers based on the order of their requests, submit suggestions for acceptance by the membership, direct voting procedures, give final decisions on points of order, announce resolutions, follow up on works of committees, and inform the Council of all incoming correspondence.
4. The President may take part in deliberations and submit suggestions in the name of the state which he represents and may, for this purpose, assign a member of his state's delegation to act on his behalf in such instances.

*Article Eight. SUPREME COUNCIL AGENDA*

1. The Ministerial Council shall prepare a draft agenda for the Supreme Council, and such draft agenda shall be conveyed by the Secretary-General, together with explanatory notes and documentation, to the member states under cover of the letter of convocation at least thirty days before the date set for the meeting.
2. The draft agenda shall include the following:
  - a. A report by the Secretary-General on the Supreme Council's activities between the two sessions, and actions taken to carry out its resolutions.
  - b. Reports and matters received from the Ministerial Council and the Secretariat General.
  - c. Matters which the Supreme Council had previously decided to include on the agenda.
  - d. Matters suggested by a member state for necessary review by the Supreme Council.
3. Every member state may request inclusion of additional items on the draft agenda provided such request is tabled at least fifteen days prior to the date set for opening the session. Such matters shall be listed in an additional agenda which shall be sent, along with relevant documentation, to the member states, at least five days before the date set for the session.
4. Any member state may request inclusion of extra items on the draft agenda as late as the date set for opening a session, if such matters are considered both important and urgent.
5. The Council shall approve its agenda at the start of every session.
6. The Council may, during the session, add new items that are considered urgent.

7. The ordinary session shall be adjourned after completion of discussions of the items placed on the agenda. The Supreme Council may decide to suspend the session's meetings before completion of discussions on agenda items, and resume such meetings at a later date.

*Article Nine.* OFFICE AND COMMITTEES OF SUPREME COUNCIL

1. The Supreme Council Office shall be formed, in every session, of the Council President, the Chairman of the Ministerial Council and the Secretary-General. The Office shall be headed by the Supreme Council President.

2. The Office shall carry out the following functions

- a. Review the text of resolutions passed by the Supreme Council without affecting their contents.
- b. Assist the President of the Supreme Council in directing the activities of the session in a general way.
- c. Other tasks indicated in these Rules of Procedures or other matters entrusted to it by the Supreme Council.

*Article Ten*

1. The Council may, at the start of every session, create any committees that it deems necessary to allow adequate study of matters listed on the agenda. Delegates of member states shall take part in the activities of such committees.

2. Meetings of committees shall continue until they complete their tasks, with due regard for the date set for closing the session. Their resolutions shall be carried by majority vote.

3. Every committee shall start its work by selecting a chairman from among its members. The rapporteur of the committee shall act for the chairman in directing the meeting in the absence of the chairman. The chairman, or the rapporteur in the chairman's absence, shall submit to the Council all the explanations that it requests on the committee's reports. The chairman may, with the approval of the session's President, take part in the discussions, without voting if he is not a member of the Supreme Council.

4. The Council may refer any of the matters included in the agenda to the committees, based on their specialization for study and reporting. Any one item may be referred to more than one committee.

5. Committees may neither discuss any matter not referred to them by the Council, nor adopt any recommendation which, if approved by the Council, may produce a financial obligation, before the committee receives a report from the Secretary-General regarding the financial and administrative results that may ensue from adopting the resolution.

*Article Eleven.* PROGRESS OF DELIBERATIONS AND SUGGESTIONS

1. Every member state may participate in the deliberations and committees of the Supreme Council as stipulated in these Rules of Procedures.

2. The President shall direct discussion of the items as presented in order on the meeting's agenda and may, when necessary, call the Secretary-General or his representative to the meeting to explain any point as necessary.

3. The President shall give the floor to speakers in the order of their requests. He may give priority to the chairman or rapporteur of a committee to submit a report or explain specific points.

4. Every member may, during deliberations, raise points of order which the President shall resolve immediately and his decisions shall be valid unless contradicted by a majority of the Supreme Council member states.

*Article Twelve*

1. Every member may, during the discussion of any subject, request suspension or adjournment of the meeting or discussion of the subject, or cloture. Such requests may not be discussed but the President shall put them to the vote, if duly seconded, and decision shall be by majority of the member states.

2. With due regard to provisions of item 4 of the preceding article, suggestions indicated in item 1 of this article, shall be given priority over all others based on the following order:

- a. Suspend the meeting.
- b. Adjourn the meeting.
- c. Postpone discussion of the matter on hand.
- d. Cloture of discussion of the matter on hand.

3. Apart from suggestions concerning language or procedural matters, draft resolutions and substantive amendments shall be submitted in writing to the Secretary-General or his representative who shall distribute them as soon as possible to the delegations. No draft resolution may be submitted for discussion or voting before the text thereof is distributed to all the delegations.

4. A proposal that has already been decided upon in the same session may not be reconsidered unless the Council decides otherwise.

*Article Thirteen*

The President shall follow the activities of the committees, inform the Supreme Council of correspondence received, and formally announce before members all the resolutions and recommendations arrived at.

*Article Fourteen. VOTING*

Every member state shall have one vote and no state may represent another state or vote for it.

*Article Fifteen*

1. Voting shall be by calling the names in the alphabetical order of the states' names, or by raising hands. Voting shall be secret if so requested by a member by decision of the President.

The Supreme Council may decide otherwise. The vote of every member shall be documented in the minutes of the meeting if voting is effected by calling the names. The minutes shall indicate the result of voting, if the vote is secret or by show of hands.

2. A member may abstain from a vote or express reservations over a procedural matter or part thereof, in which case the reservation shall be read at the time the resolution is announced and shall be duly documented in writing. Members may present explanations about their stand in the voting after voting is completed.

3. Once the President announces that voting has started, no interruption may be made unless the matter relates to a point of order relevant to the vote.

*Article Sixteen*

1. If a member requests amendment of a proposal, voting on the amendment shall be carried out first. If there are more than one amendment, voting shall first be made on the amendment which in the President's opinion is farthest from the original proposal, then on the next farthest, and so on until voting is completed on all proposed amendments. If one or more such amendments is passed, then voting shall be made on the original proposal as amended.

2. Any new proposal shall be deemed as an amendment to the original proposal if it merely entails an addition to, omission from or change to a part of the original proposal.

*Article Seventeen*

1. The Supreme Council may create technical committees charged with giving advice on the design and execution of Supreme Council programs in specific fields.

2. The Supreme Council shall appoint the members of the technical committees from specialists who are citizens of the member states.

3. The technical committees shall meet at the invitation of the Secretary-General and shall lay down their work plans in consultation with him.

4. The Secretary-General shall prepare the committees' agendas after consultation with the chairman of the committee concerned.

*Article Eighteen.* AMENDMENT OF RULES OF PROCEDURES

1. Any member state may propose amendments to the Rules of Procedures.

2. No proposed amendments may be considered unless the relevant proposal is circulated to the member states by the Secretariat General prior to tabling with the Ministerial Council by at least thirty days.

3. No basic changes may be introduced to the proposed amendment mentioned in the preceding item unless the text of such proposed changes have been circulated to the member states by the Secretariat General before tabling with the Ministerial Council by at least fifteen days.

4. Except for items based on the provisions of the Charter, and with due regard to preceding items, these Rules of Procedures shall be amended by a resolution of the Supreme Council approved by majority of the members.

*Article Nineteen.* EFFECTIVE DATE

These Rules of Procedures shall go into effect as of the date of approval by the Supreme Council and may not be amended except in accordance with procedures set forth in the preceding article.

These Rules of Procedures are signed at Abu Dhabi City, United Arab Emirates, on 21 Rajab 1401 AH corresponding to 25 May 1981 AD.

United Arab Emirates  
State of Bahrain  
Kingdom of Saudi Arabia  
Sultanate of Oman  
State of Qatar  
State of Kuwait

COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF

RULES OF PROCEDURES OF THE MINISTERIAL COUNCIL

*Article One*

1. These regulations shall be called Rules of Procedures of the Ministerial Council of the Gulf Arab States Cooperation Council and shall encompass rules governing Council meetings and exercise of its functions.

2. The following terms as used in these shall have the meanings indicated opposite each:

Cooperation Council:	The Gulf Arab States Cooperation Council
Charter:	Statute establishing the Gulf Arab States Cooperation Council
Supreme Council:	The highest body of the Gulf Arab States Cooperation Council
Council:	Ministerial Council of the Gulf Arab States Cooperation Council.
Secretary-General:	The Secretary-General of the Gulf Arab States Cooperation Council
Chairman:	The Chairman of the Ministerial Council of the Gulf Arab States Cooperation Council

*Article Two. STATES REPRESENTATION*

1. The Ministerial Council shall be composed of the member states' Foreign Ministers or other delegated Ministers.

2. Every member state shall, at least one week prior the convening of every Ministerial Council's ordinary session, convey to the Secretary General a list of the names of the members of its delegation. For extraordinary sessions, the list shall be submitted three days before the date set for the session.

*Article Three. CONVENING THE SESSIONS*

1. The Ministerial Council shall decide in every meeting the venue of its next regular session.

2. The Secretary-General shall decide, in consultation with the member states, the venues of extraordinary sessions.

3. If circumstances should arise that preclude the convening of an ordinary or extraordinary session at the place set for it, the Secretary-General shall so inform the member states and shall set another place for the meeting after consultation with them.

*Article Four. ORDINARY SESSIONS*

1. The Council shall convene in ordinary session once every three months.

2. The Secretary-General shall set the date for opening the session and suggest the date of its closing.

3. The Secretary-General shall address the invitation to attend a Council ordinary session at least fifteen days in advance, and shall indicate therein the date and place set for the meeting, as well as attach thereto the session's agenda, explanatory notes and other documentation.

*Article Five. EXTRAORDINARY SESSIONS*

1. The Council shall hold an extraordinary session at the request of any member state seconded by another member.

2. The Secretary-General shall address the invitation to the Council's extraordinary session and attach a memorandum containing the request of the member which asked for the meeting.

3. The Secretary-General shall specify in the invitation the place, date and agenda of the session.

*Article Six*

1. The Council may itself decide to hold extraordinary sessions, in which case it shall specify the agenda, time and place of the session.



2. The Secretary-General shall send out to the member states the invitation to attend the Council's extraordinary meeting, along with a memorandum containing the Council's decision to this effect, and specifying the date and agenda of the session.

3. The extraordinary session shall be convened within a maximum of five days from the date of issue of the invitation.

*Article Seven*

No matters, other than those for which the extraordinary session was called, may be included on its agenda.

*Article Eight. AGENDA*

The Secretary-General shall prepare a draft agenda for a Council's ordinary session and such draft shall include the following:

1. The Secretary-General's report on the Cooperation Council's work.
2. Matters referred to him by the Supreme Council.
3. Matters which the Council had previously decided to include on the agenda.
4. Matters which the Secretary-General believes should be reviewed by the Council.
5. Matters suggested by a member state.

*Article Nine*

Member states shall convey to the Secretary-General their suggestions on matters they wish to include on the Council's agenda at least thirty days prior to the date of the Council's ordinary session.

*Article Ten*

Member states or the Secretary-General may request the inclusion of additional items on the Council's draft agenda at least ten days prior to the date set for opening an ordinary session. Such items shall be listed on an additional schedule which shall be conveyed along with relevant documentation to the member states at least five days prior to the date of the session.

*Article Eleven*

Member states or the Secretary-General may request inclusion of additional items on the Council ordinary session's agenda up to the date set for opening the session if such matters are both important and urgent.

*Article Twelve*

The Council shall approve its agenda at the beginning of every session.

*Article Thirteen*

A Council's ordinary session shall end upon completion of discussion of matters listed on the agenda. The Council may, when necessary, decide to suspend its meetings temporarily before discussion of agenda items is completed and resume its meetings at a later date.

*Article Fourteen*

The Council may defer discussion of certain items on its agenda and decide to include them with the others, when necessary, on the agenda of a subsequent session.

*Article Fifteen. COUNCIL'S CHAIRMANSHIP*

1. Chairmanship of the Council shall be entrusted every six months to a head of delegation on rotation based on the alphabetical order of the member states' names, and if necessary, to the next in order.

2. The Chairman shall exercise his functions until he passes his post on to his successor.

3. The Chairman shall, as well, preside over the extraordinary sessions.

4. The representative of a state that is party to an outstanding dispute may not chair the session or meeting assigned for discussing such dispute, in which case the Council shall name a temporary Chairman.

#### *Article Sixteen*

1. The Chairman shall announce the opening and closing of sessions and meetings, the suspension of meetings and cloture of discussions, and shall see that the provisions of the Charter and these Rules of Procedures are duly respected.

2. The Chairman may participate in the Council's deliberations and vote in the name of the state he represents. He may, for such purpose, delegate another member of his delegation to act on his behalf.

#### *Article Seventeen. COUNCIL'S OFFICE*

1. The Council Office shall include the Chairman, Secretary-General, and heads of working subcommittees which the Council decides to form.

2. The Council Chairman shall preside over the Office.

#### *Article Eighteen*

The Office shall carry out the following tasks:

1. Help the Chairman direct the session's proceedings.
2. Coordinate the work of the Council and the subcommittees.
3. Supervise the drafting of the resolutions passed by the Council.
4. Other tasks indicated in these Rules of Procedures or entrusted to it by the Council.

#### *Article Nineteen. SUBCOMMITTEES*

1. The Council shall utilize preparatory and working committees to accomplish its tasks.

2. The Secretariat General shall participate in the work of the committees.

#### *Article Twenty*

1. The Secretary-General may, in consultation with the Chairman of the session, form preparatory committees charged with the study of matters listed on the agenda.

2. Preparatory committees shall be composed of delegates of member states and may, when necessary, seek the help of such experts as they may deem fit.

3. Each preparatory committee shall meet at least three days prior to the opening of the session by invitation of the Secretary-General. The work of the committee shall end at the close of the session.

#### *Article Twenty-One*

1. The Council may, at the start of each session, form working committees and charge them with specific tasks.

2. The work of the working committees shall continue until the date set for closing the session.

#### *Article Twenty-Two*

1. Each subcommittee shall start its work by electing a chairman and a rapporteur from among its members. When the chairman is absent, the rapporteur shall act for him in directing the meetings.

2. The chairman or rapporteur of each subcommittee shall submit a report on its work to the Council.

3. The chairman or rapporteur of a subcommittee shall present to the Council all explanations required about the contents of the subcommittee's report.

*Article Twenty-Three*

1. The Secretariat-General shall organize the technical secretariat and subcommittees of the Council.

2. The Secretariat General shall prepare minutes of meetings documenting discussions, resolutions and recommendations. Such minutes shall be prepared for all meetings of the Council and its subcommittees.

3. The Secretary-General shall supervise the organization of the Council's relations with the information media.

4. The Secretary-General shall convey the Council's resolutions and recommendations and relevant documentation to the member states within fifteen days after the end of the session.

*Article Twenty-Four*

The Council's secretariat and subcommittee shall receive and distribute documents, reports, resolutions and recommendations of the Council and its subcommittees and shall draw up and distribute minutes and daily bulletins, as well as safeguard the documents and carry out any other tasks required by the Council's work.

*Article Twenty-Five*

Texts of resolutions or recommendations made by the Council may not be announced or published except by decision of the Council.

*Article Twenty-Six. DELIBERATIONS*

Every member state may take part in the deliberations of the Council and its subcommittees in the manner prescribed in these Rules of Procedures.

*Article Twenty-Seven*

1. The Chairman shall direct deliberations on matters on hand in the order they are listed on the Council's agenda.

2. The Chairman shall give the floor to speakers in the order of their requests. Priority may be given to the chairman or rapporteur of a certain committee to present its report or explain certain points therein. The floor shall be given to the Secretary-General or his representative whenever it is necessary.

3. The Council Chairman may, during deliberations, read the list of the names of members who requested the floor, and with the approval of the Council, close the list. The only exception is exercise of the right of reply.

*Article Twenty-Eight*

The Council shall decide whether the meetings shall be open or secret.

*Article Twenty-Nine*

1. Every member state may raise a point of order which the chairman shall resolve immediately and his decision shall be final unless opposed by majority of the member states.

2. A member who raises a point of order may not go beyond the point he raised.

*Article Thirty*

1. Every member may, during discussion of any matter, suggest the suspension or adjournment of the meeting, or discussion of the matter on hand, or cloture. The Chairman shall in such cases submit the suggestion to the vote directly, if the suggestion is seconded by another member, and it requires the approval of the majority of the member states to pass.

2. With due regard to the provisions of the preceding item, suggestions indicated therein shall be submitted to the vote in the following order:

- a. Suspension of meeting.
- b. Adjournment of meeting.
- c. Postponement of discussion of the matter on hand.
- d. Cloture of discussion of the matter on hand.

*Article Thirty-One*

1. Member states may suggest draft resolutions or recommendations, or amendments thereto, and may withdraw such suggestions unless they are voted upon.

2. Drafts indicated in the preceding item shall be submitted in writing to the Secretariat General for distribution to delegations as soon as possible.

3. Except for suggestions concerning language or procedures, drafts indicated in this article may not be discussed or voted upon before their texts are distributed to all delegations.

4. A suggestion already decided upon in the same session may not be reconsidered unless the Council decides otherwise.

*Article Thirty-Two*

The Chairman shall follow the work of the committees, inform the Council of incoming correspondence, and formally announce before members the resolutions and recommendations that have been arrived at.

*Article Thirty-Three. VOTING*

1. The Council shall pass its resolutions with the unanimous approval of the member states present and participating in the vote, while decisions in procedural matter shall be passed by a majority vote. The member abstaining from the vote shall document his non-subscription to the decision.

2. If members of the council should disagree on the definition of the matter being put to the vote, the matter shall be settled by majority vote of the member states present.

*Article Thirty-Four*

1. Every member state shall have one vote.
2. No member state may represent another state or vote for it.

*Article Thirty-Five*

1. Voting shall be by calling the names in the alphabetical order of the states' names, or by raising hands.

2. Voting shall be by secret ballot if so requested by a member or by decision of the Chairman. The Council, however, may decide otherwise.

3. The vote of every member shall be documented in the minutes of the meeting if voting is effected by calling the names. The minutes shall indicate the result of voting if the vote is secret or by show of hands.

4. Member states may explain their positions after the vote and such explanations shall be written down in the minutes of the meeting.

5. Once the Chairman announces that voting has started, no interruption may be made except for a point of order relating to the vote or its postponement in accordance with the provisions of this article and the next article.

*Article Thirty-Six*

1. The Council Chairman with the help of the Secretary-General shall endeavor to reconcile the stands of member states on disputed matters and obtain their agreement to a draft resolution before submitting it to the vote.

2. The Council Chairman, the Secretary-General or any member state may request postponement of a vote for a specific period during which further negotiations may be made concerning the item submitted to the vote.

*Article Thirty-Seven*

1. If a member requests amendment of a proposal, voting on the amendment shall be carried out first. If there are more than one amendment, voting shall first be made on the amendment which the Chairman considers to be farthest from the original proposal, then on the next farthest, and so on until all proposed amendments have been voted upon. If one or more amendment is passed, then voting shall be made on the original proposal as amended.

2. A new proposal shall be deemed as an amendment to the original proposal if it merely entails an addition to, omission from, or change to a part of the original proposal.

*Article Thirty-Eight*

1. Any member state or the Secretary-General may propose amending these Rules of Procedures.

2. No proposed amendment to these Rules of Procedures may be considered unless the relevant proposal is circulated to the member states by the Secretariat General at least thirty days before submission to the Council.

3. No basic changes may be introduced to the proposed amendment mentioned in the preceding item unless the texts of such proposed change have been circulated to the member states at least fifteen days prior to submission to the Council.

4. Except for items based on provisions of the Charter, and with due regard to preceding items, these Rules of Procedures shall be amended by a resolution of the Council approved by majority of its members.

*Article Thirty-Nine. EFFECTIVE DATE*

These Rules of Procedures shall go into effect as of the date of approval by the Council and may not be amended except in accordance with procedures set forth in the preceding article.

Thus, these Rules of Procedures are signed at Abu Dhabi City, United Arab Emirates, on 21 Rajab 1401 AH corresponding to 25 May 1981 AD.

United Arab Emirates  
State of Bahrain  
Kingdom of Saudi Arabia  
Sultanate of Oman  
State of Qatar  
State of Kuwait

## THE COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF

RULES OF PROCEDURES  
COMMISSION FOR SETTLEMENT OF DISPUTES

## PREAMBLE

In accordance with the provisions of article six of the Charter of the Gulf Arab States Cooperation Council; and

In execution of the provision of article ten of the Cooperation Council Charter,

A Commission for Settlement of Disputes, hereinafter referred to as the Commission, shall be set up and its jurisdiction and rules for its proceedings shall be as follows:

*Article One.* TERMINOLOGY

Terms used in these Rules of Procedures shall have the same meanings established in the Charter of the Gulf Arab States Cooperation Council.

*Article Two.* COMMISSION'S SEAT AND MEETINGS

The Commission shall have its headquarters at Riyadh, Saudi Arabia, and shall hold its meetings on the territory of the state where its headquarters is located, but may hold its meetings elsewhere, when necessary.

*Article Three.* JURISDICTION

The Commission shall, once installed, have jurisdiction to consider the following matters referred to it by the Supreme Council:

- a. Disputes between member states.
- b. Differences of opinion as to the interpretation or execution of the Cooperation Council Charter.

*Article Four.* COMMISSION'S MEMBERSHIP

a. The Commission shall be formed of an appropriate number of citizens of member states not involved in the dispute as the Council selects in every case separately depending on the nature of the dispute, provided that the number shall not be less than three members.

b. The Commission may seek the advice of any such experts as it may deem necessary.

c. Unless the Supreme Council decides otherwise, the Commission's task shall end with the submission of its recommendations or opinion to the Supreme Council which, after the conclusion of the Commission's task, may summon it at any time to explain or elaborate on its recommendations or opinions.

*Article Five.* MEETINGS AND INTERNAL PROCEDURES

a. The Commission's meeting shall be valid if attended by all members.

b. The Secretariat General of the Cooperation Council shall prepare procedures required to conduct the Commission's affairs, and such procedures shall go into effect as of the date of approval by the Ministerial Council.

c. Each party to the dispute shall send representatives to the Commission who shall be entitled to follow proceedings and present their defense.

*Article Six.* CHAIRMANSHIP

The Commission shall select a chairman from among its members.

*Article Seven.* VOTING

Every member of the Commission shall have one vote, and shall issue its recommendations or opinions on matters referred to it by majority of the members. In case of a tie, the party with chairman vote shall prevail.

*Article Eight. COMMISSION'S SECRETARIAT*

*a.* The Secretary-General shall appoint a recorder for the Commission, and a sufficient number of employees to carry out the secretarial work.

*b.* The Supreme Council may create an independent organization to carry out the Commission's secretarial work when the need arises.

*Article Nine. RECOMMENDATIONS AND OPINIONS*

*a.* The Commission shall issue its recommendations or opinions in accordance with the Cooperation Council's Charter, international laws and practices, and the principles of Islamic Shari'ah. The Commission shall submit its findings on the case on hand to the Supreme Council for appropriate action.

*b.* The Commission may, while considering any dispute referred to it and pending the issue of its final recommendations thereon, ask the Supreme Council to take interim action called for by necessity or circumstances.

*c.* The Commission's recommendations or opinions shall spell out the reasons on which they were based and shall be signed by the chairman and recorder.

*d.* If an opinion is passed wholly or partially by unanimous vote of the members, the dissenting members shall be entitled to document their dissenting opinion.

*Article Ten. IMMUNITIES AND PRIVILEGES*

The Commission and its members shall enjoy such immunities and privileges in the territories of the member states as are required to realize its objectives and in accordance with article seventeen of the Cooperation Council Charter.

*Article Eleven. COMMISSION'S BUDGET*

The Commission's budget shall be considered part of the Secretariat General's budget. Remunerations of the Commission's members shall be established by the Supreme Council.

*Article Twelve. AMENDMENTS*

*a.* Any member state may request for amendments of these Rules of Procedures.

*b.* Requests for amendments shall be submitted to the Secretary-General who shall relay them to the member states by at least four months before submission to the Ministerial Council.

*c.* An amendment shall be effective if approved unanimously by the Supreme Council.

*Article Thirteen. EFFECTIVE DATE*

These Rules of Procedures shall go into effect as of the date of approval by the Supreme Council.

These Rules of Procedures were signed at Abu Dhabi City, United Arab Emirates on 21 Rajab 1401 AH corresponding to 25 May 1981 AD.

United Arab Emirates  
State of Bahrain  
Kingdom of Saudi Arabia  
Sultanate of Oman  
State of Qatar  
State of Kuwait





## **Annex 9**

United Nations Convention on the Law of the Sea,  
signed at Montego Bay on 10 December 1982,  
Part XV – Settlement of Disputes  
1833 United Nations, *Treaty Series* 3

No. 31363

---

**MULTILATERAL**

**United Nations Convention on the Law of the Sea (with annexes, final act and procès-verbaux of rectification of the final act dated 3 March 1986 and 26 July 1993). Concluded at Montego Bay on 10 December 1982**

*Authentic texts: Arabic, Chinese, English, French, Russian and Spanish.  
Registered ex officio on 16 November 1994.*

---

**MULTILATÉRAL**

**Convention des Nations Unies sur le droit de la mer (avec annexes, acte final et procès-verbaux de rectification de l'acte final en date des 3 mars 1986 et 26 juillet 1993). Conclue à Montego Bay le 10 décembre 1982**

*Textes authentiques : arabe, chinois, anglais, français, russe et espagnol.  
Enregistrée d'office le 16 novembre 1994.*

## UNITED NATIONS CONVENTION<sup>1</sup> ON THE LAW OF THE SEA

### The States Parties to this Convention,

**Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world,**

**Noting that developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea,**

**Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole,**

**Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,**

<sup>1</sup> Came into force on 16 November 1994, i.e., 12 months after the date of deposit with the Secretary-General of the United Nations of the sixtieth instrument of ratification or accession, in accordance with article 308 (1):

<i>Participant</i>	<i>Date of deposit of the instrument of ratification or accession (a)</i>	<i>Participant</i>	<i>Date of deposit of the instrument of ratification or accession (a)</i>
Angola .....	5 December 1990	Kuwait* .....	2 May 1986
Antigua and Barbuda .....	2 February 1989	Mali .....	16 July 1985
Bahamas .....	29 July 1983	Malta* .....	20 May 1993
Bahrain .....	30 May 1985	Marshall Islands .....	9 August 1991a
Barbados .....	12 October 1993	Mexico .....	18 March 1983
Belize .....	13 August 1983	Micronesia (Federated States of) .....	29 April 1991a
Botswana .....	2 May 1990	Namibia .....	18 April 1983
Brazil* .....	22 December 1988	Nigeria .....	14 August 1986
Cameroon .....	19 November 1985	Oman* .....	17 August 1989
Cape Verde* .....	10 August 1987	Paraguay .....	26 September 1986
Costa Rica .....	21 September 1992	Philippines* .....	8 May 1984
Côte d'Ivoire .....	26 March 1984	Saint Kitts-et-Nevis .....	7 January 1993
Cuba* .....	15 August 1984	Saint Lucia .....	27 March 1985
Cyprus .....	12 December 1988	Saint Vincent and the Grenadines .....	1er October 1993
Djibouti .....	8 October 1991	Sao Tome and Principe .....	3 November 1987
Dominica .....	24 October 1991	Senegal .....	25 October 1984
Egypt* .....	26 August 1983	Seychelles .....	16 September 1991
Fiji .....	10 December 1982	Somalia .....	24 July 1989
Gambia .....	22 May 1984	Sudan .....	23 January 1985
Ghana .....	7 June 1983	Togo .....	16 April 1985
Grenada .....	25 April 1991	Trinidad and Tobago .....	25 April 1986
Guinea .....	6 September 1985	Tunisia* .....	24 April 1985
Guinea-Bissau* .....	25 August 1986	Uganda .....	9 November 1990
Guyana .....	16 November 1993	United Republic of Tanzania* .....	30 September 1985
Honduras .....	5 October 1993	Uruguay* .....	10 December 1992
Iceland* .....	21 June 1985	Yemen*, ** .....	21 July 1987
Indonesia .....	3 February 1986	Yugoslavia* .....	5 May 1986
Iraq .....	30 July 1985	Zaire .....	17 February 1989
Jamaica .....	21 March 1983	Zambia .....	7 March 1983
Kenya .....	2 March 1989	Zimbabwe .....	24 February 1993

*(Continued on page 398)*

**Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,**

**Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970<sup>2</sup> in which the General Assembly of the United Nations solemnly declared inter alia that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,**

**Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,**

**Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,**

**Have agreed as follows:**

(Continued from page 397)

In addition, and prior to the entry into force of the Convention, the following States also deposited instruments of ratification, accession or notification of succession:

<i>Participant</i>	<i>Date of deposit of the instrument of ratification, accession (a) or notification of succession (d)</i>	<i>Participant</i>	<i>Date of deposit of the instrument of ratification, accession (a) or notification of succession (d)</i>
Bosnia and Herzegovina . . . . . (With effect from 16 November 1994.)	12 January 1994 <sup>d</sup>	The former Yugoslav Republic of Macedonia . . . . . (With effect from 16 November 1994.)	19 August 1994 <sup>d</sup>
Comoros . . . . . (With effect from 16 November 1994.)	21 June 1994	Australia . . . . . (With effect from 16 November 1994.)	5 October 1994
Sri Lanka . . . . . (With effect from 16 November 1994.)	19 July 1994	Germany* . . . . . (With effect from 16 November 1994.)	14 October 1994 <sup>a</sup>
Viet Nam* . . . . . (With effect from 16 November 1994.)	25 July 1994	Mauritius . . . . . (With effect from 16 November 1994.)	4 November 1994

\* For the declarations made upon ratification or accession, see vol. 1835, p. 105.

\*\* Democratic Yemen ratified the Convention on 21 July 1987. Subsequently, the Yemen Arab Republic and the People's Democratic Republic of Yemen merged on 22 May 1990 to form the Republic of Yemen. The Republic of Yemen is considered a party to the Convention as from the date when Democratic Yemen became a party to the Convention.

<sup>2</sup> United Nations, *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28 (A/8028)*, p. 24.

## PART XV

## SETTLEMENT OF DISPUTES

## SECTION 1. GENERAL PROVISIONS

Article 279Obligation to settle disputes by peaceful means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Article 280Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Article 281Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 282Obligations under general, regional or bilateral agreements

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

Article 283Obligation to exchange views

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 284  
Conciliation

1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.

2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.

3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Article 285  
Application of this section to disputes submitted pursuant to Part XI

This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part. If an entity other than a State Party is a party to such a dispute, this section applies mutatis mutandis.

SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

Article 286  
Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287  
Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;

- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

#### Article 288 Jurisdiction

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

3. The Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 289

Experts

In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.

Article 290

Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Sea-Bed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Article 291

Access

1. All the dispute settlement procedures specified in this Part shall be open to States Parties.

2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention.



#### Article 292

##### Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

#### Article 293

##### Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.

#### Article 294

##### Preliminary proceedings

1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.

2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.

3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

**Article 295**  
**Exhaustion of local remedies**

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

**Article 296**  
**Finality and binding force of decisions**

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

**SECTION 3. LIMITATIONS AND EXCEPTIONS TO APPLICABILITY OF SECTION 2**

**Article 297**  
**Limitations on applicability of section 2**

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:

- (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
  - (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
  - (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.
2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
- (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or

- (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
- (b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.
3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.
- (b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
- (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
- (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
- (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.
- (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
- (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.
- (e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

**Article 298****Optional exceptions to applicability of section 2**

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

- (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
- (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
- (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;
- (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;
- (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

#### Article 299

##### Right of the parties to agree upon a procedure

1. A dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute.

2. Nothing in this section impairs the right of the parties to the dispute to agree to some other procedure for the settlement of such dispute or to reach an amicable settlement.

### PART XVI

#### GENERAL PROVISIONS

#### Article 300

##### Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

#### Article 301

##### Peaceful uses of the seas

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

#### Article 302

##### Disclosure of information

Without prejudice to the right of a State Party to resort to the procedures for the settlement of disputes provided for in this Convention, nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.



## **Annex 10**

League of Arab States, Arab Convention on the Suppression  
of Terrorism, adopted at Cairo on 22 April 1998

[http://www.unodc.org/images/tldb-f/conv\\_arab\\_terrorism.en.pdf](http://www.unodc.org/images/tldb-f/conv_arab_terrorism.en.pdf)

<http://edoc.mpil.de/conference-on-terrorism/index.cfm>

## **The Arab Convention For The Suppression Of Terrorism**

League of Arab States

Adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice

Cairo, April 1998

Translated from Arabic by the United Nations English translation service (Unofficial translation) 29 May 2000

### **Preamble**

The Arab states signatory hereto,

Desiring to promote mutual cooperation in the suppression of terrorist offences, which pose a threat to the security and stability of the Arab Nation and endanger its vital interests,

Being committed to the highest moral and religious principles and, in particular, to the tenets of the Islamic Sharia, as well as to the humanitarian heritage of an Arab Nation that rejects all forms of violence and terrorism and advocates the protection of human rights, with which precepts the principles of international law conform, based as they are on cooperation among peoples in the promotion of peace,

Being further committed to the Pact of the League of Arab States, the Charter of the United Nations and all the other international conventions and instruments to which the Contracting States to this Convention are parties,

Affirming the right of peoples to combat foreign occupation and aggression by whatever means, including armed struggle, in order to liberate their territories and secure their right to self-determination, and independence and to do so in such a manner as to preserve the territorial integrity of each Arab country, of the foregoing being in accordance with the purposes and principles of the Charter of the United Nations and with the Organisation's resolutions.

Have agreed to conclude this convention and to invite any Arab State that did not participate in its conclusion to accede hereto.



2 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

## Part One: Definitions and General Provisions

### Article 1

Each of the following terms shall be understood in the light of the definition given;

#### 1. Contracting State

Any member State of the League of Arab States that has ratified this Convention and that has deposited its instruments of ratification with the General Secretariat of the League.

#### 2. Terrorism

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resources.

#### 3. Terrorist offence

Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their domestic law. The offences stipulated in the following conventions, except where conventions have not been ratified by Contracting States or where offences have been excluded by their legislation, shall also be regarded as terrorist offences:

- a. The Tokyo Convention on offences and Certain Other Acts Committed on Board Aircraft, of 14 September 1963;
- b. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970;
- c. The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 23 September 1971, and the Protocol thereto of 10 May 1984;
- d. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973;

<http://edoc.mpil.de/conference-on-terrorism/index.cfm>

3

- e. The International Convention against the Taking of Hostages, of 17 December 1979;
- f. The provisions of the United Nations Convention on the Law of the Sea, of 1982, relating to piracy on the high seas.

## Article 2

- a. All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.
- b. None of the terrorist offences indicated in the preceding article shall be regarded as a political offence. In the application of this Convention, none of the following offences shall be regarded as a political offence, even if committed for political motives:
- c. Attacks on the kings, Heads of State or rulers of the contracting States or on their spouses and families;
- d. Attacks on crown princes, vice-presidents, prime ministers or ministers in any of the Contracting States;
- e. Attacks on persons enjoying diplomatic immunity, including ambassadors and diplomats serving in or accredited to the Contracting States;
- f. Premeditated murder or theft accompanied by the use of force directed against individuals, the authorities or means of transport and communications;
- g. Acts of sabotage and destruction of public property and property assigned to a public service, even if owned by another Contracting State;
- h. The manufacture, illicit trade in or possession of weapons, munitions or explosives, or other items that may be used to commit terrorist offences.

4 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

## **Part Two: Principles of Arab Cooperation for the Suppression of Terrorism**

### **Chapter I: The Security Field**

#### **Section I: Measures for the prevention and suppression of terrorist offences:**

##### **Article 3**

Contracting States undertake not to organise, finance or commit terrorist acts or to be accessories thereto in any manner whatsoever. In their commitment to the prevention and suppression of terrorist offence in accordance with their domestic laws and procedures, they shall endeavour:

##### *I. Preventive measures:*

1. To prevent the use of their territories as a base for planning, organising, executing, attempting or taking part in terrorist crime in any manner whatsoever. This includes the prevention of terrorists; infiltration into, or residence in their territories either as individuals or groups, receiving or giving refuge to them, training, arming, financing, or providing any facilitation to them;
2. To cooperate and coordinate action among Contracting States, particularly neighbouring countries suffering from similar or common terrorist offences;
3. To develop and strengthen systems for the detection of the movement, importation, exportation, stockpiling and use of weapons, munitions and explosives and of other means of aggression, murder and destruction as well as procedures for monitoring their passage through customs and across borders in order to prevent their

transfer from one Contracting State to another or to third-party States other than for lawful purposes;

4. To develop and strengthen systems concerned with surveillance procedures and the securing of borders and points of entry overland and by air in order to prevent illicit entry thereby;
5. To strengthen mechanisms for the security and protection of eminent persons, vital installations and means of public transportation,
6. To enhance the protection, security and safety of diplomatic and consular persons and missions and international and regional organisations accredited to Contracting States, in accordance with the relevant international agreements, which govern this subject;
7. To reinforce security-related information activities and to coordinate them with those of each State in accordance with its information policy, with a view to exposing the objectives of terrorist groups and organisations, thwarting their schemes and demonstrating the danger they pose to security and stability;
8. To establish, in each Contracting State, a database for the accumulation and analysis of information relating to terrorist elements, groups, movements and organisations and for the monitoring of developments with respect to the terrorist phenomenon and of successful experiences in counter-terrorism, and to keep such information up to date and make it available to the competent authorities of Contracting States, within the limits established by the domestic laws and procedures of each State;

## *II. Measures of suppression*

1. To arrest the perpetrators of terrorist offences and to prosecute them in accordance with national law or extradite them in accordance with the provision's of this Convention or of any bilateral treaty between the requesting State and the requested State;
2. To provide effective protection for those working in the criminal justice field;
3. To provide effective protection for sources of information concerning terrorist offences and for witnesses thereof;
4. To extend necessary assistance to victims of terrorism;
5. To establish effective cooperation between the relevant agencies and the public in countering terrorism by, inter alia, establishing appropriate guarantees and incentives to encourage the reporting of ter-

- 6 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

rorist acts, the provision of information to assist in their investigation, and cooperation in the arrest of perpetrators.

## **Section II: Arab cooperation for the prevention and suppression of terrorist offences**

### **Article 4**

Contracting States shall cooperate for the prevention and suppression of terrorist offences, in accordance with the domestic laws and regulations of each State, as set forth hereunder:

#### *I. Exchanging of information*

1. Contracting States shall undertake to promote the exchange of information between and among them concerning:
  - a. The activities and crimes of terrorist groups and of their leaders and members; their headquarters and training; the means and sources by which they are funded and armed; the types of weapons, munitions and explosives used by them; and other means of aggression, murder and destruction;
  - b. The means of communication and propaganda used by terrorist groups, their modus operandi; the movements of their leaders and members; and the travel documents that they use.
2. Each contracting State shall undertake to notify any other Contracting State in an expeditious manner of the information it has concerning any terrorist offence that takes place in its territory and is intended to harm the interests of that State or of its nationals and to include in such notification statements concerning the circumstances surrounding the offence, those who committed it, its victims, the losses occasioned by it and the devices and methods used in its perpetration, to the extent compatible with the requirements of the investigation and inquiry.

3. Contracting States shall undertake to cooperate with each other in the exchange of information for the suppression of terrorist offences and promptly to notify other Contracting States of all the information or data in their possession that may prevent the occurrence of terrorist offences in their territory, against their nationals or residents or against their interests.
4. Each Contracting State shall undertake to furnish any other Contracting State with any information or data in its possession that may:
  - a. Assist in the arrest of a person or persons accused of committing a terrorist offence against the interests of that State or of being implicated in such an offence whether by aiding and abetting, collusion or incitement;
  - b. Lead to the seizure of any weapons, munitions or explosives or any devices or funds used or intended for use to commit a terrorist offence.
5. Contracting States shall undertake to maintain the confidentiality of the information that they exchange among themselves and not to furnish it to any State that is not a Contracting State or any other party without the prior consent of the State that was the source of the information.

## *II. Investigations:*

Contracting States shall undertake to promote cooperation among themselves and to provide assistance with respect to measures for the investigation and arrest of fugitives suspected or convicted of terrorist offences in accordance with the laws and regulations of each state.

## *III. Exchange of expertise:*

1. Contracting States shall cooperate in the conduct and exchange of research studies for the suppression of terrorist offences and shall exchange expertise in the counter-terrorism field.
2. Contracting States shall cooperate, within the limits of their resources, in providing all possible technical assistance for the formulation of programmes or the holding of joint training courses or training courses intended for one state or for a group of Contracting States, as required for the benefit of those working in counter-

- 8 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

terrorism with the aim of developing their scientific and practical abilities and enhancing their performance.

## Chapter II: The Judicial Field

### Section I: Extradition of Offenders

#### Article 5

Contracting States shall undertake to extradite those indicated for or convicted of terrorist offences whose extradition is requested by any of these states in accordance with the rules and conditions stipulated in this convention.

#### Article 6

Extradition shall not be permissible in any of the following circumstances:

- a. If the offence for which extradition is requested is regarded under the laws in force in the requested State as an offence of a political nature;
- b. If the offence for which extradition is requested relates solely to a dereliction of military duties;
- c. If the offence for which extradition is requested was committed in the territory of the requested contracting State, except where the offence has harmed the interests of the requesting State and its laws provide for the prosecution and punishment for such offences and where the requested State has not initiated any investigation or prosecution;
- d. If a final judgement having the force of *res judicata* has been rendered in respect of the offence in the requested Contracting State or in a third Contracting State;

- e. If, on delivery of the request for extradition, proceedings have been terminated or punishment has, under the law of the requesting State, lapsed because of the passage of time;
- f. If the offence was committed outside the territory of the requesting State by a person who is not a national of that State and the law of the requested State does not allow prosecution for the same category of offence when committed outside its territory by such a person;
- g. If the requesting State has granted amnesty to perpetrators of offences that include the offence in question;
- h. If the legal system of the requested State does not allow it to extradite its nationals. In this case, the requested State shall prosecute any such persons who commit in any of the other Contracting States a terrorist offence that is punishable in both States by deprivation of liberty for a period of at least one year or more. The nationality of the person whose extradition is sought shall be determined as at the date on which the offence in question was committed, and use shall be made in this regard of the investigation conducted by the requesting state.

#### **Article 7**

Should the person whose extradition is sought be under investigation, on trial or already convicted for another offence in the requested State, his concluded, the trial is completed or the sentence is imposed. The requested State may nevertheless extradite him on an interim basis for questioning or trial provided that he is returned to that State before serving the sentence imposed on him in the requesting State.

#### **Article 8**

For purposes of the extradition of offenders under this Convention, no account shall be taken of any difference there may be in the domestic legislation of Contracting States in the legal designation of the offence as a felony or a misdemeanour or in the penalty assigned to it, provided



10 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

that it is punishable under the laws of both States by deprivation of liberty for a period of at least one year or more.

## **Section II: Judicial Delegation**

### **Article 9**

Each Contracting State may request any other Contracting State to undertake in its territory and on its behalf any judicial procedure relating to an action arising out of a terrorist offence and, in particular:

- a. To hear the testimony of witnesses and take depositions as evidence;
- b. To effect service of judicial documents;
- c. To execute searches and seizures;
- d. To examine and inspect evidence;
- e. To obtain relevant documents and records or certified copies thereof.

### **Article 10**

Each of the Contracting States shall undertake to implement judicial delegations relating to terrorist offences, but such assistance may be refused in either of the two following cases:

- a. Where the request relates to an offence that is subject to investigation or prosecution in the requested State;
- b. Where granting the request might be prejudicial to the sovereignty, security or public order of the requested State.

**Article 11**

The request for judicial delegation shall be granted promptly in accordance with the provisions of the domestic law of the requested State. The latter may postpone the execution of the request until such time as any ongoing investigation or prosecution involving the same matter are completed or any compelling reasons for postponement cease to exist, provided that the requesting State is notified of such postponement.

**Article 12**

- a. A measure that is undertaken by means of a judicial delegation, in accordance with the provisions of this Conventions, shall have the same legal effect as if it had been taken by the competent authority of the requesting State
- b. The result of implementing the judicial delegation may be used only for the purpose for which the delegation is issued.

**Section III: Judicial cooperation****Article 13**

Each contracting State shall provide the other States with all possible and necessary assistance for investigations or prosecutions relating to terrorist offences.

**Article 14**

- a. Where one of the Contracting States has jurisdiction to prosecute a person suspected of a terrorist offence, it may request the State in which the suspect is present to take proceedings against him for

- 12 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

that offence, subject to the agreement of that State and provided that the offence is punishable in the prosecuting State by deprivation of liberty for a period of at least one year or more. The requesting state shall, in this event, provide the requested state with all the investigation documents and evidence relating to the offence.

- b. The investigation or prosecution shall be conducted on the basis of the charge or charges made by the requesting state against the suspect, in accordance with the provisions and procedures of the law of the prosecuting state.

### Article 15

The submission by the requesting state of a request for prosecution in accordance with paragraph (a) of the preceding article shall entail the suspension of the measures taken by it to pursue, investigate and prosecute the suspect whose prosecution is being requested, with the exception of those required for the purposes of the judicial cooperation and assistance, or the judicial delegation, sought by the State requested to conduct the prosecution.

### Article 16

- a. The measures taken in either the requesting State or that in which the prosecution takes place shall be subject to the law of the State in which they are taken and they shall have the force accorded to them by that law.
- b. The requesting State may try or retry a person whose prosecution it has requested only if the requested State declines to prosecute him.
- c. The State requested to take proceedings shall in all cases undertake to notify the requesting State of what action it has taken with regard to the request and of the outcome of the investigation or prosecution.

**Article 17**

The State requested to take proceedings may take all the measures and steps established by its law with respect to the accused both before the request to take proceedings reaches it and subsequently.

**Article 18**

The transfer of competence for prosecution shall not prejudice the rights of the victim of the offence, who reserves the right to approach the courts of the requesting State or the prosecuting State with a view to claiming his civil-law rights as a result of the offence.

**Section IV: Seizure of assets and proceeds derived from the offence****Article 19**

- a. If it is decided to extradite the requested person, any Contracting State shall undertake to seize and hand over to the requesting State the property used and proceeds derived from or relating to the terrorist offence, whether in the possession of the person whose extradition is sought or that of a third party.
- b. Once it has been established that they relate to the terrorist offence, the items indicated in the preceding paragraph shall be surrendered even if the person to be extradited is not handed over because he has absconded or died or for any other reason.
- c. The provisions of the two preceding paragraphs shall be without prejudice to the rights of any Contracting State or of bona fide third parties in the property or proceeds in question.

14 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

#### **Article 20**

The State requested to hand over property and proceeds may take all the precautionary measures necessary to discharge its obligation to hand them over. It may also retain such property or proceeds on a temporary basis if they are required for pending criminal proceedings or may, for the same reason, hand them over to the requesting State on condition that they are returned.

### **Section V: Exchange of evidence**

#### **Article 21**

Contracting States shall undertake to have the evidence of any terrorist offence committed in their territory against another Contracting State examined by their competent agencies, and they may seek the assistance of any other Contracting State in doing so. They shall take the necessary measures to preserve such evidence and ensure its legal validity. They alone shall examination to the State against whose interests the offence was committed, and the Contracting State or States whose assistance is sought shall not pass this information to any third party.

## **Part Three: Mechanisms for Implementing Cooperation**

### **Chapter I: Extradition Procedures**

#### **Article 22**

Requests for extradition shall be made between the competent authorities in the Contracting States directly, through their ministries of justice or the equivalent or through the diplomatic channel.

**Article 23**

The request for extradition shall be made in writing and shall be accompanied by the following:

- a. The original or an authenticated copy of the indictment or detention order or any other documents having the same effect and issued in accordance with the procedure laid down in the law of the requesting State;
- b. A statement of the offences for which extradition is requested, showing the time and place of their commission, their legal designation and a reference to the legal provisions applicable thereto, together with a copy of the relevant provisions;
- c. As accurate a description as possible of the person whose extradition is sought, together with any other information that may serve to establish his identity and nationality.

**Article 24**

1. The judicial authorities in the requesting State may apply to the requested State by any of the means of written communication for the provisional detention of the person being sought pending the presentation of the request for extradition.
2. In this case, the State from which extradition is requested may detain the person being sought on a provisional basis. If the request for extraction is not presented together with the necessary documents specified in the preceding article, the person whose extradition is being sought may not be detained for more than 30 days from the date of his arrest.

**Article 25**

The requesting State shall submit a request accompanied by the documents specified in article 23 of this Convention. If the requested State determines that the request is in order, its competent authorities shall grant the request in accordance with its own law and its decision shall be promptly communicated to the requesting State.

16 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

#### **Article 26**

1. In all of the cases stipulated in the two preceding articles, the period of provisional detention shall not exceed 60 days from the date of arrest.
2. During the period specified in the preceding paragraph, the possibility of provisional release is not excluded provided that the State from which extradition is requested takes any measures it considers necessary to prevent the escape of the person sought.
3. Such release shall not prevent the rearrest of the person concerned or his extradition if a request for extradition is received subsequently.

#### **Article 27**

Should the requested State consider that it requires supplementary information in order to ascertain whether the conditions stipulated in this Chapter has been met, it shall

notify the requesting State accordingly and a date for the provision of such information shall be established.

#### **Article 28**

Should the requested State receive several requests for extradition from different States, either for the same offence or for different offences, it shall make its decision

having regard to all the circumstances and, in particular, the possibility of subsequent extradition, the respective dates o when the requests were received, the relative

seriousness of the offences and the place where the offences were committed.

## Chapter II: Procedures for Judicial Delegation

### Article 29

Request relating to judicial delegations shall contain the following information:

- a. The authority presenting the request;
- b. The subject of and reason for the request;
- c. An exact statement, to the extent possible, of the identity and nationality of the person concerned;
- d. A description of the offence in connection with which the request for a judicial delegation is being made, its legal designation, the penalty established for its commission, and as much information as possible on the circumstances so as to facilitate the proper functioning of the judicial delegation.

### Article 30

1. The request for a judicial delegation shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State and shall be returned through the same channel.
2. In case of urgency, the request for a judicial delegation shall be addressed by the judicial authorities of the requesting State directly to the judicial authorities of the requested State, and a copy of the request shall be sent at the same time to the Ministry of Justice of the requested State. The request, accompanied by the documents relating to its implementation, shall be returned through the channel stipulated in the preceding paragraph.
3. The request for a judicial delegation may be sent by the judicial authorities directly to the competent authority in the requested State, and replies may be forwarded directly through this authority.



18 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

### **Article 31**

Requests for judicial delegation and their accompanying documents must be signed and must bear the seal of the competent authority or be authenticated by it. Such documents shall be exempt from all formalities that may be required by the legislation of the requested State.

### **Article 32**

Should an authority that receives a request for a judicial delegation not have the competence to deal with it, it shall automatically refer it to the competent authority in its State. In the event the request has been sent directly, it shall notify the requesting State in the same manner.

### **Article 33**

Every refusal of a request for a judicial delegation must be accompanied by a statement of the grounds for such refusal.

## **Chapter III: Measures for the Protection of Witnesses and Experts**

### **Article 34**

If, in the estimation of a requesting State, the appearance of a witness or expert before its judicial authority is of particular importance, it shall indicate this fact in its

request. The request or summons to appear shall indicate the approximate amount of the allowances and the travel and subsistence expenses and shall include an

undertaking to pay them. The requested State shall invite the witness or expert to appear and shall inform the requesting State of the response.

**Article 35**

1. A witness or an expert who does not comply with a summons to appear shall not be subject to any penalty or coercive measure, not withstanding any contrary statement in the summons.
2. Where a witness or an expert travels to the territory of the requesting State of his own accord, he should be summoned to appear in accordance with the provisions of the domestic legislation of that State.

**Article 36**

1. A witness or an expert shall not be prosecuted, detained or subjected to any restrictions on his personal liberty in the territory of the requesting State in respect of any acts or convictions that preceded the person's departure from the requested State, regardless of his nationality, as long as his appearance before the judicial authorities of that State is in response to a summons.
2. No witness or expert, regardless of his nationality, who appears before the judicial authorities of a requesting State in response to a summons may be prosecuted, detained or subjected to any restriction on his personal liberty in the territory of that State in respect of any acts or convictions not specified in the summons and that preceded the person's departure from the territory of the requested State.
3. The immunity stipulated in this article shall lapse if the witness or expert sought, being free to leave, remains in the territory of the requesting State for a period of 30 consecutive days after his presence is not longer required by the judicial authorities or, having left the territory of the requesting State, has voluntarily returned.

**Article 37**

1. The requesting State shall take all necessary measures to protect witnesses and experts from any publicity that might endanger them, their families or their property as a result of their provision

20 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

of testimony or expertise and shall, in particular, guarantee confidentiality with respect to:

- a. The date, place and means of their arrival in the requesting state;
  - b. Their place of residence, their movements and the places they frequent;
  - c. Their testimony and the information they provide before the competent judicial authorities.
2. The requesting State shall undertake to provide the necessary protection for the security of witnesses and experts and of members of their families that is required by their situation, the circumstances of the case in connection with which they are sought and the types of risks that can be anticipated.

### Article 38

1. Where a witness or expert whose appearance, is sought by a requesting State is in custody in the requested State, he may be temporarily transferred to the location of the hearing where he is requested to provide his testimony under conditions and at times to be determined by the requested State. Such transfer may be refused if:
  - a. The witness or expert in custody objects;
  - b. His presence is required for criminal proceedings in the territory of the requested State;
  - c. His transfer would prolong the term of his detention;
  - d. There are considerations militating against his transfer.
2. The witness or expert thus transferred shall continue to be held in custody in the territory of the requesting State until such time as he is returned to the requested State unless the latter State requests that he be released.

## **Part Four: Final Provisions**

### **Article 39**

This Convention is subject to ratification, acceptance or approval by the signatory States, and instruments of ratification, acceptance or approval shall be deposited with the General Secretariat of the League of Arab States within 30 days of the date of such ratification, acceptance or approval. The General Secretariat shall notify member States of the deposit of each such instrument and of its date.

### **Article 40**

1. This convention shall enter into force on the thirtieth day after the date as of which instruments of ratification, acceptance or approval have been deposited by seven Arab States.
2. This Convention shall enter into force for any other Arab State only after the instrument of ratification, acceptance or approval has been deposited and 30 days have elapsed from the date of that deposit.

### **Article 41**

No Contracting State may make any reservation that explicitly or implicitly violates the provisions of this Convention or is incompatible with its objectives.

### **Article 42**

A contracting State may denounce this Convention only by written request addressed to the Secretary-General of the League of Arab States. Denunciation shall take effect six months from the date the request is addressed to the Secretary-General of the League of Arab States.

22 <http://edoc.mpil.de/conference-on-terrorism/index.cfm>

The provisions of this Convention shall remain in force in respect of requests submitted before this period expires.

Done at Cairo, this twenty-second day of April 1998, in a single copy, which shall be deposited with the General Secretariat of the League of Arab States. A certified copy shall be kept at the General Secretariat of the Council of Arab Ministers of the Interior, and certified copies shall be transmitted to each of the parties that are signatories to this Convention or that accede hereto.

In witness whereof, the Arab Ministers of the Interior and Ministers of Justice have signed this Convention on behalf of their respective states.



## **Annex 11**

Convention of the Organization of the Islamic Conference  
on Combating International Terrorism,  
adopted at Ouagadougou on 1 July 1999  
<https://www.refworld.org/docid/3de5e6646.html>

**ANNEX TO RESOLUTION NO: 59/26-P**

**CONVENTION**

**OF THE ORGANISATION OF THE ISLAMIC CONFERENCE**

**ON**

**COMBATING INTERNATIONAL TERRORISM**

The Member States of the Organisation of the Islamic Conference,

Pursuant to the tenets of the tolerant Islamic Sharia which reject all forms of violence and terrorism, and in particular specially those based on extremism and call for protection of human rights, which provisions are paralleled by the principles and rules of international law founded on cooperation between peoples for the establishment of peace;

Abiding by the lofty, moral and religious principles particularly the provisions of the Islamic Sharia as well as the human heritage of the Islamic Ummah.

Adhering to the Charter of the Organisation of the Islamic Conference, its objectives and principles aimed at creating an appropriate atmosphere to strengthen cooperation and understanding among Islamic States as well as relevant OIC resolutions;

Adhering to the principles of International Law and the United Nations Charter as well as all relevant UN resolutions on procedures aimed at eliminating international terrorism, and all other conventions and international instruments to which states acceding to this Convention are parties and which call, inter alia, for the observance of the sovereignty, stability, territorial integrity, political independence and security of states, and non-intervention in their international affairs;

Proceeding from the rules of the Code of Conduct of the Organization of Islamic Conference for Combating International Terrorism;

Desiring to promote cooperation among them for combating terrorist crimes that threaten the security and stability of the Islamic States and endanger their vital interests;

Being committed to combating all forms and manifestations of terrorism and eliminating its objectives and causes which target the lives and properties of people;

Confirming the legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle to liberate their territories and attain their rights to self-determination and independence in compliance with the purposes and principles of the Charter and resolutions of the United Nations;



Believing that terrorism constitutes a gross violation of human rights, in particular the right to freedom and security, as well as an obstacle to the free functioning of institutions and socio-economic development, as it aims at destabilizing States;

Convinced that terrorism cannot be justified in any way, and that it should therefore be unambiguously condemned in all its forms and manifestations, and all its actions, means and practices, whatever its origin, causes or purposes, including direct or indirect actions of States;

Recognizing the growing links between terrorism and organized crime, including illicit trafficking in arms, narcotics, human beings and money laundering;

Have agreed to conclude this Convention, calling on all Member States of the Organization of the Islamic Conference to accede to it.

## PART I

### Definition and General Provisions

#### Article 1

For the purposes of this Convention:

1. "Contracting State" or "Contracting Party" means every Member State in the Organisation of the Islamic Conference that has ratified or adhered to this Convention and deposited its instruments of ratification or adherence with the General Secretariat of the Organisation.
2. "Terrorism" means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.
3. "Terrorist Crime" means any crime executed, started or participated in to realize a terrorist objective in any of the Contracting States or against its nationals, assets or interests or foreign facilities and nationals residing in its territory punishable by its internal law.
4. Crimes stipulated in the following conventions are also considered terrorist crimes with the exception of those excluded by the legislations of Contracting States or those who have not ratified them:
  - a) Convention on "Offences and Other Acts Committed on Board of Aircrafts" (Tokyo, 14.9.1963).

- b) Convention on "Suppression of Unlawful Seizure of Aircraft" (The Hague, 16.12.1970).
- c) Convention on "Suppression of Unlawful Acts Against the Safety of Civil Aviation" signed at Montreal on 23.9.1971 and its Protocol (Montreal, 10.12.1984).
- d) Convention on the "Prevention and Punishment of Crimes Against Persons Enjoying International Immunity, Including Diplomatic Agents" (New York, 14.12.1973).
- e) International Convention Against the Taking of Hostages (New York, 1979).
- f) The United Nations Law of the Sea Convention of 1988 and its related provisions on piracy at sea.
- g) Convention on the "Physical Protection of Nuclear Material" (Vienna, 1979).
- h) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation-Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1988).
- i) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms on the Continental Shelf (Rome, 1988).
- j) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 1988).
- k) International Convention for the Suppression of Terrorist Bombings (New York, 1997).
- l) Convention on the Marking of Plastic Explosives for the purposes of Detection (Montreal, 1991)

## Article 2

- a. Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.
- b. None of the terrorist crimes mentioned in the previous article shall be considered political crimes.

c. In the implementation of the provisions of this Convention the following crimes shall not be considered political crimes even when politically motivated:

1. Aggression against kings and heads of state of Contracting States or against their spouses, their ascendants or descendants.
  2. Aggression against crown princes or vice-presidents or deputy heads of government or ministers in any of the Contracting States.
  3. Aggression against persons enjoying international immunity including Ambassadors and diplomats in Contracting States or in countries of accreditation.
  4. Murder or robbery by force against individuals or authorities or means of transport and communications.
  5. Acts of sabotage and destruction of public properties and properties geared for public services, even if belonging to another Contracting State.
  6. Crimes of manufacturing, smuggling or possessing arms and ammunition or explosives or other materials prepared for committing terrorist crimes.
- d. All forms of international crimes, including illegal trafficking in narcotics and human beings money laundering aimed at financing terrorist objectives shall be considered terrorist crimes.

## PART II

### Foundations of Islamic Cooperation for Combating Terrorism

#### *Chapter I*

#### *In the Field of Security*

#### **Division I**

#### **Measures to Prevent and Combat Terrorist Crimes.**

#### Article 3

- I. The Contracting States are committed not to execute, initiate or participate in any form in organizing or financing or committing or instigating or supporting terrorist acts whether directly or indirectly.
- II. Committed to prevent and combat terrorist crimes in conformity with the provisions of this Convention and their respective domestic rules and regulations the contracting States shall see to:

(A) Preventive Measures:

1. Barring their territories from being used as an arena for planning, organizing, executing terrorist crimes or initiating or participating in these crimes in any form; including preventing the infiltration of terrorist elements or their gaining refuge or residence therein individually or collectively, or receiving hosting, training, arming, financing or extending any facilities to them.
2. Cooperating and coordinating with the rest of the Contracting States, particularly neighbouring countries which suffer from similar or common terrorist crimes.
3. Developing and strengthening systems relating to detecting transportation, importing, exporting stockpiling, and using of weapons, ammunition and explosives as well as other means of aggression, killing and destruction in addition to strengthening trans-border and custom controls in order to intercept their transfer from one Contracting State to another or to other States unless they are intended for specific legitimate purposes.
4. Developing and strengthening systems related to surveillance procedures, securing borders, and land, sea and air passages in order to prevent infiltration through them.
5. Strengthening systems for ensuring the safety and protection of personalities, vital installations and means of public transport.
6. Re-enforcing protection, security and safety of diplomatic and consular persons and missions; and regional and international organizations accredited in the Contracting State in accordance with the conventions and rules of international law which govern this subject.
7. Promoting security intelligence activities and coordinating them with the intelligence activities of each Contracting State pursuant to their respective intelligence policies, aimed at exposing the objectives of terrorist groups and organisations, thwarting their designs and revealing the extent of their danger to security and stability.
8. Establishing a data base by each Contracting State to collect and analyze data on terrorist elements, groups, movements and organizations and monitor developments of the phenomenon of terrorism and successful experiences in combating it. Moreover, the Contracting State shall update this information and exchange them with competent authorities in
9. other Contracting States within the limits of the laws and regulations in every State.

(B) Combating Measures:

1. Arresting perpetrators of terrorists crimes and prosecuting them according to the national law or extraditing them in accordance with the provisions of this Convention or existing Conventions between the requesting and requested States.

2. Ensuring effective protection of persons working in the field of criminal justice as well as to witnesses and investigators.
3. Ensuring effective protection of information sources and witnesses on terrorist crimes.
4. Extending necessary assistance to victims of terrorism.
5. Establishing effective cooperation between the concerned organs in the contracting States and the citizens for combating terrorism including extending appropriate guarantees and appropriate incentives to encourage informing on terrorist acts and submitting information to help uncover them and cooperating in arresting the perpetrators.

## **Division II**

### **Areas of Islamic cooperation for preventing and combating terrorist crimes.**

#### Article 4

Contracting States shall cooperate among themselves to prevent and combat terrorist crimes in accordance with the respective laws and regulations of each State in the following areas:

#### First: Exchange of Information

- 1- Contracting States shall undertake to promote exchange of information among them as such regarding:
  - a. Activities and crimes committed by terrorist groups, their leaders, their elements, their headquarters, training, means and sources that provide finance and weapons, types of arms, ammunition and explosives utilized as well as other ways and means to attack, kill and destroy.
  - b. Means of communications and propaganda utilized by terrorist groups, how they act, movement of their leaders, their elements and their travel documents.
  
- 2- Contracting States shall expeditiously inform any other Contracting State regarding available information about any terrorist crime perpetrated in its territory aimed at undermining the interests of that State or its nationals and to state the facts surrounding the crime in terms of its circumstances, criminals involved, victims, losses, devices and methods utilized to carry out the crime, without prejudicing investigation and inquiry requisites.
  
- 3- Contracting States shall exchange information with the other Parties to combat terrorist crimes and to inform the Contracting State or other States of all available information or data that could prevent terrorist crimes within its territory or against its nationals or residents or interests.

4- The Contracting States shall provide any other Contracting State with available information or data that will:

- a. Assist in arresting those accused of committing a terrorist crime against the interests of that country or being implicated in such acts either by assistance, collusion, instigation, or financing.
- b. Contribute to confiscating any arms, weapons, explosives, devices or funds spent or meant to be spent to commit a terrorist crime.

5- The Contracting States undertake to respect the confidentiality of information exchanged between them and shall refrain from passing it to any non-Contracting States or other parties without prior consent of the source country.

#### Second: Investigation

Each Contracting State pledges to promote cooperation with other contracting states and to extend assistance in the field of investigation procedures in terms of arresting escaped suspects or those convicted for terrorist crimes in accordance with the laws and regulations of each country.

#### Third: Exchange of Expertise

1. Contracting States shall cooperate with each other to undertake and exchange studies and researches on combating terrorist crimes as well as exchange of expertise in this field.
2. Contracting States shall cooperate within the scope of their capabilities to provide available technical assistance for preparing programmes or holding joint training sessions with one or more Contracting State if the need arises for personnel required in the field of combating terrorism in order to improve their scientific and practical potential and upgrade their performance standards.

#### Fourth: Education and Information Field

The Contracting States shall cooperate in:

3. Promoting information activities and supporting the mass media in order to confront the vicious campaign against Islam, by projecting the true image of tolerance of Islam, and exposing the designs and danger of terrorist groups against the stability and security of Islamic States.
4. Including the noble human values, which proscribe the practice of terrorism in the educational curricula of Contracting States.

5. Supporting efforts aimed at keeping abreast of the age by introducing an advanced Islamic thought based on ijtihad by which Islam is distinguished.

## *Chapter II*

### *In the Judicial Field*

#### **Section I**

#### **Extraditing Criminals**

#### Article 5

Contracting States shall undertake to extradite those indicted or convicted of terrorist crimes, requested for extradition by any of these countries in compliance with the rules and conditions stipulated in this Convention.

#### Article 6

Extradition shall not be permissible in the following cases:

6. If the Crime for which extradition is requested is deemed by the laws enforced in the requested Contracting State as one of a political nature and without prejudice to the provisions of Article 2, paragraphs 2 and 3 of this Convention for which extradition is requested.
7. If the Crime for which extradition is sought relates solely to a dereliction of military obligations.
8. If the Crime for which extradition is requested, was committed in the territory of the requested Contracting State, unless this crime has undermined the interests of the requesting Contracting State and its laws stipulate that the perpetrators of those crimes shall be prosecuted and punished providing that the requested country has not commenced investigation or trial.
9. If the Crime has been the subject of a final sentence which has the force of law in the requested Contracting State.
10. If the action at the time of the extradition request elapsed or the penalty prescribed in accordance with the law in the Contracting State requesting extradition.
11. Crimes committed outside the territory of the requesting Contracting State by a person who was not its national and the law of the requested Contracting State does not prosecute such a crime if perpetrated outside its territory by such a person.
12. If pardon was granted and included the perpetrators of these crimes in the requesting Contracting State.
13. If the legal system of the requested State does not permit extradition of its national, then it shall be obliged to prosecute whosoever commits a

terrorist crime if the act is punishable in both States by a freedom restraining sentence for a minimum period of one year or more. The nationality of the person requested for extradition shall be determined according to the date of the crime taking into account the investigation undertaken in this respect by the requesting State.

#### Article 7

If the person requested for extradition is under investigation or trial for another crime in the requested State, his extradition shall be postponed until the investigation is disposed of or the trial is over and the punishment implemented. In this case, the requested State shall extradite him provisionally for investigation or trial on condition that he shall be returned to it before execution of the sentence issued in the requested State.

#### Article 8

For the purpose of extraditing crime perpetrators according to this Convention, the domestic legislations of Contracting States shall not have any bearing as to their differences with respect to the crime being classified as a felony or misdemeanor, nor as to the penalty prescribed for it.

### Section II

#### Rogatory Commission

#### Article 9

Each Contracting State shall request from any other Contracting State to undertake in its territory rogatory action with respect to any judicial procedures concerning an action involving a terrorist crime and in particular:

1. To hear witnesses and testimonies taken as evidence.
2. To communicate legal documents.
3. To implement inquiry and detention procedures.
4. To undertake on the scene inspection and analyse evidence.
5. To obtain necessary evidence or documents or records or their certified copies.

#### Article 10

Each Contracting State shall implement rogatory commissions related to terrorist crimes and may reject the request for implementation with respect to the following cases.



6. If the crime for which the request is made, is the subject of a charge, investigation or trial in the country requested to implement rogatory commission.
7. If the implementation of the request prejudices the sovereignty or the security or public order of the country charged with this mission.

#### Article 11

The request for rogatory mission shall be implemented promptly in accordance with the provisions of the domestic laws of the requested State and which may postpone its implementation until its investigation and prosecution procedures are completed on the same subject or until the compelling reasons that called for postponement are removed. In this case the requesting State shall be informed of this postponement.

#### Article 12

The request for a rogatory commission related to a terrorist crime shall not be refused on the grounds of the rule of transaction confidentiality for banks and financial institutions. And in the implementation of the request the rules of the enforcing State are to be followed.

#### Article 13

The procedure, undertaken through rogatory commission in accordance with the provisions of this Convention, shall have the same legal effect as if it was brought before the competent authority in the State requesting rogatory commission. The results of its implementation shall only be utilized within the scope of the rogatory commission.

### Section 3

#### Judicial Cooperation

#### Article 14

Each Contracting State shall extend to the other contracting parties every possible assistance as may be necessary for investigation or trial proceedings related to terrorist crimes.

#### Article 15

14. If judicial competence accrues to one of the Contracting States for the prosecution of a subject accused of a terrorist crime, this State may request the country which hosts the suspect to prosecute him for this crime subject to the host country's consent and providing the crime is punishable in that

country by a freedom restraining sentence for at least one year or by a more severe sanction. In such a case the requesting State shall pass all investigation documents and evidence related to the crime to the requested State.

15. Investigation or trial shall be conducted on the grounds of the case or cases brought by the requesting State against the accused in accordance with the legal provisions and procedures of the country holding the trial.

#### Article 16

The request for trial on the basis of para (1) of the previous article, entails the suspension of procedures of prosecution, investigation and trial in the territory of the requesting State except those relating to the requisites of cooperation, assistance or rogatory commission sought by the State requested to hold the trial procedures.

#### Article 17

16. Procedures undertaken in either of the two States - the requesting State or the one where the trial is held - shall be subject to the law of the country where the procedure is executed and which shall have legal preeminence as may be stipulated in its legislation.
17. The requesting State shall not bring to trial or retrial the accused subject unless the requested State refuses to prosecute him.
18. In all cases the State requested to hold trial shall inform the requesting country of its action with respect to the request for trial and shall communicate to it the results of its investigations or trial proceedings.

#### Article 18

The State requested to hold trial may undertake all measures and procedures stipulated by its legislation regarding the accused both before and after the request for trial is received.

### Section 4

#### Seized Assets and Proceeds of the Crime

#### Article 19

If the extradition of a subject is decided, the Contracting State shall hand over to the requesting State the assets and proceeds seized, used or related to the terrorist crime, found in the possession of the wanted subject or with a third party.

#### Article 20

The State requested to hand over the assets and proceeds may undertake all necessary custodial measures and procedures for the implementation of its obligation. It may also retain them provisionally if required for penal action implemented therein or hand them to the requesting State on condition that they shall be returned for the same purpose.

#### **Section 5**

#### **Exchange of Evidence**

#### **Article 21**

A Contracting State shall see to it that the evidence and effects of any terrorist crime committed on its territory against another Contracting State are examined by its competent organs and may seek assistance to that end from any other Contracting State. Moreover, it shall take every necessary step to safeguard the evidence and proof of their legal relevance. It may communicate, if requested, the result to the country whose interest were targeted by the crime. The State or States which have assisted in this case shall not pass this information to others.

### **PART III**

#### **Mechanism for Implementing Cooperation**

#### *Chapter I*

#### *Extradition Procedures*

#### **Article 22**

The exchange of extradition requests between Contracting States shall be undertaken directly through diplomatic channels or through their Ministries of Justice or their substitute.

#### **Article 23**

A request for extradition shall be submitted in writing and shall include:

1. The original or an authenticated copy of the indictment, arrest order or any other instruments of identical weight issued in line with the conditions stipulated in the requesting State's legislation.
2. A statement of the acts for which extradition is sought specifying the dates and places, where these acts were committed and their legal implications along with reference to the legal articles under which they fall as well as a copy of these articles.

3. Description, in as much detail as possible, of the subject wanted for extradition and any other information such as to determine his identity and nationality.

#### Article 24

1. The judicial authorities in the requesting State may approach the requested State by any channel of written communication and seek the preventive arrest of the wanted subject pending the arrival of the extradition request.

2. In this case the requested State may effect the preventive arrest of the wanted subject. However, if the request for extradition is not submitted together with the necessary documents listed in the above article, the subject whose extradition is sought may not be detained for more than thirty days as of the day of his arrest.

#### Article 25

The requesting State shall send a request together with the documents listed in Article 24 of this Convention. If the requested State accepts the request as valid, its competent authorities shall implement it in accordance with its legislation and shall promptly notify the requesting State of the action undertaken.

#### Article 26

- In all cases stipulated in the two articles above, preventive detention shall not exceed sixty days after the date of arrest.
- Temporary release may be effected during the period stipulated in the previous article and the requested State shall take appropriate measures to ensure that the wanted subject does not escape.
- Release shall not prevent the re-arrest of the subject and his extradition if it was requested after his release.

#### Article 27

If the requested State requires additional clarification to ascertain the conditions stipulated in this chapter, it shall notify the requesting State thereof and fix a date for provision of such clarifications.

#### Article 28

If the requested State received a number of extradition requests from various countries related to the same or diverse acts, this State shall decide upon these requests bearing in mind the circumstances and in particular the possibility of subsequent extradition, date of receiving the requests, degree of the danger of the crime and where it was committed.

*Chapter II**Measures for Rogatory Commissions*

## Article 29

Rogatory Commission requests must specify the following:

1. The competent authority that issued the request.
2. Subject of the request and its reason.
3. The identity and nationality of the person being the subject of the rogatory commission (as may be possible).
4. Information on the crime requiring rogatory commission, its legal definition and penalty inflicted on its perpetrators along with maximum available information on its circumstances in order to ensure the efficient implementation of the rogatory commission.

## Article 30

1. The request for rogatory commission shall be forwarded by the Ministry of Justice in the requesting State to the Ministry of Justice in the requested State and returned in the same way.
2. In case of expediency, the request for rogatory commission shall be directly forwarded by the judicial authorities in the requesting State to the judicial authorities in the requested State. A copy of this rogatory commission shall also be sent at the same time to the Ministry of Justice in the requested State. The rogatory commission shall be returned together with the papers concerning its implementation in the way stipulated in the previous item.
3. The request for rogatory commission may be forwarded directly from the judicial authorities to the competent authority in the requested country. Answers may be sent directly through the said authority.

## Article 31

Requests for rogatory commission and accompanying documents shall be signed or stamped with the seal of a competent authority or that authorized by it. These documents shall be exempted from all formal procedures that could be required by the legislation of the requested State.

## Article 32

If the authority that received the request for rogatory commission was not competent enough to deal with it, it shall automatically transfer it to the competent authority in its country. If the request is forwarded directly the answer shall reach the requesting State in the same manner.

Article 33

Any refusal for rogatory commission shall be explained.

*Chapter III*

*Measures for Protecting Witnesses and Experts*

Article 34

If the requesting State deems that the appearance of the witness or expert before its judicial authorities is of special importance, reference thereto shall be made in its request. The request or summons shall include an approximate statement in terms of compensation, travel expenses, accommodation and commitment to make these payments. The requested State shall invite the witness or expert and inform the requesting State about his/her reply.

Article 35

1. No penalty nor coercive measure may be inflicted upon the witness or expert who does not comply with the summons even if the writ provides for such a penalty.
2. If the witness or expert arrives voluntarily to the territory of the requesting State, he shall be summoned according to the provisions of the internal legislation of this State.

Article 36

1. A witness or expert may not be subjected to trial, detained or have his freedom restricted in the territory of the requesting State, for acts or court rulings that preceded his departure for the requesting State, irrespective of his nationality, as long as his appearance before the judicial authorities of the said State is based on a summons.
2. No witness or expert, whatever his nationality, appearing before the judiciary of the State in question on the basis of a summons, may be prosecuted or detained or have his freedom restricted in any way on the requesting State's territory for other acts or court decisions not mentioned in the summons and predating his departure from the State from which he is requested.
3. The immunity privileges stated in this Article shall become invalid if a witness or expert remains on the requesting State's territories for over thirty consecutive days despite his ability to return once his presence was no longer requested by the judiciary, or if he returns to the requesting State's territories after his departure.

Article 37

1. The requesting State shall undertake all necessary measures to ensure the protection of a witness or expert from publicity that could endanger him, his family or his property as a result of his testimony and in particular:

- a) To ensure confidentiality of the date and place of his arrival as well as the means involved.
- b) To ensure confidentiality of his accommodation, movements and locations where he may be found.
- c) To ensure confidentiality of the testimony and information given to the competent judicial authorities.

2. The requesting State shall provide necessary security required by the condition of the witness or expert and of his family, and circumstances of the case and types of expected risks.

#### Article 38

1. If the witness or expert who is summoned to the requesting State is imprisoned in the requested State, he shall be provisionally transferred to the location of the hearing at which he is to testify according to conditions and times determined by the requested State.

Transfer may be denied:

- a. If the witness or expert refuses.
- b. If his presence is necessary for undertaking criminal procedures in the territory of the requested State.
- c. If his transfer would prolong his imprisonment.
- d. If there are considerations militating against his transfer.

2. The transferred witness or expert shall remain in detention in the territory of the requesting State until he is repatriated to the requested State unless the latter requests his release.

### PART IV

#### Final Provisions

#### Article 39

This Convention shall be ratified, or adhered to, by the Signatory States and the instruments of ratification or accession shall be deposited with the General Secretariat of the Organisation of the Islamic Conference not exceeding a period of thirty days as of the

date of ratification or accession. The General Secretariat shall inform all Member States about any deposition and date of such instruments.

Article 40

1. This Convention shall enter into force thirty days after the deposit of the seventh instrument of ratification or accession at the OIC General Secretariat.
2. This Convention shall not be applicable to any other Islamic State until it deposits its instruments of ratification or accession with the General Secretariat of the Organisation of the Islamic Conference and after a period of thirty days of the date of deposition.

Article 41

It is not permissible for any Contracting State to make any reservation, explicitly or implicitly in conflict with the provisions of this Convention or deviating from its objectives.

Article 42

1. A Contracting State shall not withdraw from this Convention except by a written request to the Secretary General of the Organization of the Islamic Conference.
2. Withdrawal shall be affective six months after the date of sending the request to the Secretary General.

This Convention has been written in English, Arabic and French of equal authenticity, of one original deposited with the General Secretariat of the Organization of the Islamic Conference which shall have it registered at the United Nations Organization, in accordance with the provisions of Article 102 of its Charter. The General Secretariat shall communicate approved copies thereof to the Member States of the Organization of the Islamic Conference.

-----



## **Annex 12**

**International Convention for the Suppression of the Financing  
of Terrorism, signed at New York on 9 December 1999**

2178 United Nations, *Treaty Series* 197

## No. 38349

---

### Multilateral

**International Convention for the Suppression of the Financing of Terrorism (with annex). New York, 9 December 1999**

**Entry into force:** *10 April 2002, in accordance with article 26 which reads as follows: "1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession." (see following page)*

**Authentic texts:** *Arabic, Chinese, English, French, Russian and Spanish*

**Registration with the Secretariat of the United Nations:** *ex officio, 10 April 2002*

---

### Multilatéral

**Convention internationale pour la répression du financement du terrorisme (avec annexe). New York, 9 décembre 1999**

**Entrée en vigueur :** *10 avril 2002, conformément à l'article 26 qui se lit comme suit : "1. La présente Convention entrera en vigueur le trentième jour qui suivra la date de dépôt auprès du Secrétaire général de l'Organisation des Nations Unies du vingt-deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion. 2. Pour chacun des États qui ratifieront, accepteront ou approuveront la Convention ou y adhéreront après le dépôt du vingt-deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion, la Convention entrera en vigueur le trentième jour après le dépôt par cet État de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion." (voir la page suivante)*

**Textes authentiques :** *arabe, chinois, anglais, français, russe et espagnol*

**Enregistrement auprès du Secrétariat des Nations Unies :** *d'office, 10 avril 2002*

<b>Participant</b>	<b>Ratification, Accession (a) and Acceptance (A)</b>
Algeria with reservation <sup>1</sup>	8 Nov 2001
Antigua and Barbuda	11 Mar 2002 a
Azerbaijan	26 Oct 2001
Bolivia	7 Jan 2002
Botswana	8 Sep 2000
Canada	19 Feb 2002
Chile with declaration <sup>1</sup>	10 Nov 2001
Cuba with reservation <sup>1</sup>	15 Nov 2001
Cyprus	30 Nov 2001
France with declarations <sup>1</sup>	7 Jan 2002
Grenada	13 Dec 2001 a
Guatemala with declaration <sup>1</sup>	12 Feb 2002
Lesotho	12 Nov 2001
Malta	11 Nov 2001
Monaco with declarations <sup>1</sup>	10 Nov 2001
Netherlands with declaration <sup>1</sup>	7 Feb 2002 A
Palau	14 Nov 2001 a
Peru	10 Nov 2001
Saint Kitts and Nevis	16 Nov 2001
Sri Lanka	8 Sep 2000
United Kingdom of Great Britain and Northern Ireland	7 Mar 2001
Uzbekistan	9 Jul 2001

<sup>1</sup>. For the text of the declarations and reservations made upon ratification, accession or acceptance, see p. 286 of this volume.

<b>Participant</b>	<b>Ratification, Adhésion (a) et Acceptation (A)</b>
Algérie avec réserve <sup>1</sup>	8 nov 2001
Antigua-et-Barbuda	11 mars 2002 a
Azerbaïdjan	26 oct 2001
Bolivie	7 janv 2002
Botswana	8 sept 2000
Canada	19 févr 2002
Chili avec déclaration <sup>1</sup>	10 nov 2001
Chypre	30 nov 2001
Cuba avec réserve <sup>1</sup>	15 nov 2001
France avec déclarations <sup>1</sup>	7 janv 2002
Grenade	13 déc 2001 a
Guatemala avec déclaration <sup>1</sup>	12 févr 2002
Lesotho	12 nov 2001
Malte	11 nov 2001
Monaco avec déclarations <sup>1</sup>	10 nov 2001
Ouzbékistan	9 juil 2001
Palaos	14 nov 2001 a
Pays-Bas avec déclaration <sup>1</sup>	7 févr 2002 A
Pérou	10 nov 2001
Royaume-Uni de Grande-Bretagne et d'Irlande du Nord	7 mars 2001
Saint-Kitts-et-Nevis	16 nov 2001
Sri Lanka	8 sept 2000

<sup>1</sup>. Pour les textes des déclarations et réserves faites lors de la ratification, l'adhésion ou l'acceptation, voir p.286 du présent volume.

المرفق

- ١ - اتفاقية قمع الاستيلاء غير المشروع على الطائرات، الموقع في لاهاي في ١٦ كانون الأول/ ديسمبر ١٩٧٠.
- ٢ - اتفاقية قمع الأعمال غير المشروعة، الموجهة ضد سلامة الطيران المدني، الموقع في مونتريال في ٢٢ أيلول/سبتمبر ١٩٧١.
- ٣ - اتفاقية منع الجرائم المركبة ضد الأشخاص المتمتعين بحماية دولية، بمن فيهم الموظفون الدبلوماسيون، والمعاقبة عليها، التي اعتمدها الجمعية العامة في ١٤ كانون الأول/ ديسمبر ١٩٧٢.
- ٤ - الاتفاقية الدولية لمناهضة أخذ الرهائن، التي اعتمدها الجمعية العامة في ١٧ كانون الأول/ ديسمبر ١٩٧٩.
- ٥ - اتفاقية الحماية المادية للمواد النووية، المعتمدة في فيينا في ٢ آذار/ مارس ١٩٨٠.
- ٦ - البروتوكول المتعلق بقمع أعمال العنف غير المشروعة في المطارات التي تخدم الطيران المدني الدولي، المكمل لاتفاقية قمع الأعمال غير القانونية الموجهة ضد سلامة الطيران المدني، والموقع في مونتريال في ٢٤ شباط/فبراير ١٩٨٨.
- ٧ - اتفاقية قمع الأعمال غير المشروعة الموجهة ضد سلامة الملاحة البحرية، الموقع في روما في ١٠ آذار/ مارس ١٩٨٨.
- ٨ - البروتوكول المتعلق بقمع الأعمال غير المشروعة الموجهة ضد سلامة المنصات الثابتة الواقعة على الجرف القاري، الموقع في روما في ١٠ آذار/ مارس ١٩٨٨.
- ٩ - الاتفاقية الدولية لقمع الهجمات الإرهابية بالقنابل التي اعتمدها الجمعية العامة في ١٥ كانون الأول/ ديسمبر ١٩٩٧.

٢ - بالنسبة إلى كل دولة تصدق على الاتفاقية أو تقبلها أو توافق عليها أو تنضم إليها بعد إيداع وثيقة التصديق أو القبول أو الموافقة أو الانضمام الثانية والعشرين، يبدأ سريان الاتفاقية في اليوم الثلاثين من تاريخ إيداع تلك الدولة وثيقة تصديقها أو قبولها أو موافقتها أو انضمامها.

#### المادة ٢٧

١ - لأي دولة طرف أن تنسحب من هذه الاتفاقية بإشعار خطي يوجه إلى الأمين العام للأمم المتحدة.  
٢ - يصبح الانسحاب سارياً عند انقضاء سنة على تاريخ وصول الإشعار إلى الأمين العام للأمم المتحدة.

#### المادة ٢٨

يودع أصل هذه الاتفاقية، الذي تتساوى في الحجية نصوصه باللغات الإسبانية والإنكليزية والروسية والصينية والعربية والفرنسية، لدى الأمين العام للأمم المتحدة، الذي يرسل منها نسخاً معتمدة إلى جميع الدول.

وإبانتا لما تقدم، قام الموقعون أدناه، المخولون من حكوماتهم حسب الأصول، بالتوقيع على هذه الاتفاقية المعروضة للتوقيع في مقر الأمم المتحدة بنيويورك في ١٠ كانون الثاني/يناير ٢٠٠٠.

[For the list of signatories, see p. 281 of this volume. — Pour la liste de signataires, voir p. 281 du present volume]

٤ - يدخل التعديل المعتمد على المرفق حيز النفاذ بعد ٢٠ يوما من إيداع صك التصديق الثاني والعشرين، أو قبوله أو الموافقة على هذا التعديل بالنسبة لجميع الدول الأطراف التي أودعت هذا الصك. وبالنسبة لكل دولة طرف تقوم بالتصديق على التعديل، أو قبوله، أو الموافقة عليه بعد إيداع الصك الثاني والعشرين، يدخل التعديل حيز النفاذ في اليوم الثلاثين من قيام الدولة الطرف بإيداع صك التصديق، أو القبول أو الموافقة.

#### المادة ٢٤

١ - يعرض للتحكيم أي خلاف ينشأ بين دولتين أو أكثر من الدول الأطراف حول تفسير أو تطبيق هذه الاتفاقية وتتعدى تسويته عن طريق التفاوض خلال مدة معقولة، وذلك بناء على طلب واحدة من تلك الدول. وإذا لم تتمكن الأطراف من التوصل، في غضون ستة أشهر من تاريخ طلب التحكيم، إلى اتفاق على تنظيم التحكيم، جاز لأي منها رفع الخلاف إلى محكمة العدل الدولية، بتقديم طلب بذلك، وفقا للنظام الأساسي للمحكمة.

٢ - يجوز لأي دولة أن تعلن، عند التوقيع على هذه الاتفاقية أو التصديق عليها أو قبولها أو الموافقة عليها أو الانضمام إليها، أنها لا تعتبر نفسها ملزمة بأحكام الفقرة ١. ولا تكون الدول الأطراف الأخرى ملزمة بهذه الأحكام إزاء أي دولة طرف أبدت تحفظا من هذا القبيل.

٣ - لأي دولة أبدت تحفظا وفقا لأحكام الفقرة ٢ أن تسحب ذلك التحفظ متى شاءت، بإخطار توجهه إلى الأمين العام للأمم المتحدة.

#### المادة ٢٥

١ - يفتح باب التوقيع على هذه الاتفاقية أمام جميع الدول من ١٠ كانون الثاني/يناير ٢٠٠٠ إلى ٣١ كانون الأول/ديسمبر ٢٠٠٠ في مقر الأمم المتحدة بنيويورك.

٢ - تخضع هذه الاتفاقية للتصديق أو القبول أو الموافقة. وتودع وثائق التصديق أو القبول أو الموافقة لدى الأمين العام للأمم المتحدة.

٣ - يفتح باب الانضمام إلى هذه الاتفاقية أمام أي دولة. وتودع وثائق الانضمام لدى الأمين العام للأمم المتحدة.

#### المادة ٢٦

١ - يبدأ سريان هذه الاتفاقية في اليوم الثلاثين من تاريخ إيداع وثيقة التصديق أو القبول أو الموافقة أو الانضمام الثانية والعشرين لدى الأمين العام للأمم المتحدة.

المادة ٢٠

تنفذ الدول الأطراف الالتزامات المنصوص عليها في هذه الاتفاقية بما يتفق مع مبدأي تساوي الدول في السيادة وسلامتها الإقليمية ومبدأ عدم التدخل في الشؤون الداخلية للدول الأخرى.

المادة ٢١

لا يوجد في هذه الاتفاقية ما يضر بالحقوق والالتزامات والمسؤوليات الأخرى للدول والأفراد بموجب القانون الدولي، ولا سيما أغراض ميثاق الأمم المتحدة، والقانون الإنساني الدولي والاتفاقيات الأخرى ذات الصلة.

المادة ٢٢

ليس في هذه الاتفاقية ما يبيح لدولة طرف أن تمارس في إقليم دولة طرف أخرى ولاية قضائية أو مهام هي من صميم اختصاص سلطات الدولة الطرف الأخرى وفقاً لقانونها الداخلي.

المادة ٢٣

١ - يجوز تعديل المرفق بإضافة المعاهدات التالية ذات الصلة:

(أ) المعاهدات التي تكون مفتوحة لمشاركة جميع الدول؛

(ب) المعاهدات التي أصبحت سارية؛

(ج) المعاهدات التي تم تصديقها، أو قبولها، أو الموافقة عليها، أو التي انضم إليها ما لا يقل عن اثنتين وعشرين دولة طرفاً في هذه الاتفاقية.

٢ - بعد سريان هذه الاتفاقية، يجوز لأي دولة طرف أن تقترح تعديلاً. ويرسل أي اقتراح للتعديل إلى الجهة المودعة في شكل خطي. ويقوم الوديع بإشعار جميع الدول الأطراف بالمقترحات التي تفي بمقتضيات الفقرة ١ ويلتمس آراءها فيما إذا كان ينبغي اعتماد التعديل المقترح.

٣ - يعتبر التعديل المقترح معتمداً إلا إذا اعترض عليه ثلث الدول الأطراف بإشعار خطي يقدم في موعد لا يتجاوز ١٨٠ يوماً من تعميمه.



المدنية عن انتهاك أي قيد يلزم بعدم الكشف عن المعلومات، إذا أبلغت عن شكوكها بحسن نية؛

'٤' إلزام المؤسسات المالية بالاحتفاظ، لمدة خمس سنوات على الأقل، بجميع السجلات اللازمة المتعلقة بالمعاملات المحلية أو الدولية.

٢ - تتعاون الدول الأطراف كذلك في منع الجرائم المحددة في المادة ٢ من خلال النظر في:

(أ) إمكانية وضع تدابير منها مثلا الإشراف على جميع وكالات تحويل الأموال والترخيص لها؛

(ب) إمكانية تطبيق تدابير تسمح بكشف أو رصد النقل المادي عبر الحدود للأموال النقدية أو الصكوك القابلة للتداول لحاملها، رهنا بضمانات صارمة الفرض منها التأكد من الاستخدام المناسب للمعلومات ودون المساس بأي شكل بحرية حركة رؤوس الأموال.

٢ - تتعاون الدول الأطراف كذلك في منع الجرائم المنصوص عليها في المادة ٢ بتبادل المعلومات الدقيقة والمتحقق من صحتها وفقا لأحكام تشريعاتها الداخلية، وتنسيق التدابير الإدارية وغيرها من التدابير المتخذة، حسب الاقتضاء، بفرض منع ارتكاب الجرائم المبينة في المادة ٢، ولا سيما عن طريق:

(أ) إنشاء قنوات اتصال فيما بين أجهزتها ودوائرها المختصة، وصيانة تلك القنوات لتيسير التبادل المأمون والسريع للمعلومات المتعلقة بجميع جوانب الجرائم المبينة في المادة ٢؛

(ب) التعاون فيما بينها على إجراء التحريات بشأن الجرائم التي تم تحديدها وفقا للمادة ٢ من الاتفاقية فيما يتصل بما يلي:

'١' كشف هوية الأشخاص الذين توجد بشأنهم شبهة معقولة تدل على تورطهم في هذه الجرائم وأماكن تواجدهم وأنشطتهم؛

'٢' حركة الأموال المتصلة بارتكاب هذه الجرائم.

٤ - يجوز للدول الأطراف أن تتبادل المعلومات عن طريق المنظمة الدولية للشرطة الجنائية (الإنتربول).

#### المادة ١٩

على الدولة الطرف التي يلاحق فيها قضائيا المرتكب المنترض للجريمة أن تقوم، وفقا لما نص عليه تشريعاتها الداخلية أو إجراءاتها الواجبة التطبيق، بإبلاغ النتيجة النهائية لإجراءات الملاحقة إلى الأمين العام للأمم المتحدة، الذي يحيل هذه المعلومات إلى الدول الأطراف الأخرى.

المادة ١٧

تكفل لأي شخص يوضع قيد الاحتجاز أو تتخذ بشأنه أي إجراءات أخرى أو تقام عليه الدعوى عملاً بهذه الاتفاقية معاملة منصفة وجميع الحقوق والضمانات طبقاً لتشريعات الدولة التي يوجد ذلك الشخص في إقليمها ولأحكام القانون الدولي الواجبة التطبيق، بما في ذلك الأحكام المتعلقة بحقوق الإنسان.

المادة ١٨

١ - تتعاون الدول الأطراف في منع الجرائم المبينة في المادة ٧، باتخاذ جميع التدابير الممكنة لتحقيق أمور من بينها تكييف تشريعاتها الداخلية عند الاقتضاء لمنع أو إحباط التحضير في إقليم كل منها، لارتكاب تلك الجرائم داخل أقاليمها أو خارجها، بما في ذلك:

(أ) تدابير تحظر، في أقاليمها، الأنشطة غير المشروعة التي يقوم بها عن علم المشجعون على الجرائم المبينة في المادة ٧، أو المحرضون عليها أو منظموها أو مرتكبوها من أشخاص ومنظمات؛

(ب) تدابير تلزم المؤسسات المالية والمهن الأخرى التي لها صلة بالمعاملات المالية، باستخدام أكفأ التدابير المتاحة للتحقق من هويات عملائها المعتادين أو المبرين، وكذا من هويات العملاء الذين تفتح حسابات لصالحهم وإيلاء اهتمام خاص بالمعاملات غير العادية أو المشبوهة والتبليغ عن المعاملات التي يشتبه في أنها من نشاط إجرامي. ولهذا الغرض يتعيّن على الدول الأطراف أن تنظر فيما يلي:

١' وضع أنظمة تحظر فتح حسابات يكون صاحبها أو المستفيد منها مجهول الهوية أو لا يمكن التحقق من هويته، واتخاذ تدابير لضمان تحقق تلك المؤسسات من هوية المالكين الحقيقيين لتلك المعاملات؛

٢' إلزام المؤسسات المالية، عند الاقتضاء، بالقيام فيما يتعلق بتحديد هوية الكيانات الاعتبارية، باتخاذ تدابير للتحقق من وجود العميل ومن هيكله القانوني، وذلك بالحصول منه أو من أي سجل عام أو من الائنين، على دليل على تسجيله كشركة، يتضمن المعلومات المتعلقة باسم العميل، وشكله القانوني، وعنوانه وأسماء مديريه، والأحكام المنظمة لسلطة إلزام ذلك الكيان؛

٣' وضع أنظمة تفرض على المؤسسات المالية التزاماً بالإبلاغ الفوري للسلطات المختصة بكل المعاملات الكبيرة المعقدة غير العادية والأنماط غير العادية للمعاملات التي ليس لها غرض اقتصادي ظاهر أو هدف قانوني واضح، دون أن تخشى تحمل المسؤولية الجنائية أو

المادة ١٥

ليس في هذه الاتفاقية ما يفسر على أنه يفرض التزاما بتسليم المجرمين أو بتبادل المساعدة القانونية إذا توفرت لدى الدولة الطرف المطلوب منها التسليم أسباب وجيهة تدعوها إلى الاعتقاد بأن طلب تسليم المجرمين لارتكابهم الجرائم المبينة في المادة ٢، أو طلب تبادل المساعدة القانونية فيما يتعلق بهذه الجرائم، قد قُدم بغية ملاحقة أو معاقبة شخص ما بسبب العرق أو الدين أو الجنسية أو الأصل الإثني أو الآراء السياسية، أو الاعتقاد بأن استجابتها للطلب سيكون فيها مساس بوضع الشخص المذكور لأي من هذه الأسباب.

المادة ١٦

١ - يجوز نقل أي شخص محتجز أو يتخضع لعقوبته في إقليم دولة طرف ومطلوب وجوده في دولة أخرى من الدول الأطراف لأغراض تحديد الهوية أو الشهادة أو المساعدة من نواح أخرى في الحصول على أدلة لأغراض التحقيق في الجرائم المبينة في المادة ٢ أو المحاكمة عليها، إذا استوفي الشرطان التاليان:

(أ) موافقة ذلك الشخص طوعا وعن علم تام؛

(ب) موافقة السلطات المختصة في كلتا الدولتين على النقل، رهنا بالشروط التي تريانها مناسبة.

٢ - لأغراض هذه المادة:

(أ) يكون للدولة التي ينقل إليها الشخص سلطة إبقائه قيد الاحتجاز، وعليها التزام بذلك، ما لم تطلب الدولة التي نقل منها غير ذلك أو تأذن به؛

(ب) على الدولة التي ينقل إليها الشخص أن تنفذ، دون إبطاء، التزامها بإعادته إلى عهدة الدولة التي نقل منها وفقا للمتفق عليه من قبل، أو لما يتفق عليه بين السلطات المختصة في كلتا الدولتين؛

(ج) لا يجوز للدولة التي ينقل إليها الشخص أن تطالب الدولة التي نقل منها ببدء إجراءات لطلب التسليم من أجل إعادته إليها؛

(د) تحتسب للشخص المنقول المدة التي قضاها قيد الاحتجاز لدى الدولة التي نقل إليها، على أنها من مدة العقوبة المنفذة عليه في الدولة التي نقل منها.

٣ - ما لم توافق الدولة الطرف التي يتقرر نقل شخص ما منها، وفقا لأحكام هذه المادة، لا يجوز محاكمة ذلك الشخص، أيا كانت جنسيته، أو احتجازه أو فرض أي قيود أخرى على حرية تنقله في إقليم الدولة التي ينقل إليها بسبب أي أفعال أو أحكام بالإدانة سابقة لمغادرته إقليم الدولة التي نقل منها.

المادة ١٢

- ١ - تتبادل الدول الأطراف أكبر قدر من المساعدة القانونية فيما يتعلق بأي تحقيقات أو إجراءات جنائية أو إجراءات تسليم تتصل بالجرائم المبينة في المادة ٢، بما في ذلك المساعدة المتصلة بالحصول على ما يوجد لديها من أدلة لازمة لهذه الإجراءات.
- ٢ - لا يجوز للدول الأطراف التذرع بسريرة المعاملات المصرفية لرفض طلب لتبادل المساعدة القانونية.
- ٣ - لا يجوز للدولة الطالبة، بدون موافقة مسبقة من الدولة المطلوب منها تقديم معلومات أو أدلة لأغراض التحقيق أو الملاحقة أو الإجراءات القضائية، استخدام هذه المعلومات أو الأدلة في أغراض أخرى سوى ما جاء في الطلب.
- ٤ - يجوز لكل دولة طرف أن تنظر في إمكانية وضع آليات لكي تتبادل مع الدول الأطراف الأخرى المعلومات أو الأدلة اللازمة لإثبات المسؤولية الجنائية أو المدنية أو الإدارية عملاً بالمادة ٥.
- ٥ - تفي الدول الأطراف بالتزاماتها المنصوص عليها في الفقرتين ١ و ٢ بما يتفق مع أي معاهدات أو ترتيبات أخرى بشأن تبادل المساعدة القانونية أو المعلومات قد تكون قائمة فيما بينها. وفي حالة عدم وجود مثل هذه المعاهدات أو الترتيبات، تتبادل الدول الأطراف هذه المساعدة وفقاً لتشريعاتها الداخلية.

المادة ١٣

لا يجوز، لأغراض تسليم المجرمين أو تبادل المساعدة القانونية، اعتبار أي جريمة من الجرائم المبينة في المادة ٢ جريمة مالية. لذلك لا يجوز للدول الأطراف أن تتذرع بالطابع المالي للجريمة وحده لرفض طلباً يتعلق بتبادل المساعدة القانونية أو تسليم المجرمين.

المادة ١٤

لا يجوز، لأغراض تسليم المجرمين أو تبادل المساعدة القانونية بين الدول الأطراف، اعتبار أي جريمة من الجرائم المبينة في المادة ٢ جريمة سياسية أو جريمة متصلة بجريمة سياسية أو جريمة ارتكبت بدوافع سياسية. وبالتالي، لا يجوز رفض طلب بشأن تسليم المجرمين أو المساعدة القانونية المتبادلة قائم على مثل هذه الجريمة لمجرد أنه يتعلق بجريمة سياسية أو جريمة متصلة بجريمة سياسية أو جريمة ارتكبت بدوافع سياسية.

المادة ١٠

١ - في الحالات التي تنطبق عليها أحكام المادة ٧، إذا لم تقم الدولة الطرف التي يوجد في إقليمها مرتكب الجريمة المفترض بتسليم ذلك الشخص، تكون ملزمة بإحالة القضية، دون إبطاء لا لزوم له وبدون أي استثناء وسواء كانت الجريمة قد ارتكبت أو لم ترتكب في إقليمها، إلى سلطاتها المختصة لغرض الملاحقة الجنائية حسب إجراءات تتفق مع تشريعات تلك الدولة. وعلى هذه السلطات أن تتخذ قرارها بنفس الأسلوب المتبع في حالة أي جريمة أخرى ذات طابع خطير وفقا لقانون تلك الدولة.

٢ - حينما لا تجيز التشريعات الداخلية للدولة الطرف أن تسلّم أحد رعاياها إلا بشرط إعادته إليها ليخضع العقوبة المفروضة عليه نتيجة المحاكمة أو الإجراءات التي طلب تسليمه من أجلها، وتوافق تلك الدولة والدولة التي تطلب تسليم ذلك الشخص إليها على هذه الصيغة وعلى أي شروط أخرى قد تريانها مناسبة، يكون التسليم المشروط كافيا لإعفاء الدولة الطرف المطلوب منها التسليم من الالتزام المنصوص عليه في الفقرة ١.

المادة ١١

١ - تعتبر الجرائم المشار إليها في المادة ٢ بقوة القانون من الجرائم التي تستوجب تسليم المجرمين المنصوص عليها في أي معاهدة لتسليم المجرمين أبرمت بين الدول الأطراف قبل سريان هذه الاتفاقية. وتمهد الدول الأطراف باعتبار مثل هذه الجرائم جرائم تستوجب تسليم المجرمين في أي معاهدة لتسليم المجرمين تبرم فيما بينها بعد ذلك.

٢ - حينما تلتقى دولة طرف تجعل تسليم المجرمين مشروطا بوجود معاهدة طلبا للتسليم من دولة طرف أخرى لا ترتبط معها بمعاهدة لتسليم المجرمين، يجوز للدولة المطلوب منها التسليم أن تعتبر هذه الاتفاقية بمثابة الأساس القانوني للتسليم فيما يتعلق بالجرائم المشار إليها في المادة ٢. وتخضع عملية التسليم للشروط الأخرى التي تنص عليها تشريعات الدولة المطلوب منها التسليم.

٢ - تعترف الدول الأطراف التي لا تجعل تسليم المجرمين مشروطا بوجود معاهدة بالجرائم المشار إليها في المادة ٢ كجرائم تستوجب تسليم المجرمين فيما بينها، رهنا بالشروط التي تنص عليها تشريعات الدولة المطلوب منها التسليم.

٤ - إذا اقتضت الضرورة، تعامل الجرائم المبينة في المادة ٢، لأغراض تسليم المجرمين فيما بين الدول الأطراف، كما لو أنها ارتكبت لا في مكان وقوعها فحسب بل في أقاليم الدول التي تكون قد قررت ولايتها القضائية وفقا للمفترتين ١ و ٢ من المادة ٧.

٥ - تعتبر أحكام جميع معاهدات أو اتفاقات تسليم المجرمين المبرمة بين الدول الأطراف فيما يتعلق بالجرائم المشار إليها في المادة ٢ معدلة بين هذه الدول إذا كانت تتعارض مع هذه الاتفاقية.

## المادة ٩

١ - عند تلقي الدولة الطرف معلومات تنيد بأن الفاعل أو المرتكب المفترض لجريمة مشار إليها في المادة ٢ قد يكون موجودا في إقليمها، تتخذ تلك الدولة الطرف التدابير اللازمة وفقا لتشريعاتها الداخلية للتحقيق في الوقائع التي أبلغت بها.

٢ - تقوم الدولة الطرف التي يكون الفاعل أو المرتكب المفترض للجريمة موجودا في إقليمها، إذا ارتأت أن الظروف تبرر ذلك، باتخاذ التدابير المناسبة بموجب تشريعاتها الداخلية، لكي تكفل وجود ذلك الشخص لفرض المحاكمة أو التسليم.

٢ - يحق لأي شخص تتخذ بشأنه التدابير المشار إليها في الفقرة ٢:

(أ) أن يتصل دون تأخير بأقرب ممثل مختص للدولة التي يحمل جنسيتها أو، في غير تلك الحالة، بممثل للدولة التي لها صلاحية حماية حقوق ذلك الشخص، أو للدولة التي يقيم في إقليمها عادة، إذا كان عديم الجنسية؛

(ب) أن يزوره ممثل لتلك الدولة؛

(ج) أن يُبلغ بحقوقه المنصوص عليها في الفقرتين الفرعيتين (أ) و (ب) من هذه الفقرة.

٤ - تمارس الحقوق المشار إليها في الفقرة ٢ وفقا لقوانين وأنظمة الدولة التي يوجد الفاعل أو المرتكب المفترض للجريمة في إقليمها، شريطة أن تحقق هذه القوانين والأنظمة بالكامل المقاصد التي من أجلها مُنحت الحقوق بموجب الفقرة ٢ من هذه المادة.

٥ - لا تُلح أحكام الفقرتين ٢ و ٤ بما تتمتع به أي دولة طرف قررت ولايتها القضائية، وفقا للفقرة الفرعية ١ (ب) أو ٢ (ب) من المادة ٧، من حق في دعوة لجنة الصليب الأحمر الدولية إلى الاتصال بمرتكب الجريمة المفترض وزيارته.

٦ - متى احتجزت دولة طرف شخصا، عملا بأحكام هذه المادة، عليها أن تقوم فورا، مباشرة أو عن طريق الأمين العام للأمم المتحدة، بإخطار الدول الأطراف التي قررت ولايتها القضائية وفقا للفقرة ١ أو ٢ من المادة ٧، وأي دول أطراف أخرى معنية، إذا رأت من المستصوب القيام بذلك، بوجود ذلك الشخص قيد الاحتجاز وبالظروف التي تبرر احتجازه. وعلى الدولة التي تجري التحقيق المنصوص عليه في الفقرة ١ أن تبلغ تلك الدول الأطراف فورا بنتائج ذلك التحقيق وأن تبين لها ما إذا كانت تنوي ممارسة ولايتها القضائية.

- (د) إذا ارتكب الجريمة شخص عديم الجنسية يوجد محل إقامته المعتاد في إقليم تلك الدولة؛ أو
- (هـ) إذا ارتكبت الجريمة على متن طائرة تشغلها حكومة تلك الدولة.
- ٢ - عند التصديق على هذه الاتفاقية أو قبولها أو الموافقة عليها أو الانضمام إليها، تخطر كل دولة طرف الأمين العام للأمم المتحدة بالولاية القضائية التي قررت وفقاً للفقرة ٢. وفي حالة أي تغيير، تقوم الدولة الطرف المعنية بإخطار الأمين العام بذلك على الفور.
- ٤ - تتخذ كل دولة طرف أيضاً التدابير اللازمة لتقرير ولايتها القضائية فيما يتصل بالجرائم المشار إليها في المادة ٢ في الحالات التي يكون فيها مرتكب الجريمة المنترض موجوداً في إقليمها وفي حالات عدم قيامها بتسليمه إلى أي من الدول الأطراف التي قررت ولايتها القضائية وفقاً للفقرتين ١ أو ٢.
- ٥ - عندما تقرر أكثر من دولة طرف واحدة ولايتها القضائية على الجرائم المبينة في المادة ٢، تعمل الدول الأطراف المعنية على تنسيق إجراءاتها بصورة ملائمة، ولا سيما فيما يتعلق بشروط المحاكمة وطرائق تبادل المساعدة القانونية.
- ٦ - لا تستبعد هذه الاتفاقية ممارسة أي ولاية قضائية تقرها دولة طرف وفقاً لقانونها الداخلي، دون إخلال بالتواعد العامة للقانون الدولي.

#### المادة ٨

- ١ - تتخذ كل دولة طرف التدابير المناسبة وفقاً لمبادئها القانونية المحلية لتحديد أو كشف وتجميد أو حجز أي أموال مستخدمة أو مخصصة لفرض ارتكاب الجرائم المبينة في المادة ٢، وكذلك العائدات الآتية من هذه الجرائم وذلك لأغراض مصادرتها عند الاقتضاء.
- ٢ - تتخذ كل دولة طرف، وفقاً لمبادئها القانونية الداخلية، التدابير المناسبة لمصادرة الأموال المستخدمة أو المخصصة لفرض ارتكاب الجرائم المبينة في المادة ٢، وكذلك العائدات الآتية من هذه الجرائم.
- ٣ - يجوز لكل دولة طرف معنية أن تنظر في إبرام اتفاقات تنص على اقتسامها الأموال المتأتية من المصادرة المشار إليها في هذه المادة مع غيرها من الدول، في جميع الأحوال أو على أساس كل حالة على حدة.
- ٤ - تنظر كل دولة طرف في إنشاء آليات تنص على تخصيص المبالغ التي تتأتى من عمليات المصادرة المشار إليها في هذه المادة، لتعويض ضحايا الجرائم المنصوص عليها في المادة ٢، الفقرة ١، الفقرة الفرعية (أ) أو (ب)، أو تعويض أسرهم.
- ٥ - تطبق أحكام هذه المادة رهناً بحقوق الغير ذي النية الحسنة:

٣ - تكفل كل دولة طرف، بصفة خاصة، إخضاع الكيانات الاعتبارية المسؤولة وفقاً للفقرة ١ أعلاه لجزاءات جنائية أو مدنية أو إدارية فعالة، ومناسبة، وراعية. ويجوز أن تشمل هذه الجزاءات جزاءات نقدية.

#### المادة ٦

تعتمد كل دولة طرف التدابير اللازمة، بما في ذلك التشريعات الداخلية، عند الاقتضاء، لكفالة عدم تبرير الأعمال الإجرامية الداخلة في نطاق هذه الاتفاقية، في أي حال من الأحوال، باعتبارات ذات طابع سياسي أو فلسفي أو إيديولوجي أو عرقي أو إثني أو ديني أو أي طابع مماثل آخر.

#### المادة ٧

١ - تتخذ كل دولة طرف التدابير اللازمة لتقرير ولايتها القضائية فيما يتصل بالجرائم المشار إليها في المادة ٢، حين تكون الجريمة قد ارتكبت:

(أ) في إقليم تلك الدولة؛ أو

(ب) على متن سفينة تحمل علم تلك الدولة أو طائرة مسجلة بموجب قوانين تلك الدولة وقت ارتكاب الجريمة؛ أو

(ج) على يد أحد رعايا تلك الدولة.

٢ - يجوز أيضاً لكل دولة طرف أن تقرر ولايتها القضائية على جرائم من هذا القبيل في الحالات التالية:

(أ) إذا كان هدف الجريمة أو نتيجتها ارتكاب إحدى الجرائم المشار إليها في المادة ٢ الفقرة ١ (أ) أو (ب) منها في إقليم تلك الدولة أو ضد أحد رعاياها؛ أو

(ب) إذا كان هدف الجريمة أو نتيجتها ارتكاب إحدى الجرائم المشار إليها في المادة ٢، الفقرة ١ (أ) أو (ب) منها ضد مرفق حكومي أو عام تابع لتلك الدولة وموجود خارج إقليمها، بما في ذلك الأماكن الدبلوماسية أو القنصلية التابعة لتلك الدولة؛ أو

(ج) إذا كان هدف الجريمة أو نتيجتها ارتكاب إحدى الجرائم المشار إليها في المادة ٢، الفقرة ١ (أ) أو (ب) منها في محاولة لإكراه تلك الدولة على القيام بعمل ما أو الامتناع عن القيام به؛



(ب) ينظم ارتكاب جريمة في مفهوم الفقرة ١ أو ٤ من هذه المادة أو يأمر أشخاصا آخرين بارتكابها؛

(ج) يشارك في قيام مجموعة من الأشخاص، يعملون بقصد مشترك بارتكاب جريمة واحدة أو أكثر من الجرائم المشار إليها في الفقرة ١ أو ٤ من هذه المادة. وتكون هذه المشاركة عمدية وتنفذ:

١٠ إما بهدف توسيع النشاط الجنائي أو الفرض الجنائي للمجموعة، عندما ينطوي ذلك النشاط أو الفرض على ارتكاب جريمة من الجرائم المشار إليها في الفقرة ١ من هذه المادة؛ أو

١١ وإما بمعرفة نية المجموعة ارتكاب جريمة من الجرائم المشار إليها في الفقرة ١ من هذه المادة.

#### المادة ٢

٢ لا تنطبق هذه الاتفاقية إذا ارتكبت الجريمة داخل دولة واحدة وكان مرتكبها المفترض من رعايا تلك الدولة، وموجودا في إقليمها، ولم تكن أي دولة أخرى تملك، بموجب الفقرة ١ أو ٢ من المادة ٧، الأساس اللازم لتقرير ولايتها القضائية، إلا أن أحكام المواد من ١٢ إلى ١٨ تنطبق في مثل الحالات، حسب الاقتضاء.

#### المادة ٤

تتخذ كل دولة طرف التدابير اللازمة من أجل:

(أ) اعتبار الجرائم المبينة في المادة ٢، جرائم جنائية بموجب قانونها الداخلي؛

(ب) المعاقبة على تلك الجرائم بعتوبات مناسبة تراعي خطورتها على النحو الواجب.

#### المادة ٥

١ - تتخذ كل دولة طرف التدابير اللازمة، وفقا لمبادئها القانونية الداخلية، للتمكن من أن يتحمل أي كيان اعتباري موجود في إقليمها أو منظم بموجب قوانينها المسؤولية إذا قام شخص مسؤول عن إدارة أو تسيير هذا الكيان، بصفته هذه، بارتكاب جريمة منصوص عليها في المادة ٢. وهذه المسؤولية قد تكون جنائية أو مدنية أو إدارية.

٢ - تتحمل هذه المسؤولية دون مساس بالمسؤولية الجنائية للأفراد الذين ارتكبوا الجرائم.

٢ - ويقصد بتعبير "العائدات" أي أموال تنشأ أو تُحصل، بصورة مباشرة أو غير مباشرة، من ارتكاب جريمة من الجرائم المشار إليها في المادة ٧.

#### المادة ٧

١ - يرتكب جريمة بمفهوم هذه الاتفاقية، كل شخص يقوم بأية وسيلة كانت، مباشرة أو غير مباشرة، وبشكل غير مشروع وإرادته، بتقديم أو جمع أموال بنية استخدامها، أو هو يعلم أنها ستستخدم كليا أو جزئيا، للقيام:

(أ) بعمل يشكل جريمة في نطاق إحدى المعاهدات الواردة في المرفق وبالتعريف المحدد في هذه المعاهدات:

(ب) بأي عمل آخر يهدف إلى التسبب في موت شخص مدني أو أي شخص آخر، أو إصابته بجروح بدنية جسيمة، عندما يكون هذا الشخص غير مشترك في أعمال عداوية في حالة نشوب نزاع مسلح، عندما يكون غرض هذا العمل، بحكم طبيعته أو في سياقه، موجها لترويع السكان، أو لإرغام حكومة أو منظمة دولية على القيام بأي عمل أو الامتناع عن القيام به.

٢ - (أ) لدى إيداع صك التصديق أو القبول أو الموافقة أو الانضمام، يجوز لدولة طرف ليست طرفا في معاهدة من المعاهدات المدرجة في المرفق، أن تعلن، عند تطبيق هذه الاتفاقية على الدولة الطرف، أن تلك المعاهدة تعتبر غير مدرجة في المرفق المشار إليه في الفقرة الفرعية (أ) من الفقرة ١. وسيتوقف سريان الإعلان حالما تدخل المعاهدة حيز التنفيذ بالنسبة للدولة الطرف، التي ستقوم بإعلام الجهة المودعة بهذا الأمر:

(ب) إذا لم تعد الدولة الطرف طرفا في معاهدة مدرجة في المرفق، يجوز لهذه الدولة أن تصدر إعلانا كما هو منصوص عليه في هذه المادة، بشأن تلك المعاهدة.

٣ - لكي يشكل عمل ما جريمة من الجرائم المحددة في الفقرة ١، ليس من الضروري أن تستعمل الأموال فعليا لتنفيذ جريمة من الجرائم المشار إليها في الفقرة ١، الفقرتين الفرعيتين (أ) و (ب).

٤ - يرتكب جريمة أيضا كل شخص يحاول ارتكاب جريمة من الجرائم المحددة في الفقرة ١ من هذه المادة.

٥ - يرتكب جريمة كل شخص:

(أ) يساهم كشريك في جريمة منصوص عليها في الفقرة ١ أو ٤ من هذه المادة:

وإذ تشير أيضا إلى قرار الجمعية العامة ١٦٥/٥٢ المؤرخ ١٥ كانون الأول/ ديسمبر ١٩٩٧، الذي طلبت فيه الجمعية العامة إلى الدول النظر، بصفة خاصة، في تنفيذ التدابير الواردة في الفقرات ٢ (أ) إلى (و) من القرار ٢١٠/٥١ المؤرخ ١٧ كانون الأول/ ديسمبر ١٩٩٦،

وإذ تشير كذلك إلى قرار الجمعية العامة ١٠٨/٥٣ المؤرخ ٨ كانون الأول/ ديسمبر ١٩٩٨، الذي قررت الجمعية العامة فيه أن تقوم اللجنة المخصصة المنشأة بموجب قرارها ٢١٠/٥١ المؤرخ ١٧ كانون الأول/ ديسمبر ١٩٩٦ بوضع مشروع لاتفاقية دولية لمنع تمويل الإرهاب استكمالا للصكوك الدولية القائمة ذات الصلة،

وإذ تعتبر أن تمويل الإرهاب مصدر قلق شديد للمجتمع الدولي بأسره،

وإذ تلاحظ أن عدد وخطورة أعمال الإرهاب الدولي يتوقفان على التمويل الذي يمكن أن يحصل عليه الإرهابيون،

وإذ تلاحظ أيضا أن الصكوك القانونية المتعددة الأطراف القائمة لا تعالج تمويل الإرهاب صراحة،

واقترانها منها بالحاجة الملحة إلى تعزيز التعاون الدولي بين الدول في وضع واتخاذ تدابير فعالة لمنع تمويل الإرهاب فضلا عن قمعته من خلال محاكمة ومعاينة مرتكبيه،

قد اتفقت على ما يلي:

#### المادة ١٠

##### لأغراض هذه الاتفاقية:

١ - يقصد بتعبير "الأموال" أي نوع من الأموال المادية أو غير المادية، المنقولة أو غير المنقولة التي يحصل عليها بأي وسيلة كانت، والوثائق أو الصكوك القانونية أيا كان شكلها، بما في ذلك الشكل الإلكتروني أو الرقمي، والتي تدل على ملكية تلك الأموال أو مصلحة فيها، بما في ذلك، على سبيل المثال لا الحصر، الائتمانات المصرفية، وشيكات السفر، والشيكات المصرفية، والحوالات والأسهم والأوراق المالية والسندات والكمبيالات وخطابات الاعتماد.

٢ - ويقصد بتعبير "المرفق الحكومي أو العام" أي مرفق أو أي وسيلة نقل، دائمة كانت أو مؤقتة يستخدمها أو يشغلها ممثلو الدولة، أو أعضاء الحكومة أو البرلمان أو الهيئة التضائية أو وكلاء أو موظفو الدولة أو أي سلطة أو كيان عام أو وكلاء أو موظفو منظمة حكومية دولية في إطار مهامهم الرسمية.

[ ARABIC TEXT — TEXTE ARABE ]

**الاتفاقية الدولية لمنع تمويل الإرهاب****ديباجة****إن الدول الأطراف في هذه الاتفاقية،**

إذ تضع في اعتبارها مقاصد ميثاق الأمم المتحدة ومبادئه المتعلقة بحفظ السلام والأمن الدوليين  
تعزيز علاقات حسن الجوار والصداقة والتعاون بين الدول،

وإذ يساورها بالغ القلق إزاء تصاعد أعمال الإرهاب بجميع أشكاله ومظاهره فسي أنحاء العالم  
أهة.

وإذ تشير إلى الإعلان بمناسبة الذكرى السنوية الخمسين لإنشاء الأمم المتحدة الوارد في القرار  
٦/٥٠ المؤرخ ٢٤ تشرين الأول/أكتوبر ١٩٩٥.

وإذ تشير أيضا إلى جميع قرارات الجمعية العامة ذات الصلة بشأن هذه المسألة، بما في ذلك القرار  
٦٠/٤١ المؤرخ ٩ كانون الأول/ ديسمبر ١٩٩٤ ومرافقه الإعلان المتعلق بالتدابير الرامية إلى القضاء على  
إرهاب الدولي، والذي جاء فيه أن "الدول الأعضاء في الأمم المتحدة تعيد رسميا تأكيد إدانتها القاطعة  
جميع أعمال الإرهاب وأساليبه وممارساته، على اعتبار أنها أعمال إجرامية لا يمكن تبريرها، أينما ارتكبت  
أيضا كان مرتكبوها. بما في ذلك ما يعرض منها للخطر العلاقات الودية فيما بين الدول والشعوب ويهدد  
سلامة الإقليمية للدول وأمنها".

وإذ تلاحظ أن الإعلان المتعلق بالتدابير الرامية إلى القضاء على الإرهاب الدولي يشجع أيضا الدول  
على أن تستعرض على وجه السرعة نطاق الأحكام القانونية الدولية القائمة بشأن منع الإرهاب بجميع  
شكاله ومظاهره وقمعه والقضاء عليه، بهدف ضمان توفر إطار قانوني شامل يغطي جميع جوانب هذه  
مسألة".

وإذ تشير إلى قرار الجمعية العامة ٢١٠/٥١ المؤرخ ١٧ كانون الأول/ ديسمبر ١٩٩٦، الذي طلبت  
جمعية العامة في فقرته الفرعية ٢ (و) إلى جميع الدول اتخاذ خطوات، بالوسائل الداخلية الملائمة، لمنع  
مويل الإرهابيين والمنظمات الإرهابية والحيلولة دون هذا التمويل، سواء كان بطريقة مباشرة أو غير  
باشرة عن طريق منظمات ذات أهداف خيرية أو اجتماعية أو ثقافية أو تدعي ذلك، أو تعمل أيضا في  
نشطة غير مشروعة مثل الاتجار غير المشروع بالأسلحة والمخدرات وابتزاز الأموال، بما في ذلك استغلال  
أشخاص لأغراض تمويل الأنشطة الإرهابية، والنظر بصفة خاصة، إذا اقتضت الحالة، في اعتماد تدابير  
نظمية لمنع تحركات الأموال المشتبه في أنها لأغراض إرهابية، والتصدي لهذه التحركات، دون وضع  
نقبات بأي حال أمام الحق في حرية انتقال رؤوس الأموال المشروعة. وفي توسيع نطاق تبادل المعلومات  
متعلقة بالتحركات الدولية لهذه الأموال.

[ ENGLISH TEXT — TEXTE ANGLAIS ]

## INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

*Preamble*

The States Parties to this Convention,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly reso-

lution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

#### *Article 1*

For the purposes of this Convention:

1. "Funds" means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

2. "A State or governmental facility" means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

3. "Proceeds" means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

#### *Article 2*

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

---

*Volume 2178, I-38349*

---

2 (a) On depositing its instrument of ratification, acceptance, approval or accession, a state Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

*Article 3*

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

*Article 4*

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

*Article 5*

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

*Article 6*

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

*Article 7*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
- (c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.



---

*Volume 2178, 1-38349*

---

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

*Article 8*

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

*Article 9*

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures un-

der its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

#### *Article 10*

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

---

*Volume 2178, 1-38349*

---

*Article 11*

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

*Article 12*

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

*Article 13*

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

*Article 14*

None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

*Article 15*

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

*Article 16*

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;
- (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

- (a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

- (b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

---

*Volume 2178, I-38349*

---

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

*Article 17*

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

*Article 18*

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

#### *Article 19*

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

#### *Article 20*

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

---

*Volume 2178, I-38349*

---

*Article 21*

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

*Article 22*

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

*Article 23*

1. The annex may be amended by the addition of relevant treaties that:

- (a) Are open to the participation of all States;
- (b) Have entered into force;
- (c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.

2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

*Article 24*

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph

1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

*Article 25*

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 26*

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

*Article 27*

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

*Article 28*

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

In witness whereof, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

[For the list of signatories, see p. 281 of this volume.]



## **Annex 13**

International Law Commission, Articles on Responsibility  
of States for Internationally Wrongful Acts (2001),  
in Report of the International Law Commission on the Work  
of its Fifty-third Session (2001), Doc. A/56/10

Reproduced in ILC Yearbook 2001, Vol. II(2)

**Draft articles on  
Responsibility of States for Internationally Wrongful Acts,  
with commentaries**

**2001**

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.



Copyright © United Nations  
2008

## RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

### *General commentary*

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

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

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

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

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

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

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

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

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

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

(g) Determining any procedural or substantive pre-conditions for one State to invoke the responsibility of

another State, and the circumstances in which the right to invoke responsibility may be lost;

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

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

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

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

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

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

<sup>32</sup> *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (c).

<sup>33</sup> For the purposes of the articles, the term “internationally wrongful act” includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

quo which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

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

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

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

## PART ONE

### THE INTERNATIONALLY WRONGFUL ACT OF A STATE

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

## CHAPTER I

### GENERAL PRINCIPLES

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

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

#### *Commentary*

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

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

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

<sup>35</sup> *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4, at p. 23.*

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

<sup>37</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), at p. 38, para. 47.

<sup>38</sup> *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 174, at p. 184.*

<sup>39</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 221.*

<sup>40</sup> *Ibid.*, p. 228.

<sup>41</sup> Seven of these awards rendered in 1901 reiterated that “a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents” (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (VerCELLI claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

the *Dickson Car Wheel Company* case,<sup>42</sup> in the *International Fisheries Company* case,<sup>43</sup> in the *British Claims in the Spanish Zone of Morocco* case<sup>44</sup> and in the *Armstrong Cork Company* case.<sup>45</sup> In the “*Rainbow Warrior*” case,<sup>46</sup> the arbitral tribunal stressed that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility”.<sup>47</sup>

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

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

<sup>43</sup> *International Fisheries Company (U.S.A.) v. United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

<sup>44</sup> According to the arbitrator, Max Huber, it is an indisputable principle that “responsibility is the necessary corollary of rights. All international rights entail international responsibility”, UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

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

<sup>46</sup> Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

<sup>47</sup> *Ibid.*, p. 251, para. 75.

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

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

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

ary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a “sanction”.<sup>51</sup> In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

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

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

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

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

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same

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

<sup>52</sup> *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

<sup>53</sup> *Ibid.*, para. 34.

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

conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

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

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

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

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

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

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

#### *Commentary*

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrong-

<sup>55</sup> *Reparation for Injuries* (see footnote 38 above), p. 179.

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

<sup>57</sup> For the position of international organizations, see article 57 and commentary.

ful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

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

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

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

(3) The element of attribution has sometimes been described as “subjective” and the element of breach as “objective”, but the articles avoid such terminology.<sup>61</sup> Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective”. For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...” In other cases, the standard for breach of an obligation may be “objective”, in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different

<sup>58</sup> See footnote 34 above.

<sup>59</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagyymaros Project* (footnote 27 above), p. 54, para. 78.

<sup>60</sup> See footnote 42 above.

<sup>61</sup> Cf. *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

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

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

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

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

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

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

<sup>62</sup> *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

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

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

<sup>65</sup> *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

<sup>66</sup> *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

<sup>67</sup> *Factory at Chorzów, Merits* (*ibid.*).

<sup>68</sup> *Reparation for Injuries* (see footnote 38 above), p. 184.

<sup>69</sup> “*Rainbow Warrior*” (see footnote 46 above), p. 251, para. 75.

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

<sup>71</sup> See footnote 34 above.

<sup>72</sup> See also article 33, paragraph 2, and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.<sup>73</sup>

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

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

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

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

<sup>74</sup> See, e.g., *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 51, para. 86.

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

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

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

#### *Commentary*

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

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

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

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

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

<sup>76</sup> *Ibid.*, pp. 24–25. See also “*Lotus*”, *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 24.*



tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

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

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.<sup>78</sup>

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;<sup>79</sup>

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.<sup>80</sup>

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*<sup>81</sup> and *Jurisdiction of the Courts of Danzig*.<sup>82</sup>

(4) ICJ has often referred to and applied the principle.<sup>83</sup> 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".<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup>

The principle has also been applied by numerous arbitral tribunals.<sup>87</sup>

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

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

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

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

<sup>86</sup> *Ibid.*, p. 74, para. 124.

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

<sup>88</sup> In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

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

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

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

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

<sup>77</sup> *S.S. "Wimbledon"* (see footnote 34 above), pp. 29–30.

<sup>78</sup> *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

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

<sup>80</sup> *Treatment of Polish Nationals* (see footnote 75 above), p. 24.

<sup>81</sup> *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

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

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

<sup>84</sup> *Reparation for Injuries* (see footnote 38 above), at p. 180.

<sup>85</sup> *Eletronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

(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.

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

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

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

## CHAPTER II

## ATTRIBUTION OF CONDUCT TO A STATE

*Commentary*

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

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

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

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

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

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

<sup>93</sup> League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

<sup>94</sup> *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIIAA, vol. IV (Sales No. 1951.V.I), p. 82 (1925).

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

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

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

attributed to the State under international law, whatever the position may be under internal law.<sup>99</sup>

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

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

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

<sup>95</sup> See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

<sup>96</sup> See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

<sup>97</sup> The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

<sup>98</sup> See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

<sup>99</sup> See article 7 and commentary.

<sup>100</sup> See article 55 and commentary.

<sup>101</sup> *Kenneth P. Yeager v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17, p. 92, at pp. 101–102 (1987).

#### Article 4. Conduct of organs of a State

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

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

#### Commentary

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

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

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

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference<sup>104</sup> were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of “any

failure on the part of its organs to carry out the international obligations of the State”.<sup>105</sup>

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

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

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

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

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

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

<sup>105</sup> Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

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

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

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

<sup>102</sup> Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

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

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

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

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

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

<sup>109</sup> *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

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

<sup>111</sup> See article 3 and commentary.

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

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

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

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

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.<sup>115</sup>

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

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

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

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

<sup>116</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 104 above), p. 90; *Supplement to Vol. III ... (ibid.)*, pp. 3 and 18.

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

<sup>118</sup> UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

<sup>119</sup> *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany v. United States of America)*, *Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,<sup>120</sup> the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.<sup>121</sup> This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

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

(12) The term “person or entity” is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term “entity” is used in a similar sense<sup>123</sup> in the draft articles

<sup>120</sup> See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

<sup>121</sup> See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

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

<sup>123</sup> See *Yearbook ... 1991*, vol. II (Part Two), pp. 14–18.

on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.<sup>124</sup> The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where “the act had no connexion with the official function and was, in fact, merely the act of a private individual”.<sup>125</sup> The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.<sup>126</sup> In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

#### *Article 5. Conduct of persons or entities exercising elements of governmental authority*

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

#### *Commentary*

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

<sup>124</sup> *Mallén* (see footnote 117 above), at p. 175.

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

<sup>126</sup> See paragraph (7) of the commentary to article 7.

(2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal’s jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.<sup>127</sup>

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

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

when, by delegation of powers, bodies act in a public capacity, e.g., police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.<sup>128</sup>

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Commit-

tee of the Conference was unable in the time available to examine it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such ... autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.<sup>129</sup>

(5) The justification for attributing to the State under international law the conduct of “parastatal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

#### *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**

<sup>127</sup> *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

<sup>128</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ... (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where “the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force”, *ibid*.

<sup>129</sup> *Ibid.*, p. 92.

**acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

*Commentary*

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words “placed at the disposal of” in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.<sup>130</sup>

(3) Examples of situations that could come within this limited notion of a State organ “placed at the disposal” of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.<sup>131</sup>

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving

State. The notion of an organ “placed at the disposal” of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the “beneficiary” State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.<sup>132</sup>

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be “acting in the exercise of elements of the governmental authority” of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of “transferred responsibility”. Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: “the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power.”<sup>133</sup> It is implicit in the Arbitrator’s finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul’s acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of “delegated” powers.<sup>134</sup> At the relevant time Liechtenstein was not

<sup>130</sup> Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others v. Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

<sup>131</sup> See also article 47 and commentary.

<sup>132</sup> For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

<sup>133</sup> UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

<sup>134</sup> *X and Y v. Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights*, 1977, vol. 20 (1978), p. 372, at pp. 402–406.



a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.<sup>135</sup>

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.<sup>136</sup> There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.<sup>137</sup> In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

#### **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**

<sup>135</sup> See also *Droz and Janousek v. France and Spain*, Eur. Court H.R., Series A, No. 240 (1992), paras. 96 and 110. See also *Controllor and Auditor-General v. Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan v. Davison*, *ibid.*, vol. 108, p. 622.

<sup>136</sup> For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

<sup>137</sup> See, e.g., article 89 of the Rome Statute of the International Criminal Court.

**State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

#### *Commentary*

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.<sup>138</sup> Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,<sup>139</sup> State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".<sup>140</sup> As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."<sup>141</sup> At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

<sup>138</sup> See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

<sup>139</sup> In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: "Only Son", Moore, *History and Digest*, vol. IV, pp. 3404–3405; "William Lee", *ibid.*, p. 3405; and *Donougho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the "William Yeaton" case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

<sup>140</sup> For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

<sup>141</sup> Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority”.<sup>142</sup> It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed “by virtue of ... official capacity”. In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee’s request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of “[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority”.<sup>143</sup> The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

International responsibility is ... incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.<sup>144</sup>

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.<sup>145</sup> It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: “A Party to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces”: this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and “correspond[s] to the general principles of law on international responsibility”.<sup>146</sup>

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took *Caire* to the local barracks and shot him. The Commission held:

that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.<sup>147</sup>

<sup>142</sup> “American Bible Society” incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; “Shine and Milligen”, G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and “Miller”, *ibid.*, pp. 570–571.

<sup>143</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 88 above), point V, No. 2 (b), p. 74, and *Supplement to Vol. III ...* (see footnote 104 above), pp. 3 and 17.

<sup>144</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...*, document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook ... 1975*, vol. II, pp. 61–70.

<sup>145</sup> For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that “an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity” (*Yearbook ... 1961*, vol. II, p. 53).

<sup>146</sup> ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

<sup>147</sup> *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica*, *ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Yomans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA,

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.<sup>148</sup>

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority”.<sup>149</sup>

(8) The problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression “if the organ, person or entity acts in that capacity” in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.<sup>150</sup> In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

<sup>148</sup> *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

<sup>149</sup> *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

<sup>150</sup> One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.<sup>151</sup> Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.<sup>152</sup>

#### *Article 8. Conduct directed or controlled by a State*

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

#### *Commentary*

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.<sup>153</sup> Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.<sup>154</sup> In such cases it does not matter that the person or persons involved are private individuals nor whether

their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.<sup>155</sup> But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

...

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>156</sup>

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

<sup>151</sup> See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

<sup>152</sup> See further article 44, subparagraph (b), and commentary.

<sup>153</sup> Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

<sup>154</sup> See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.) v. Germany (Sabotage cases): "Black Tom" and "Kingsland" incidents, ibid.*, vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

<sup>155</sup> *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

<sup>156</sup> *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.<sup>157</sup>

The Appeals Chamber held that the requisite degree of control by the Yugoslavian “authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”.<sup>158</sup> In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.<sup>159</sup> In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.<sup>160</sup>

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion.<sup>161</sup> The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.<sup>162</sup> Since

corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.<sup>163</sup> On the other hand, where there was evidence that the corporation was exercising public powers,<sup>164</sup> or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,<sup>165</sup> the conduct in question has been attributed to the State.<sup>166</sup>

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

<sup>157</sup> *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

<sup>158</sup> ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

<sup>159</sup> See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

<sup>160</sup> The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou v. Turkey, Merits*, Eur. Court H.R., Reports, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid.*, *Preliminary Objections*, Eur. Court H.R., Series A, No. 310, p. 23, para. 62 (1995).

<sup>161</sup> *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

<sup>162</sup> For example, the Workers’ Councils considered in *Schering Corporation v. The Islamic Republic of Iran*, Iran-U.S. C.T.R.,

vol. 5, p. 361 (1984); *Otis Elevator Company v. The Islamic Republic of Iran*, *ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company v. The Government of Iran*, *ibid.*, vol. 17, p. 153 (1987).

<sup>163</sup> *SEDCO, Inc. v. National Iranian Oil Company*, *ibid.*, vol. 15, p. 23 (1987). See also *International Technical Products Corporation v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

<sup>164</sup> *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

<sup>165</sup> *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc. v. The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

<sup>166</sup> See *Hertzberg et al. v. Finland* (Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X v. Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights*, 1971, vol. 14 (1973), p. 199; and *Young, James and Webster v. the United Kingdom*, Eur. Court H.R., Series A, No. 44 (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

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

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

*Commentary*

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase “in circumstances such as to call for”. Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:<sup>167</sup> in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or “Komitehs” immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

<sup>167</sup> This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.<sup>168</sup>

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.<sup>169</sup>

(5) In respect of the second condition, the phrase “in the absence or default of” is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase “absence or default” seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term “call for” conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.<sup>170</sup>

<sup>168</sup> *Yeager* (see footnote 101 above), p. 104, para. 43.

<sup>169</sup> See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

<sup>170</sup> See, e.g., the *Sambiaggio* case, UNRIIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

**Article 10. Conduct of an insurrectional or other movement**

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

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

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

*Commentary*

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions<sup>171</sup> and arbitral tribunals<sup>172</sup> have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a “well-established principle of international law”, that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.<sup>173</sup> Diplomatic practice is remarkably consistent in recognizing that the conduct of an

<sup>171</sup> See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

<sup>172</sup> See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

<sup>173</sup> UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote 170 above), p. 524.

insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (a) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (b) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.<sup>174</sup>

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term “conduct” only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

<sup>174</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (see footnote 88 above), p. 108; and *Supplement to Volume III ...* (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase “which becomes the new Government” is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression “or in a territory under its administration” is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (art. 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”.

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include “insurrectional or other” movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.<sup>175</sup> From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.<sup>176</sup> Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.<sup>177</sup>

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries “unless the revolution was successful”, since such acts then involve the responsibility of the State “under the well-recognized rules of public law”.<sup>178</sup> In the *Pinson* case, the French-Mexican Claims Commission ruled that:

<sup>175</sup> See H. Atlam, “National liberation movements and international responsibility”, *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

<sup>176</sup> As ICJ said, “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

<sup>177</sup> UNRIIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

<sup>178</sup> *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.<sup>179</sup>

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis for Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops."<sup>180</sup> Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.<sup>181</sup>

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

<sup>179</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

<sup>180</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ... (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (c), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

<sup>181</sup> Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State". *Minister of Defence, Namibia v. Mwandighi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd. v. Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

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

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

#### *Commentary*

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island".<sup>182</sup> In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.<sup>183</sup> However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

<sup>182</sup> *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

<sup>183</sup> The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").



State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.<sup>184</sup>

In that case it made no difference whether the effect of the “approval” of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.<sup>185</sup> In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.<sup>186</sup> This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann’s capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann’s captors as a “volunteer group”.<sup>187</sup> Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann’s captors were “in fact acting on the instructions of, or under the direction or control of” Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

<sup>184</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

<sup>185</sup> *Ibid.*, pp. 31–33, paras. 63–68.

<sup>186</sup> *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

<sup>187</sup> *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

(6) The phrase “acknowledges and adopts the conduct in question as its own” is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.<sup>188</sup> ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as “approval”, “endorsement”, “the seal of official governmental approval” and “the decision to perpetuate [the situation]”.<sup>189</sup> These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to “approval” or “endorsement” of conduct in some general sense but do not involve any assumption of responsibility. The language of “adoption”, on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State’s intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term “acknowledges and adopts” in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase “if and to the extent that” is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word “and”. The order of the two conditions indicates the normal sequence of

<sup>188</sup> The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

<sup>189</sup> See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

### CHAPTER III

#### BREACH OF AN INTERNATIONAL OBLIGATION

##### *Commentary*

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (b), when such conduct constitutes “a breach of an international obligation of the State”. This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.<sup>190</sup> In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

<sup>190</sup> See paragraphs (2) to (4) of the general commentary.

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.<sup>191</sup>

#### *Article 12. Existence of a breach of an international obligation*

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

##### *Commentary*

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as “incompatibility with the obligations” of a State,<sup>192</sup> acts “contrary to” or “inconsistent with” a given rule,<sup>193</sup> and

<sup>191</sup> See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

<sup>192</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

<sup>193</sup> *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

“failure to comply with its treaty obligations”.<sup>194</sup> In the *ELSI* case, a Chamber of the Court asked the “question whether the requisition was in conformity with the requirements ... of the FCN Treaty”.<sup>195</sup> The expression “not in conformity with what is required of it by that obligation” is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase “is not in conformity with” is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation “regardless of its origin”. As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.<sup>196</sup> An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula “regardless of its origin” refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word “source” is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect “the obligations arising from treaties and other sources of international law”. The word

<sup>194</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

<sup>195</sup> *ELSI* (see footnote 85 above), p. 50, para. 70.

<sup>196</sup> Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253; *Nuclear Tests (New Zealand v. France)*, *ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995*, I.C.J. Reports 1995, p. 288.

“origin”, which has the same meaning, is not attended by the doubts and doctrinal debates the term “source” has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.<sup>197</sup> Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any “violation of a duty imposed by an international juridical standard”.<sup>198</sup> In the “*Rainbow Warrior*” arbitration, the tribunal said that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation”.<sup>199</sup> In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.<sup>200</sup>

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the “*Rainbow Warrior*” arbitration, the tribunal affirmed that “in the field of international law there is no distinction between contractual and tortious responsibility”.<sup>201</sup> As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the “civil” and “criminal” responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States

<sup>197</sup> ICJ has recognized “[t]he existence of identical rules in international treaty law and customary law” on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

<sup>198</sup> *Dickson Car Wheel Company* (see footnote 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote 43 above), p. 701 (“some principle of international law”); and *Armstrong Cork Company* (footnote 45 above), p. 163 (“any rule whatsoever of international law”).

<sup>199</sup> “*Rainbow Warrior*” (see footnote 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote 25 above), p. 46, para. 86 (“breach of an international obligation arising out of a treaty or a general rule of law”).

<sup>200</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 38, para. 47. The qualification “likely to be involved” may have been inserted because of possible circumstances precluding wrongfulness in that case.

<sup>201</sup> “*Rainbow Warrior*” (see footnote 46 above), p. 251, para. 75.

or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.<sup>202</sup> But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.<sup>203</sup> So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,<sup>204</sup> derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on

<sup>202</sup> See Part Three, chapter II and commentary; see also article 48 and commentary.

<sup>203</sup> See articles 40 and 41 and commentaries.

<sup>204</sup> According to which “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

the subject matter of the obligation breached.<sup>205</sup> Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus, PCIJ stated in its first judgment, in the *S.S. “Wimbledon”* case, that “the right of entering into international engagements is an attribute of State sovereignty”.<sup>206</sup> That proposition has often been endorsed.<sup>207</sup>

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.<sup>208</sup>

Thus, the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, “regardless of its ... character”. In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,<sup>209</sup> and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years’ imprisonment and was not allowed subsequently to contest his conviction.

<sup>205</sup> See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above); *Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote 38 above). In these decisions it is stated that “any breach of an international engagement” entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 39 above), p. 228.

<sup>206</sup> *S.S. “Wimbledon”* (see footnote 34 above), p. 25.

<sup>207</sup> See, e.g., *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 131, para. 259.

<sup>208</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

<sup>209</sup> Cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 77, para. 135, where the Court referred to the parties having accepted “obligations of conduct, obligations of performance, and obligations of result”.

He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.<sup>210</sup>

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.<sup>211</sup> But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather, it examined what more Italy could have done to make the applicant's right "effective".<sup>212</sup> The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.<sup>213</sup>

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.<sup>214</sup> Certain obligations may be breached by the mere passage of incompatible legislation.<sup>215</sup> Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the

<sup>210</sup> *Colozza v. Italy*, Eur. Court H.R., Series A, No. 89 (1985), pp. 15–16, para. 30, citing *De Cubber v. Belgium*, *ibid.*, No. 86 (1984), p. 20, para. 35.

<sup>211</sup> Cf. *Plattform "Ärzte für das Leben" v. Austria*, in which the Court gave the following interpretation of article 11:

"While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (see footnote 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

<sup>212</sup> *Colozza* case (see footnote 210 above), para. 28.

<sup>213</sup> See also *The Islamic Republic of Iran v. The United States of America*, cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

<sup>214</sup> Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote 83 above), p. 30, para. 42.

<sup>215</sup> A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

legislature itself being an organ of the State for the purposes of the attribution of responsibility.<sup>216</sup> In other circumstances, the enactment of legislation may not in and of itself amount to a breach,<sup>217</sup> especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.<sup>218</sup>

### Article 13. International obligation in force for a State

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

#### Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.<sup>219</sup>

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute ... unless ...") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the

<sup>216</sup> See article 4 and commentary. For illustrations, see, e.g., the findings of the European Court of Human Rights in *Norris v. Ireland*, Eur. Court H.R., Series A, No. 142, para. 31 (1988), citing *Klass and Others v. Germany*, *ibid.*, No. 28, para. 33 (1978); *Marckx v. Belgium*, *ibid.*, No. 31, para. 27 (1979); *Johnston and Others v. Ireland*, *ibid.*, No. 112, para. 42 (1986); *Dudgeon v. the United Kingdom*, *ibid.*, No. 45, para. 41 (1981); and *Modinos v. Cyprus*, *ibid.*, No. 259, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC-14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83, Series A, No. 3 (1983).

<sup>217</sup> As ICJ held in *LaGrand, Judgment* (see footnote 119 above), p. 497, paras. 90–91.

<sup>218</sup> See, e.g., WTO, Report of the Panel (footnote 73 above), paras. 7.34–7.57.

<sup>219</sup> *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 95.

conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was “contrary to the law of nations”. Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.<sup>220</sup> The later incidents occurred when the slave trade had been “prohibited by all civilized nations” and did not involve the responsibility of Great Britain.<sup>221</sup>

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia’s territorial waters should be considered internationally wrongful. In his award in the “*James Hamilton Lewis*” case, he observed that the question had to be settled “according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel”.<sup>222</sup> Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.<sup>223</sup> The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.<sup>224</sup>

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,<sup>225</sup> and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the ba-

sis of the obligations in force at the time when the act was performed.<sup>226</sup>

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (b), provides that such a new peremptory norm “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm”.

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.<sup>227</sup>

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

[I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.<sup>228</sup>

Similarly, in the “*Rainbow Warrior*” arbitration, the arbitral tribunal held that, although the relevant treaty obli-

<sup>220</sup> See the “*Enterprize*” case, Lapradelle-Politis (footnote 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the “*Hermosa*” and “*Créole*” cases, Lapradelle-Politis, *op. cit.*, p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

<sup>221</sup> See the “*Lawrence*” case, Lapradelle-Politis, *op. cit.*, p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the “*Volusia*” case, Lapradelle-Politis, *op. cit.*, p. 741.

<sup>222</sup> *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

<sup>223</sup> See also the “*C. H. White*” case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the S.S. “*Lisman*” case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

<sup>224</sup> See, e.g., *X v. Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

<sup>225</sup> See, e.g., Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

<sup>226</sup> See, e.g., P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, “De la rétroactivité en droit international public”, *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, “Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme”, *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, “The doctrine of intertemporal law”, *AJIL*, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, “Time and the law: international perspectives on an old problem”, *International and Comparative Law Quarterly*, vol. 46 (July 1997), p. 501.

<sup>227</sup> As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

<sup>228</sup> *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

gation had terminated with the passage of time, France's responsibility for its earlier breach remained.<sup>229</sup>

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.<sup>230</sup> But it went on to say that:

[I]t will be for the Court, in due time, to ensure that Nauru's delay in seising [*sic*] it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.<sup>231</sup>

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.<sup>232</sup>

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.<sup>233</sup> But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,<sup>234</sup> but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.<sup>235</sup>

<sup>229</sup> *Rainbow Warrior* (see footnote 46 above), pp. 265–266.

<sup>230</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (b), and commentary.

<sup>231</sup> *Certain Phosphate Lands in Nauru, ibid.*, p. 255, para. 36.

<sup>232</sup> The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

<sup>233</sup> *Namibia* case (see footnote 176 above), pp. 31–32, para. 53.

<sup>234</sup> See, e.g., *Tyrer v. the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

<sup>235</sup> See, e.g., *Zana v. Turkey, Eur. Court H.R., Reports, 1997–VII*, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", *BYBIL, 1995*, vol. 66, p. 415, at pp. 443–445.

#### *Article 14. Extension in time of the breach of an international obligation*

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

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

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

#### *Commentary*

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently<sup>236</sup> and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed,

<sup>236</sup> See, e.g., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e.g., the decision of the European Commission of Human Rights in the *De Becker v. Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland v. the United Kingdom, Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others v. Greece, ibid.*, No. 260–B, para. 40 (1993); and *Agrotexim and Others v. Greece, ibid.*, No. 330–A, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", *RGDIP*, vol. 95, p. 881 (1991).

without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.<sup>237</sup> Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.<sup>238</sup> The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, “creeping” or disguised occupation, however, may well be different.<sup>239</sup> Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.<sup>240</sup>

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such

<sup>237</sup> See article 13 and commentary, especially para. (2).

<sup>238</sup> *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

<sup>239</sup> *Papamichalopoulos* (see footnote 236 above).

<sup>240</sup> *Loizidou, Merits* (see footnote 160 above), p. 2216.

consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.<sup>241</sup> It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to “successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963”.<sup>242</sup>

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the “*Rainbow Warrior*” arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal referred with approval to the Commission’s draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.<sup>243</sup>

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.<sup>244</sup>

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court’s jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court’s competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights,

<sup>241</sup> H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula “situations or facts prior to a given date” used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

<sup>242</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 37, para. 80. See also pages 36–37, paras. 78–79.

<sup>243</sup> “*Rainbow Warrior*” (see footnote 46 above), p. 264, para. 101.

<sup>244</sup> *Ibid.*, pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid.*, pp. 279–284.



which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.<sup>245</sup>

(10) In the *Loizidou* case,<sup>246</sup> similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time.<sup>247</sup>

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970 ...

The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.<sup>248</sup>

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have

constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,<sup>249</sup> incitement or attempt,<sup>250</sup> in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—e.g. the diversion of an international river—mere preparatory conduct is not necessarily wrongful.<sup>251</sup> In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. It noted:

that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".<sup>252</sup>

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a

<sup>249</sup> Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", *AJIL*, vol. 82, No. 2 (April 1988), p. 239.

<sup>250</sup> A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Convention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

<sup>251</sup> In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid.*, p. 494 (German law). There appears to be no equivalent in international law, but article 60, paragraph 3 (a), of the 1969 Vienna Convention defines a material breach as including "a repudiation ... not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

<sup>252</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

<sup>245</sup> See footnote 236 above.

<sup>246</sup> *Loizidou, Merits* (see footnote 160 above), p. 2216.

<sup>247</sup> *Ibid.*, pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölçüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote 160 above), pp. 33–34, paras. 102–105; and *Cyprus v. Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

<sup>248</sup> *Lovelace v. Canada, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

breach if it does not “predetermine the final decision to be taken”. Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term “occurs” in paragraphs 1 and 3 of article 14.

(14) *Paragraph 3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,<sup>253</sup> was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.<sup>254</sup> If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.<sup>255</sup> Both qualifications are intended to be covered by the phrase in paragraph 3, “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.**

<sup>253</sup> *Trail Smelter*, UNRIIA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).

<sup>254</sup> An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

<sup>255</sup> See the “*Rainbow Warrior*” case (footnote 46 above), p. 266.

#### *Commentary*

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is “a series of acts or omissions defined in aggregate as wrongful”. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.<sup>256</sup>

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,<sup>257</sup> may be taken as an illustration of a “composite” obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (a), of the Convention, the prime case of genocide is “[k]illing members of the [national, ethnical, racial or religious] group” with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group “as such”. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.<sup>258</sup>

(4) It is necessary to distinguish composite obligations from simple obligations breached by a “composite” act. Composite acts may be more likely to give rise to

<sup>256</sup> See further J. J. A. Salmon, “Le fait étatique complexe: une notion contestable”, *Annuaire français de droit international*, vol. 28 (1982), p. 709.

<sup>257</sup> See, e.g., article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

<sup>258</sup> The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), p. 617, para. 34.

continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland v. the United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, and to call for its cessation. As the Court said:

A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches\* ...

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications ... in the same way as it does to “individual” applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.<sup>259</sup>

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,<sup>260</sup> even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

<sup>259</sup> *Ireland v. the United Kingdom* (see footnote 236 above), p. 64, para. 159; see also page 63, para. 157. See further the United States counterclaim in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 190, which likewise focuses on a general situation rather than specific instances.

<sup>260</sup> See, e.g., article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) *Paragraph 1* of article 15 defines the time at which a composite act “occurs” as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) *Paragraph 2* of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word “remain” in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In

cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

#### CHAPTER IV

### RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

#### *Commentary*

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.<sup>261</sup> The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.<sup>262</sup> This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.<sup>263</sup> Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the “joint behalf” of the

three States.<sup>264</sup> The acts performed by Australia involved both “joint” conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely “placed at the disposal” of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State’s conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.<sup>265</sup> Alternatively, a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case<sup>266</sup> was Albania’s failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania’s responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for

<sup>261</sup> See, in particular, article 2 and commentary.

<sup>262</sup> See M. L. Padellietti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations ...* (footnote 92 above), pp. 189–192; J. Quigley, “Complicity in international law: a new direction in the law of State responsibility”, *BYBIL*, 1986, vol. 57, p. 77; J. E. Noyes and B. D. Smith, “State responsibility and the principle of joint and several liability”, *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, “Complicity in the law of international responsibility”, *Revue belge de droit international*, vol. 29 (1996), p. 370.

<sup>263</sup> In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

<sup>264</sup> *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid.*, p. 284.

<sup>265</sup> *Soering v. the United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others v. Sweden*, *ibid.*, No. 201, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others v. the United Kingdom*, *ibid.*, No. 215, p. 37, paras. 115–116 (1991).

<sup>266</sup> *Corfu Channel, Merits* (see footnote 35 above), p. 22.

the coercion would be,<sup>267</sup> an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is, or but for the coercion would be, a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.<sup>268</sup> It is justified on the basis that responsibility under chapter IV is in a sense derivative.<sup>269</sup> In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is

<sup>267</sup> If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

<sup>268</sup> See paras. (1)–(2) and (4) of the general commentary for an explanation of the distinction.

<sup>269</sup> Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 648.

necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.<sup>270</sup>

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.<sup>271</sup> However, there can be specific treaty obligations prohibiting incitement under certain circumstances.<sup>272</sup> Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

**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.**

<sup>270</sup> See above, the commentary to paragraphs (3) and (10) of article 2.

<sup>271</sup> See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

<sup>272</sup> See, e.g., article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

*Commentary*

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term “by the latter” in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.<sup>273</sup> Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase “knowledge of the circumstances of the internationally wrongful act”. A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aid-

ing State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.<sup>274</sup> The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.<sup>275</sup> In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq’s representative to the United Nations.<sup>276</sup>

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

<sup>273</sup> See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (f) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

<sup>274</sup> *The New York Times*, 6 March 1984, p. A1.

<sup>275</sup> *Ibid.*, 5 March 1984, p. A3.

<sup>276</sup> *Ibid.*, 26 August 1998, p. A8.

in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.<sup>277</sup> Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.<sup>278</sup> The Libyan Arab Jamahiriya asserted that the United Kingdom “would be held partly responsible” for having “supported and contributed in a direct way” to the raid.<sup>279</sup> The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.<sup>280</sup> A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the “military attack” as “a violation of the Charter of the United Nations and of international law”, and calling upon all States “to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya”.<sup>281</sup>

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council<sup>282</sup> or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.<sup>283</sup> Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

<sup>277</sup> For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

<sup>278</sup> See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

<sup>279</sup> See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

<sup>280</sup> Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in *BYBIL*, 1986, vol. 57, pp. 637–638.

<sup>281</sup> General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

<sup>282</sup> See, e.g., Report by President Clinton, *AJIL*, vol. 91, No. 4 (October 1997), p. 709.

<sup>283</sup> Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.<sup>284</sup> In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, “it would have to rule, as a prerequisite, on the lawfulness”<sup>285</sup> of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.<sup>286</sup> That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

#### **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**

<sup>284</sup> For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

<sup>285</sup> *East Timor* (see footnote 54 above), p. 105, para. 35.

<sup>286</sup> *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 261, para. 55.

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

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as “suzerainty” or “protectorate” warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,<sup>287</sup> France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court’s judgment would be binding both on France and on Morocco,<sup>288</sup> and the case proceeded on that basis.<sup>289</sup> The Court’s judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that “the responsibility of the protecting State ... proceeds ... from the fact that the protecting State alone represents

the protected territory in its international relations”,<sup>290</sup> and that the protecting State is answerable “in place of the protected State”.<sup>291</sup> The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.<sup>292</sup> The justification for such an acceptance was not based on the relationship of “representation” as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other State: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.<sup>293</sup>

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.<sup>294</sup> In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because

<sup>287</sup> *Rights of Nationals of the United States of America in Morocco* (see footnote 108 above), p. 176.

<sup>288</sup> *Ibid.*, I.C.J. Pleadings, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid.*, p. 434.

<sup>289</sup> See *Rights of Nationals of the United States of America in Morocco* (footnote 108 above), p. 179.

<sup>290</sup> *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 649.

<sup>291</sup> *Ibid.*, p. 648.

<sup>292</sup> *Ibid.*

<sup>293</sup> See, e.g., *LaGrand, Provisional Measures* (footnote 91 above).

<sup>294</sup> See R. Ago, “L’occupazione bellica di Roma e il Trattato lateranense”, *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.



the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, “fell far short of what would be required to make her responsible for the wrong inflicted upon Brown”.<sup>295</sup> It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence “that Great Britain ever did undertake to interfere in this way”.<sup>296</sup> Accordingly, the relation of suzerainty “did not operate to render Great Britain liable for the acts complained of”.<sup>297</sup> In the *Heirs of the Duc de Guise* case, the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather, the majority pointed to the absence in fact of any “intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees”.<sup>298</sup> The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.<sup>299</sup>

(7) In the formulation of article 17, the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, “*direction and control*”, raised some problems in other languages, owing in particular to the ambiguity of the term “*direction*” which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and

especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of “superior orders” does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State’s conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

#### Article 18. Coercion of another State

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

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) the coercing State does so with knowledge of the circumstances of the act.

#### Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State’s obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the

<sup>295</sup> *Robert E. Brown (United States) v. Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

<sup>296</sup> *Ibid.*, p. 131.

<sup>297</sup> *Ibid.*

<sup>298</sup> *Heirs of the Duc de Guise* (see footnote 115 above). See also, in another context, *Droz and Janousek v. France and Spain* (footnote 135 above); see also *Iribarne Pérez v. France*, *Eur. Court H.R., Series A, No. 325-C*, pp. 62–63, paras. 29–31 (1995).

<sup>299</sup> It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.<sup>300</sup> As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.<sup>301</sup> However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase “but for the coercion” in subparagraph (a) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State’s conduct. The reference to “circumstances” in subparagraph (b) is understood as reference to the factual situation rather than to the coercing State’s judgement of the legality of the act. This point is clarified by the phrase “circumstances of the act”. Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State’s obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of

the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been “compelled” by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed “a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally”.<sup>302</sup> The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities “did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause”.<sup>303</sup> The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of “compulsion” in the particular circumstances of the case.<sup>304</sup>

#### Article 19. Effect of this chapter

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

#### Commentary

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase “under

<sup>302</sup> Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote 142 above), p. 702.

<sup>303</sup> Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

<sup>304</sup> For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, “Russia’s liability in tort for Persia’s breach of contract”, *AJIL*, vol. 6, No. 2 (April 1912), p. 389.

<sup>300</sup> P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

<sup>301</sup> See article 49, para. 2, and commentary.

other provisions of these articles” is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility “of any other State” to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

#### CHAPTER V

#### CIRCUMSTANCES PRECLUDING WRONGFULNESS

##### *Commentary*

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,<sup>305</sup> they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obliga-

<sup>305</sup> For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

tions under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.<sup>306</sup>

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, “the non-performance is not only justified, but ‘looks towards’ a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present”.<sup>307</sup>

(3) This distinction emerges clearly from the decisions of international tribunals. In the “*Rainbow Warrior*” arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.<sup>308</sup> In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

[E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.<sup>309</sup>

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

<sup>306</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

<sup>307</sup> *Yearbook ... 1959*, vol. II, p. 41, document A/CN.4/120.

<sup>308</sup> “*Rainbow Warrior*” (see footnote 46 above), pp. 251–252, para. 75.

<sup>309</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

Committee of the 1930 Hague Conference. Among its Bases of discussion,<sup>310</sup> it listed two “[c]ircumstances under which States can decline their responsibility”, self-defence and reprisals.<sup>311</sup> It considered that the extent of a State’s responsibility in the context of diplomatic protection could also be affected by the “provocative attitude” adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces “in the suppression of an insurrection, riot or other disturbance” (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens<sup>312</sup> and the performance of treaties.<sup>313</sup> In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.<sup>314</sup> It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.<sup>315</sup> On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

<sup>310</sup> *Yearbook ... 1956*, vol. II, pp. 219–225, document A/CN.4/96.

<sup>311</sup> *Ibid.*, pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

<sup>312</sup> *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook ... 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook ... 1958*, vol. II, pp. 50–55, document A/CN.4/111.

<sup>313</sup> See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 44–47, and his comments, *ibid.*, pp. 63–74.

<sup>314</sup> See article 73 of the Convention.

<sup>315</sup> See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.<sup>316</sup> Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.<sup>317</sup> The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.<sup>318</sup> The so-called “clean hands” doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.<sup>319</sup>

### Article 20. Consent

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

#### Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

<sup>316</sup> For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

<sup>317</sup> Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 43–47; D. W. Greig, “Reciprocity, proportionality and the law of treaties”, *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

<sup>318</sup> See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 67, para. 110.

<sup>319</sup> See J. J. A. Salmon, “Des ‘mains propres’ comme condition de recevabilité des réclamations internationales”, *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, “Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux”, *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.<sup>320</sup> But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be “valid”. Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.<sup>321</sup> Indeed there may be a question whether the State could validly consent at all. The reference to a “valid consent” in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.<sup>322</sup> In other cases, the “legitimacy” of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State’s internal law. These questions depend on the rules of international law relating to the

expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.<sup>323</sup>

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.<sup>324</sup> In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State’s entering the premises of the mission.<sup>325</sup>

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.<sup>326</sup> Furthermore, where consent is relied on to

<sup>323</sup> See paragraph (6) of the commentary to article 26.

<sup>324</sup> UNRIIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

<sup>325</sup> Vienna Convention on Diplomatic Relations, art. 22, para. 1.

<sup>326</sup> Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany’s consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

<sup>320</sup> 1969 Vienna Convention, art. 54 (b).

<sup>321</sup> See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See “International Military Tribunal (Nuremberg), judgment and sentences October 1, 1946: judgment”, reprinted in *AJIL*, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

<sup>322</sup> This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.<sup>327</sup> These limitations are indicated by the words “given act” in article 20 as well as by the phrase “within the limits of that consent”.

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor’s national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual’s free consent may be relevant to their application.<sup>328</sup> In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

### Article 21. Self-defence

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

#### Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State’s “inherent right” of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.<sup>329</sup>

<sup>327</sup> The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

<sup>328</sup> See, e.g., International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (g); and 23, para. 3.

<sup>329</sup> Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.<sup>330</sup> In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other.<sup>331</sup> The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”.

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.<sup>332</sup> Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment

<sup>330</sup> See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

<sup>331</sup> In *Oil Platforms, Preliminary Objection* (see footnote 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

<sup>332</sup> As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79, “they constitute intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.<sup>333</sup>

A State acting in self-defence is “totally restrained” by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.<sup>334</sup>

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.<sup>335</sup>

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action “taken in conformity with the Charter of the United Nations”. In addition, the term “lawful” implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

#### *Article 22. Countermeasures in respect of an internationally wrongful act*

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

#### *Commentary*

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding

<sup>333</sup> *Ibid.*, p. 242, para. 30.

<sup>334</sup> See, e.g., the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

<sup>335</sup> *I.C.J. Reports 1996* (see footnote 54 above), p. 261, para. 89.

wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct “taken in response to a previous international wrongful act of another State and ... directed against that State”,<sup>336</sup> provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the “*Naulilaa*”,<sup>337</sup> “*Cysne*”,<sup>338</sup> and *Air Service Agreement*<sup>339</sup> awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a “sanction”, or to a “reaction” to a prior internationally wrongful act; historically the more usual terminology was that of “legitimate reprisals” or, more generally, measures of “self-protection” or “self-help”. The term “sanctions” has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term “measures”, not “sanctions”. The term “reprisals” is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,<sup>340</sup> the term “countermeasures” has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State. This is emphasized by the phrases “if and to the extent” and “countermeasures taken against” the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act.

<sup>336</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

<sup>337</sup> *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

<sup>338</sup> *Ibid.*, p. 1035, at p. 1052 (1930).

<sup>339</sup> *Air Service Agreement* (see footnote 28 above).

<sup>340</sup> *Ibid.*, especially pp. 443–446, paras. 80–98.

The principle is clearly expressed in the “*Cysne*” case, where the tribunal stressed that:

reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.<sup>341</sup>

Accordingly, the wrongfulness of Germany’s conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be “directed against” the responsible State.<sup>342</sup>

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.<sup>343</sup> For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.<sup>344</sup> Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

### 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:**

<sup>341</sup> “*Cysne*” (see footnote 338 above), pp. 1056–1057.

<sup>342</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

<sup>343</sup> For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

<sup>344</sup> *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

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

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

### Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.<sup>345</sup> It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the State concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation. The adjective “irresistible” qualifying the word “force” emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been “unforeseen” the event must have been neither foreseen nor of an easily foreseeable kind. Further the “irresistible force” or “unforeseen event” must be causally linked to the situation of material impossibility, as indicated by the words “due to *force majeure* ... making it materially impossible”. Subject to paragraph 2, where these elements are met, the wrongfulness of the State’s conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State’s territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or

<sup>345</sup> “‘*Force majeure*’ and ‘fortuitous event’ as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine”, study prepared by the Secretariat (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315).



default of the State concerned,<sup>346</sup> even if the resulting injury itself was accidental and unintended.<sup>347</sup>

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.<sup>348</sup> The same view was taken at the United Nations Conference on the Law of Treaties.<sup>349</sup> But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.<sup>350</sup>

(5) In practice, many of the cases where “impossibility” has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter’s authorization. In such cases

<sup>346</sup> For example, in relation to occurrences such as the bombing of La Chau-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid.*, paras. 255–256).

<sup>347</sup> For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

“While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire.”

M. M. Whiteman, *Damages in International Law* (Washington, D.C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote 345 above), para. 130.

<sup>348</sup> *Yearbook ... 1966*, vol. II, p. 255.

<sup>349</sup> See, e.g., the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (a).

<sup>350</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 102.

the principle that wrongfulness is precluded has been accepted.<sup>351</sup>

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.<sup>352</sup> In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.<sup>353</sup> In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.<sup>354</sup> *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.<sup>355</sup> More recently, in the “*Rainbow Warrior*” arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

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

<sup>351</sup> See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

<sup>352</sup> See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

<sup>353</sup> *Lighthouses* arbitration (see footnote 182 above), pp. 219–220.

<sup>354</sup> UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

<sup>355</sup> *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.<sup>356</sup>

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.<sup>357</sup>

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because “the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ...”<sup>358</sup> Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. By analogy with this provision, paragraph 2 (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (a) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be “due” to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (a) requires that the State’s role in the occurrence of *force majeure* must be substantial.

(10) Paragraph 2 (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.<sup>359</sup> Once a State accepts the responsibility

for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

#### Article 24. Distress

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

**2. Paragraph 1 does not apply if:**

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

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

#### Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.<sup>360</sup> Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people’s lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.<sup>361</sup> An example is the entry of United States military aircraft into Yugoslavia’s airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d’affaires informed the United States Department of State that Marshal Tito had

an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

<sup>360</sup> For this reason, writers who have considered this situation have often defined it as one of “relative impossibility” of complying with the international obligation. See, e.g., O. J. Lissitzyn, “The treatment of aerial intruders in recent practice and international law”, *AJIL*, vol. 47, No. 4 (October 1953), p. 588.

<sup>361</sup> See the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

<sup>356</sup> “Rainbow Warrior” (see footnote 46 above), p. 253.

<sup>357</sup> On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., case 145/85, *Denkavit v. Belgium*, *Eur. Court H.R., Reports 1987–2*, p. 565; case 101/84, *Commission of the European Communities v. Italian Republic*, *ibid.*, *Reports 1985–6*, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

<sup>358</sup> ILR, vol. 96 (1994), p. 318, para. 55.

<sup>359</sup> As the study prepared by the Secretariat (footnote 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by

forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government “would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities”.<sup>362</sup> The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities “unless forced to do so in an emergency”. However, the Acting Secretary of State added:

I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.<sup>363</sup>

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of “shelter from severe weather, as they have the right to do under customary international law”.<sup>364</sup> Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.<sup>365</sup> The “*Rainbow Warrior*” arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of “circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State”.<sup>366</sup> The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

<sup>362</sup> United States of America, *Department of State Bulletin* (see footnote 351 above), reproduced in the study prepared by the Secretariat (see footnote 345 above), para. 144.

<sup>363</sup> Study prepared by the Secretariat (see footnote 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

<sup>364</sup> *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote 345 above), para. 136.

<sup>365</sup> There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote 345 above), para. 121.

<sup>366</sup> “*Rainbow Warrior*” (see footnote 46 above), pp. 254–255, para. 78.

(2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

(3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.<sup>367</sup>

In fact, the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

[C]learly these circumstances entirely fail to justify France’s responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.<sup>368</sup>

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.<sup>369</sup> Similar provisions appear in the international conventions on the prevention of pollution at sea.<sup>370</sup>

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the “*Rainbow Warrior*” arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does

<sup>367</sup> *Ibid.*, p. 255, para. 79.

<sup>368</sup> *Ibid.*, p. 263, para. 99.

<sup>369</sup> See also articles 39, paragraph 1 (c), 98 and 109, of the Convention.

<sup>370</sup> See, e.g., the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (a) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place “for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea”. See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is “necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea ... in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat”. See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (a).

not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The “no other reasonable way” criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), e.g. the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.<sup>371</sup>

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under paragraph 2 (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (a).<sup>372</sup>

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Paragraph 2 (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had “no other reasonable way” to save life establishes an objective test.

<sup>371</sup> See *Cashin and Lewis v. The King, Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the “*Rebecca*”, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the “*May*” v. *The King, Canada Law Reports* (1931), p. 374; the “*Queen City*” v. *The King, ibid.*, p. 387; and *Rex v. Flahaut, Dominion Law Reports* (1935), p. 685 (test of “real and irresistible distress” applied).

<sup>372</sup> See paragraph (9) of the commentary to article 23.

The words “comparable or greater peril” must be assessed in the context of the overall purpose of saving lives.

### Article 25. Necessity

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

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

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

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

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

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

### Commentary

(1) The term “necessity” (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.<sup>373</sup>

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness

<sup>373</sup> Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

ness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.

The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.<sup>374</sup>

(5) The “*Caroline*” incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the “necessity of self-defence and self-preservation”; the same point was made by counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution”.<sup>375</sup> Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.<sup>376</sup> In his message to Congress of 7 December 1841, President Tyler reiterated that:

This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government.<sup>377</sup>

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that “a strong overpowering necessity may arise when this great principle may and must be suspended”. “It must be so”,

<sup>374</sup> Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, Peace, p. 232.

<sup>375</sup> See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote 374 above), p. 221, at p. 228.

<sup>376</sup> *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

<sup>377</sup> *Ibid.*, 1841–1842, vol. 30, p. 194.

added Lord Ashburton, the British Government’s *ad hoc* envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity”.<sup>378</sup>

(6) In the *Russian Fur Seals* controversy of 1893, the “essential interest” to be safeguarded against a “grave and imminent peril” was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the “absolute necessity of immediate provisional measures” in view of the imminence of the hunting season. He “emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances”<sup>379</sup> and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as “*force majeure*” but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

*The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened “if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*”.<sup>380</sup>

It considered, however, that:

It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.<sup>381</sup>

In its view, compliance with an international obligation must be “self-destructive” for the wrongfulness of the conduct not in conformity with the obligation to be precluded.<sup>382</sup>

<sup>378</sup> *Ibid.*, p. 195. See Secretary of State Webster’s reply on page 201.

<sup>379</sup> *Ibid.*, 1893–1894 (London, HM Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (see footnote 345 above), para. 155.

<sup>380</sup> See footnote 354 above; see also the study prepared by the Secretariat (footnote 345 above), para. 394.

<sup>381</sup> *Ibid.*

<sup>382</sup> A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

(8) In *Société commerciale de Belgique*,<sup>383</sup> the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.<sup>384</sup> The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.<sup>385</sup>

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.<sup>386</sup> No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.<sup>387</sup>

(10) In the "*Rainbow Warrior*" arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".<sup>388</sup>

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the

<sup>383</sup> *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

<sup>384</sup> *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

<sup>385</sup> See footnote 383 above; and the study prepared by the Secretariat (footnote 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote 355 above); the *French Company of Venezuelan Railroads* case (footnote 178 above) p. 353; and the study prepared by the Secretariat (footnote 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

<sup>386</sup> *The "Torrey Canyon"*, Cmnd. 3246 (London, HM Stationery Office, 1967).

<sup>387</sup> International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

<sup>388</sup> "*Rainbow Warrior*" (see footnote 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (see footnote 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

The Court considers ... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words ...

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

... In the present case, the following basic conditions ... are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.<sup>389</sup>

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.<sup>390</sup> Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".<sup>391</sup> Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".<sup>392</sup> The Court held that it had no jurisdiction over the case.<sup>393</sup>

<sup>389</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 40–41, paras. 51–52.

<sup>390</sup> *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

<sup>391</sup> *Ibid.*, p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (*Jurisdiction of the Court, I.C.J. Pleadings, Fisheries Jurisdiction (Spain v. Canada)*), p. 17, at p. 38, para. 15.

<sup>392</sup> *Fisheries Jurisdiction* (see footnote 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote 391 above), paras. 17–45.

<sup>393</sup> By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Con-

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.<sup>394</sup> In the nineteenth century, abuses of necessity associated with the idea of “fundamental rights of States” led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.<sup>395</sup>

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.<sup>396</sup> It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language (“Necessity may not be invoked ... unless”).<sup>397</sup> In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.<sup>398</sup>

servation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

<sup>394</sup> See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D.C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 et seq.; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III, p. 149.

<sup>395</sup> For a review of the earlier doctrine, see *Yearbook ... 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, “Necessity (revisited) in international law”, *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, “State of necessity as a justification for internationally wrongful conduct”, *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

<sup>396</sup> Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

<sup>397</sup> This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), p. 40, para. 51.

<sup>398</sup> A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

(15) The first condition, set out in *paragraph 1 (a)*, is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

That does not exclude ... that a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.<sup>399</sup>

Moreover, the course of action taken must be the “only way” available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.<sup>400</sup> The word “way” in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,<sup>401</sup> but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in *paragraph 1 (b)*, is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as

<sup>399</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 42, para. 54.

<sup>400</sup> *Ibid.*, pp. 42–43, para. 55.

<sup>401</sup> *Ibid.*, p. 40, para. 51.

a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.<sup>402</sup>

(18) As a matter of terminology, it is sufficient to use the phrase “international community as a whole” rather than “international community of States as a whole”, which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words “of States” in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand, ICJ used the phrase “international community as a whole” in the *Barcelona Traction* case,<sup>403</sup> and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(b).<sup>404</sup>

(19) Over and above the conditions in paragraph 1, *paragraph 2* lays down two general limits to any invocation of necessity. This is made clear by the use of the words “in any case”. *Paragraph 2* (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to *paragraph 2* (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus, in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had “helped, by act or omission to bring about” the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.<sup>405</sup> For a plea of necessity to be precluded under *paragraph 2* (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. *Paragraph 2* (b) is phrased in more categorical terms than articles 23, *paragraph 2* (a), and 24, *paragraph 2* (a), because necessity needs to be more narrowly confined.

<sup>402</sup> In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (see footnote 27 above), p. 46, para. 58.

<sup>403</sup> *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

<sup>404</sup> See, e.g., third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

<sup>405</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.<sup>406</sup> The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.<sup>407</sup> The same thing is true of the doctrine of “military necessity” which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.<sup>408</sup> In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.<sup>409</sup>

#### Article 26. Compliance with peremptory norms

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

#### Commentary

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremp-

<sup>406</sup> For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 et seq. and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; and 879th meeting, 21–22 July 1960, paras. 80 et seq. and paras. 118 and 151. For the “*Caroline*” incident, see above, paragraph (5).

<sup>407</sup> See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

<sup>408</sup> See, e.g., article 23 (g) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war”. Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.

<sup>409</sup> See, e.g., M. Huber, “Die Kriegsrechtlichen Verträge und die Kriegsraison”, *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, “Les lois de la guerre et la théorie de la nécessité”, *RGDIP*, vol. 24 (1917), p. 74; N. C. H. Dunbar, “Military necessity in war crimes trials”, *BYBIL*, 1952, vol. 29, p. 442; C. Greenwood, “Historical development and legal basis”, *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, “Military necessity”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.



tory norm becomes void and terminates.<sup>410</sup> The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of “continued compatibility with international law”, noting that:

A treaty obligation the observance of which is incompatible a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility ...

The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.<sup>411</sup>

The Commission did not, however, propose with any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.<sup>412</sup> Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.<sup>413</sup> The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this

<sup>410</sup> See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

<sup>411</sup> Fourth report on the law of treaties, *Yearbook ... 1959* (see footnote 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

<sup>412</sup> For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, *I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

<sup>413</sup> As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, “in no case could one breach of the Convention serve as an excuse for another” (*Counter-Claims, Order of 17 December 1997*, *I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.<sup>414</sup>

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.<sup>415</sup> Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.<sup>416</sup>

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State’s obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.<sup>417</sup> But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.<sup>418</sup>

#### **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.**

<sup>414</sup> For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

<sup>415</sup> See, e.g., the decisions of the International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, *Prosecutor v. Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 257, para. 79.

<sup>416</sup> Cf. *East Timor* (footnote 54 above).

<sup>417</sup> See paragraph (4) of the commentary to article 45.

<sup>418</sup> See paragraphs (4) to (7) of the commentary to article 20.

### Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation and, as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) *Subparagraph* (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words “and to the extent” are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the “*Rainbow Warrior*” arbitration,<sup>419</sup> and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary’s argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that “[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives”.<sup>420</sup> It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus, a breach of a treaty justifying countermeasures may be “material” in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to “compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists”. Here “compliance with the obligation in question” includes cessation of the wrongful conduct.

(4) *Subparagraph* (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term

“compensation”, it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to “material loss” is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) *Subparagraph* (b) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, “Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner”.<sup>421</sup>

(6) *Subparagraph* (b) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

## PART TWO

### CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.<sup>422</sup> The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or

<sup>419</sup> “*Rainbow Warrior*” (see footnote 46 above), pp. 251–252, para. 75.

<sup>420</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para 101; see also page 38, para. 47.

<sup>421</sup> *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid.*, p. 81, paras. 152–153).

<sup>422</sup> 1969 Vienna Convention, art. 60.

in part.<sup>423</sup> In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (c), while Part Two does the same for subparagraph (d).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

## CHAPTER I

### GENERAL PRINCIPLES

#### *Commentary*

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are

<sup>423</sup> On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

#### **Article 28. Legal consequences of an internationally wrongful act**

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

#### *Commentary*

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent

that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

#### *Article 29. Continued duty of performance*

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

#### *Commentary*

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (a) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.<sup>424</sup> But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.<sup>425</sup> It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, includ-

ing the obligation to make reparation for any breach.<sup>426</sup> A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

#### *Article 30. Cessation and non-repetition*

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

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

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

#### *Commentary*

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.<sup>427</sup>

(2) Subparagraph (a) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

<sup>426</sup> See, e.g., "Rainbow Warrior" (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid.*, p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

<sup>427</sup> 1969 Vienna Convention, art. 70, para. 1.

<sup>424</sup> See footnote 422 above.

<sup>425</sup> Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

an action or an omission ... since there may be cessation consisting in abstaining from certain actions".<sup>428</sup>

(3) The tribunal in the "*Rainbow Warrior*" arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".<sup>429</sup> While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,<sup>430</sup> article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (a) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.<sup>431</sup> It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.<sup>432</sup>

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to rem-

edies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.<sup>433</sup> It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the "*Rainbow Warrior*" arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.<sup>434</sup> Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (b) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.<sup>435</sup>

<sup>428</sup> "*Rainbow Warrior*" (see footnote 46 above), p. 270, para. 113.

<sup>429</sup> *Ibid.*, para. 114.

<sup>430</sup> For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

<sup>431</sup> The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

<sup>432</sup> For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

<sup>433</sup> See article 35 (b) and commentary.

<sup>434</sup> UNRIIA, vol. XX, p. 217, at p. 266, para. 105 (1990).

<sup>435</sup> Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation ... Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.<sup>436</sup>

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.<sup>437</sup> But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition.<sup>438</sup>

As to the specific assurances sought by Germany, the Court limited itself to stating that:

if the United States, notwithstanding its commitment referred to ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.<sup>439</sup>

<sup>436</sup> *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

<sup>437</sup> *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

<sup>438</sup> *Ibid.*, p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

<sup>439</sup> *Ibid.*, pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.<sup>440</sup> However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take<sup>441</sup> or, when the wrongful act affects its nationals, assurances of better protection of persons and property.<sup>442</sup> In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".<sup>443</sup> It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.<sup>444</sup> Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.<sup>445</sup> In other cases, the injured State requires specific instructions to be given,<sup>446</sup> or other specific conduct to be

<sup>440</sup> See paragraph (5) of the commentary to article 36.

<sup>441</sup> In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIIP, vol. 70 (1966), pp. 1013 et seq.

<sup>442</sup> Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

<sup>443</sup> *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

<sup>444</sup> *Ibid.*, para. 124.

<sup>445</sup> See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

<sup>446</sup> See, e.g., the incidents involving the "Herzog" and the "Bundessrath", two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

taken.<sup>447</sup> But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words “if circumstances so require” at the end of subparagraph (b). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

### Article 31. Reparation

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

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

#### Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.<sup>448</sup>

In this passage, which has been cited and applied on many occasions,<sup>449</sup> the Court was using the term “reparation” in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war”, Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

<sup>447</sup> In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to “prevent future significant fumigations in the United States” (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez v. Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40 (A/35/40)*, p. 126, para. 19; *Lanza v. Uruguay*, decision of 3 April 1980, *ibid.*, p. 119, para. 17; and *Dermit Barbato v. Uruguay*, decision of 21 October 1982, *ibid.*, *Thirty-eighth Session, Supplement No. 40 (A/38/40)*, p. 133, para. 11.

<sup>448</sup> *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

<sup>449</sup> Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>450</sup>

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.<sup>451</sup> In the second sentence, it dealt with that aspect of reparation encompassed by “compensation” for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make “full reparation” in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”<sup>452</sup> through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,<sup>453</sup> the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State’s obligation to make full reparation relates to the “injury caused by the internationally wrongful act”. The notion of “injury”, defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, “injury” includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

<sup>450</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

<sup>451</sup> Cf. P.-M. Dupuy, “Le fait générateur de la responsabilité internationale des États”, *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

<sup>452</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

<sup>453</sup> For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.<sup>454</sup> “Material” damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. “Moral” damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.<sup>455</sup>

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.<sup>456</sup> There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the “*Rainbow Warrior*” arbitration it was initially argued that “in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation”, but the parties subsequently agreed that:

Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.<sup>457</sup>

The tribunal held that the breach by France had “provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage ... of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well”.<sup>458</sup>

<sup>454</sup> Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages”, *Collected Courses ... 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, “Is damage a distinct condition for the existence of an internationally wrongful act?”, Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations ...* (footnote 92 above), pp. 53–88.

<sup>455</sup> See especially article 36 and commentary.

<sup>456</sup> See paragraph (9) of the commentary to article 2.

<sup>457</sup> “*Rainbow Warrior*” (see footnote 46 above), pp. 266–267, paras. 107 and 109.

<sup>458</sup> *Ibid.*, p. 267, para. 110.

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines “injury” in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only “[i]njury ... caused by the internationally wrongful act of a State” for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses “attributable to [the wrongful] act as a proximate cause”,<sup>459</sup> or to damage which is “too indirect, remote, and uncertain to be appraised”,<sup>460</sup> or to “any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of” the wrongful act.<sup>461</sup> Thus, causality in fact is a necessary

<sup>459</sup> See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

<sup>460</sup> See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, “Les dommages indirects dans les arbitrages internationaux”, *RGDIP*, vol. 31 (1924), p. 209, citing the “*Alabama*” arbitration as the most striking application of the rule excluding “indirect” damage (footnote 87 above).

<sup>461</sup> Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq’s liability “under international law ... as a result of its unlawful invasion and occupation of Kuwait”. UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category “B” claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the “WBC claim”), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing



but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used,<sup>462</sup> in others “foreseeability”<sup>463</sup> or “proximity”.<sup>464</sup> But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.<sup>465</sup> In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search for a single verbal formula”.<sup>466</sup> The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a “duty to mitigate”, this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.<sup>467</sup> The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained”.

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a ba-

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

<sup>462</sup> As in Security Council resolution 687 (1991), para. 16.

<sup>463</sup> See, e.g., the “*Naulilaa*” case (footnote 337 above), p. 1031.

<sup>464</sup> For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, “Causation and remoteness of damage”, *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit.* (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

<sup>465</sup> See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran v. The United States of America*, cases A15 (IV) and A24, Award No. 590-A15 (IV)/A24-FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

<sup>466</sup> P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

<sup>467</sup> In the WBC claim, a UNCC panel noted that “under the general principles of international law relating to mitigation of damages ... the Claimant was not only permitted but indeed obligated to take reasonable steps to ... mitigate the loss, damage or injury being caused” report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

sis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.<sup>468</sup>

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,<sup>469</sup> the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students’ own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,<sup>470</sup> the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,<sup>471</sup> except in cases of contributory fault.<sup>472</sup> In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter’s wrongful failure to warn of the mines even though Albania had not itself laid the mines.<sup>473</sup> Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.<sup>474</sup>

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

<sup>468</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

<sup>469</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

<sup>470</sup> *Corfu Channel, Merits* (see footnote 35 above), pp. 17–18 and 22–23.

<sup>471</sup> This approach is consistent with the way in which these issues are generally dealt with in national law. “It is the very general rule that if a tortfeasor’s behaviour is held to be a cause of the victim’s harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.”: T. Weir, “Complex liabilities”, A. Tunc, ed., *op. cit.* (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (c) and (d), of the ICJ Statute, that “in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage” (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

<sup>472</sup> See article 39 and commentary.

<sup>473</sup> See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

<sup>474</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.<sup>475</sup>

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of “proportionality” applies differently to the different forms of reparation.<sup>476</sup> It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

#### *Article 32. Irrelevance of internal law*

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

##### *Commentary*

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State’s internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.<sup>477</sup> Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation “if the inter-

nal law of the High Contracting Party concerned allows only partial reparation to be made”.<sup>478</sup>

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California’s discriminatory education policies was resolved by the revision of the Californian legislation.<sup>479</sup> In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).<sup>480</sup> In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be “freed from any measure of transfer, compulsory administration, or sequestration”.<sup>481</sup> In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State’s internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

#### *Article 33. Scope of international obligations set out in this Part*

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

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

##### *Commentary*

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State’s obligations in Part Two exist depends both on the primary rule establishing

<sup>478</sup> Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

<sup>479</sup> See R. L. Buell, “The development of the anti-Japanese agitation in the United States”, *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

<sup>480</sup> See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

<sup>481</sup> *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, Judgment, 1933, P.C.I.J., Series A/B, No. 61, p. 208, at p. 249.

<sup>475</sup> The *Zafiro* case (see footnote 154 above), pp. 164–165.

<sup>476</sup> See articles 35 (b), 37, paragraph 3, and 39 and commentaries.

<sup>477</sup> See paragraphs (2) to (4) of the commentary to article 3.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.<sup>482</sup>

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.<sup>483</sup> The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".<sup>484</sup>

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule

<sup>482</sup> See further article 42 (b) (ii) and commentary.

<sup>483</sup> Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

<sup>484</sup> *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

## CHAPTER II

### REPARATION FOR INJURY

#### *Commentary*

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

#### *Article 34. Forms of reparation*

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

#### *Commentary*

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,<sup>485</sup> article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.<sup>486</sup> In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

<sup>485</sup> See paragraphs (4) to (14) of the commentary to article 31.

<sup>486</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.<sup>487</sup>

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase “in accordance with the provisions of this chapter”. It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.<sup>488</sup> Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.<sup>489</sup> Satisfaction must “not be out of proportion to the injury”.<sup>490</sup> Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.<sup>491</sup> To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others,

especially compensation, will be correspondingly more important.

#### Article 35. Restitution

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

**(a) is not materially impossible;**

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

#### Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

<sup>487</sup> Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction “by taking account of the violation of the rights set forth in the Convention” (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

<sup>488</sup> See article 35 (b) and commentary.

<sup>489</sup> See article 31 and commentary.

<sup>490</sup> See article 37, paragraph 3, and commentary.

<sup>491</sup> For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution

would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible”. The Court went on to add that “[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution”.<sup>492</sup> It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.<sup>493</sup> Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.<sup>494</sup> But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in “the best interests of the parties, and of the public”.<sup>495</sup> In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.<sup>496</sup>

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an indi-

vidual arrested in its territory,<sup>497</sup> the restitution of ships<sup>498</sup> or other types of property,<sup>499</sup> including documents, works of art, share certificates, etc.<sup>500</sup> The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,<sup>501</sup> the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner<sup>502</sup> or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.<sup>503</sup> In some cases, both material and juridical restitution may be involved.<sup>504</sup> In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.<sup>505</sup> The term “restitution” in article 35 thus

<sup>497</sup> Examples of material restitution involving persons include the “*Trent*” (1861) and “*Florida*” (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

<sup>498</sup> See, e.g., the “*Giaffarieh*” incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, *Società Italiana per l’Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

<sup>499</sup> For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid.*, p. 240 (1950); and the *Hénon* case, *ibid.*, p. 248 (1951).

<sup>500</sup> In the *Bužau-Nehoiasă Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

<sup>501</sup> For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

<sup>502</sup> For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

<sup>503</sup> In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that “the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action” (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

<sup>504</sup> Thus, PCIJ held that Czechoslovakia was “bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question” (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

<sup>505</sup> In the *Legal Status of Eastern Greenland* case, PCIJ decided that “the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid” (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France “must withdraw its customs line in accordance with

(Continued on next page.)

<sup>492</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

<sup>493</sup> See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith, ibid.*, vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont, ibid.*, vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

<sup>494</sup> See articles 43 and 45 and commentaries.

<sup>495</sup> *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for “important State reasons” (see J. G. Wetter and S. M. Schwebel, “Some little known cases on concessions”, BYBIL, 1964, vol. 40, p. 216, at p. 221).

<sup>496</sup> *Government of Kuwait v. American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.<sup>506</sup> Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.<sup>507</sup> The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.<sup>508</sup> The position may be different where

(Footnote 505 continued.)

the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", *BYBIL*, 1976-1977, vol. 48, p. 1, at pp. 5-8.

<sup>506</sup> See above, paragraph (8) of the commentary to article 30.

<sup>507</sup> *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

<sup>508</sup> For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* (1977),

the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,<sup>509</sup> although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

### Article 36. Compensation

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

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

### Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.<sup>510</sup> Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

ILR, vol. 53, p. 389, at pp. 507-508, para. 109; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, *ibid.*, p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* *ibid.*, vol. 62, p. 141, at p. 200 (1977).

<sup>509</sup> See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

<sup>510</sup> See paragraphs (5) to (6) and (8) of the commentary to article 31.

assessable damage including loss of profits so far as this is established in the given case. The qualification “financially assessable” is intended to exclude compensation for what is sometimes referred to as “moral damage” to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: “It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”<sup>511</sup> It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.<sup>512</sup>

(3) The relationship with restitution is clarified by the final phrase of article 36, paragraph 1 (“insofar as such damage is not made good by restitution”). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.<sup>513</sup> As the Umpire said in the “*Lusitania*” case:

The fundamental concept of “damages” is ... reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.<sup>514</sup>

Likewise, the role of compensation was articulated by PCIJ in the following terms:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>515</sup>

<sup>511</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), declaring that “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity” (p. 27).

<sup>512</sup> *Factory at Chorzów, Jurisdiction* (see footnote 34 above); *Fisheries Jurisdiction* (see footnote 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 142.

<sup>513</sup> *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48.

<sup>514</sup> UNRIIA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

<sup>515</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V “Saiga”* (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), *Judgment, ITLOS Reports 1999*, p. 65, para. 170 (1999). See also *Papamichalopoulos and Others v. Greece* (article 50), *Eur. Court H.R., Series A, No. 330-B*, para. 36 (1995); *Velásquez Rodríguez* (footnote 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, *Iran-U.S. C.T.R.*, vol. 6, p. 219, at p. 225 (1984).

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.<sup>516</sup> Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.<sup>517</sup>

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.<sup>518</sup> The scope of this obligation is delimited by the phrase “any financially assessable damage”, that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,<sup>519</sup> the Iran-United States Claims Tribunal,<sup>520</sup> human rights courts and other

<sup>516</sup> In the *Velásquez Rodríguez*, *Compensatory Damages* case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, *ILR*, vol. 88, p. 727 (1992), concerning the assassination in Washington, D.C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, “A reappraisal of punitive damages in international law”, *BYBIL*, 1997, vol. 68, pp. 247–266; and S. Wittich, “Awe of the gods and fear of the priests: punitive damages in the law of State responsibility”, *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

<sup>517</sup> See paragraph (3) of the commentary to article 37.

<sup>518</sup> For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

<sup>519</sup> For example, the *M/V “Saiga”* case (see footnote 515 above), paras. 170–177.

<sup>520</sup> The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal’s juris-

(Continued on next page.)

bodies,<sup>521</sup> and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.<sup>522</sup> Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.<sup>523</sup> The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.<sup>524</sup> The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which be-

(Footnote 520 continued.)

prudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, “Compensable claims before the Tribunal: expropriation claims”, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, “Compensation and valuation issues”, *ibid.*, pp. 325–385.

<sup>521</sup> For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

<sup>522</sup> ICSID tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, e.g., *Asian Agricultural Products Limited v. Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

<sup>523</sup> See, e.g., *Certain Phosphate Lands in Nauru*, *Preliminary Objections* (footnote 230 above), and for the Court’s order of discontinuance following the settlement, *ibid.*, *Order* (footnote 232 above); *Passage through the Great Belt (Finland v. Denmark)*, *Order of 10 September 1992*, *I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, *Order of 22 February 1996*, *I.C.J. Reports 1996*, p. 9 (order of discontinuance following settlement).

<sup>524</sup> See Aldrich, *op. cit.* (footnote 357 above), p. 242. See also Graefrath, “Responsibility and damages caused: relationship between responsibility and damages” (footnote 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l’acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale* (Milan, Giuffrè, 1990).

came a total loss, the damage sustained by the destroyer “*Volage*”, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that “the true measure of compensation” was “the replacement cost of the [destroyer] at the time of its loss” and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer “*Volage*”, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, “explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment”. In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom’s claim for £ 50,048 representing “the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc”.<sup>525</sup>

(10) In the *M/V “Saiga” (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the “*Saiga*”, and its crew. ITLOS awarded compensation of US\$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the “*Saiga*”; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.<sup>526</sup> Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.<sup>527</sup>

(11) In a number of cases, payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.<sup>528</sup> Similar payments have been negotiated where damage is caused to aircraft of a State, such as

<sup>525</sup> *Corfu Channel, Assessment of Amount of Compensation* (see footnote 473 above), p. 249.

<sup>526</sup> The *M/V “Saiga”* case (see footnote 515 above), para. 176.

<sup>527</sup> *Ibid.*, para. 177.

<sup>528</sup> See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid.*, p. 562), and the payment by Iraq of US\$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).



the “full and final settlement” agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.<sup>529</sup>

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself<sup>530</sup> or injury to its personnel.<sup>531</sup> Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.<sup>532</sup> In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.<sup>533</sup>

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada’s claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based “jointly and separately on (a) the relevant international agreements ... and (b) general principles of international law”.<sup>534</sup> Canada asserted that it was applying “the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty”.<sup>535</sup> The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can\$ 3 million (about 50 per cent of the amount claimed).<sup>536</sup>

<sup>529</sup> *Aerial Incident of 3 July 1988* (see footnote 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

<sup>530</sup> See, e.g., the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, HM Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

<sup>531</sup> See, e.g., Claim of Consul *Henry R. Myers (United States v. Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote 347 above), pp. 80–81.

<sup>532</sup> For examples, see Whiteman, *Damages in International Law* (footnote 347 above), p. 81.

<sup>533</sup> See, e.g., the United States-China agreement providing for an *ex gratia* payment of US\$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

<sup>534</sup> The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote 459 above), pp. 899 and 905.

<sup>535</sup> *Ibid.*, p. 907.

<sup>536</sup> Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite “Cosmos 954” (Moscow, 2 April 1981), United Nations, *Treaty Series*,

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq’s liability under international law “for any direct loss, damage—including environmental damage and the depletion of natural resources ... as a result of its unlawful invasion and occupation of Kuwait”.<sup>537</sup> The UNCC Governing Council decision 7 specifies various heads of damage encompassed by “environmental damage and the depletion of natural resources”.<sup>538</sup>

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.<sup>539</sup> However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as “non-use values”) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as “moral damage” in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the “*Lusitania*” case.<sup>540</sup> The umpire considered that international law provides compensation for mental

vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

<sup>537</sup> Security Council resolution 687 (1991), para. 16 (see footnote 461 above).

<sup>538</sup> Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

<sup>539</sup> See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

<sup>540</sup> See footnote 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid.*, p. 55 (1903).

suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being “very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated ...”.<sup>541</sup>

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V “Saiga”* case,<sup>542</sup> the tribunal held that Saint Vincent and the Grenadines’ entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the “*Lusitania*” case:

Estimate the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.<sup>543</sup>

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.<sup>544</sup> Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.<sup>545</sup>

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.<sup>546</sup> Nonetheless, the decisions of human rights bodies

on compensation draw on principles of reparation under general international law.<sup>547</sup>

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,<sup>548</sup> property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.<sup>549</sup> Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost.<sup>550</sup> The method used to

of *Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, “La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea”, *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

<sup>547</sup> See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote 515 above).

<sup>548</sup> See, e.g., R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsey, N.Y., Transnational, 1999).

<sup>549</sup> Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, e.g., the observations of the arbitrator in *Libyan American Oil Company (LLAMCO)* (footnote 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote 496 above), p. 600, para. 138; and *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, e.g., the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote 164 above), p. 122, para. 110. See also *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

<sup>550</sup> See *American International Group, Inc. v. The Islamic Republic of Iran*, which stated that, under general international law, “the valuation should be made on the basis of the fair market value of the shares”, Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing Corporation* (see footnote 549 above), the tribunal accepted its expert’s concept of fair market value “as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat” (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation “will be deemed ‘adequate’ if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known”, World Bank, *Legal Framework*

<sup>541</sup> “*Lusitania*” (see footnote 514 above), p. 40.

<sup>542</sup> See footnote 515 above.

<sup>543</sup> “*Lusitania*” (see footnote 514 above), p. 35.

<sup>544</sup> For example, the “*Topaze*” case, UNRIIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

<sup>545</sup> For example, the *William McNeil* case, *ibid.*, vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

<sup>546</sup> See the review by Shelton, *op. cit.* (footnote 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations*

assess “fair market value”, however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.<sup>551</sup> Where the property interests in question are unique or unusual, for example, art works or other cultural property,<sup>552</sup> or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.<sup>553</sup>

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.<sup>554</sup>

for the *Treatment of Foreign Investment* (Washington, D.C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation “shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation”.

<sup>551</sup> Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, e.g., the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, HM Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid.*) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

<sup>552</sup> See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US\$ 100 000 (category “D” claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant’s Islamic art collection by Iraqi military personnel.

<sup>553</sup> Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 8, p. 373 (1985).

<sup>554</sup> Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be “augmented by the existence of those elements which constitute a going concern”: *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D.C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in “Propositions and conclusions on compensation for business losses: types of damages and their valuation” (S/AC.26/1992/9), para. 16.

(24) An alternative valuation method for capital loss is the determination of net book value, i.e. the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,<sup>555</sup> so-called “break-up”, “liquidation” or “dissolution” value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.<sup>556</sup>

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.<sup>557</sup> The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.<sup>558</sup> But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a

<sup>555</sup> For an example of a business found not to be a going concern, see *Phelps Dodge Corp. v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc. v. National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid.*, p. 180 (1986).

<sup>556</sup> The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote 549 above), at pp. 256–257, paras. 220–223.

<sup>557</sup> See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of “E4” claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of “E2” claims, 9 December 1999 (S/AC.26/1999/22)).

<sup>558</sup> The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote 549 above); *Starrett Housing Corporation (ibid.)*; *Phillips Petroleum Company Iran* (see footnote 164 above); and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.<sup>559</sup> A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.<sup>560</sup>

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case<sup>561</sup> and *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*.<sup>562</sup> Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.<sup>563</sup> Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*<sup>564</sup> and in some ICSID arbitrations.<sup>565</sup> Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.<sup>566</sup> When

<sup>559</sup> See, e.g., *Amoco* (footnote 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote 164 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (see footnote 554 above) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

<sup>560</sup> See, e.g., *Ebrahimi* (footnote 558 above), p. 227, para. 159.

<sup>561</sup> *Navires* (see footnote 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co. case* (*Great Britain v. Portugal*), Lapradelle–Politis, *op. cit.* (*ibid.*), vol. II, p. 78 (1861). Contrast the decisions in the *Canada case* (*United States of America v. Brazil*), Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote 139 above).

<sup>562</sup> ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

<sup>563</sup> *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48 and 53.

<sup>564</sup> *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140.

<sup>565</sup> See, e.g., *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA v. the Government of the People's Republic of the Congo, ibid.*, p. 306 (1979).

<sup>566</sup> According to the arbitrator in the *Shufeldt* case (see footnote 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid.*, para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.<sup>567</sup> This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.<sup>568</sup>

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication;<sup>569</sup> and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.<sup>570</sup>

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.<sup>571</sup> In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases

<sup>567</sup> In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14, para. 140 (see footnote 566 above)).

<sup>568</sup> According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. III, p. 1837).

<sup>569</sup> This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów, Merits* (see footnote 34 above) and *Norwegian Shipowners' Claims* (footnote 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

<sup>570</sup> Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

<sup>571</sup> Many of the early cases concern vessels seized and detained. In the "*Montijo*", an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the "*Betsey*", compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,<sup>572</sup> this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,<sup>573</sup> lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.<sup>574</sup>

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.<sup>575</sup> In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,<sup>576</sup> or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case<sup>577</sup> a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,<sup>578</sup> a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles,

<sup>572</sup> *Factory at Chorzów, Merits* (see footnote 34 above).

<sup>573</sup> *Norwegian Shipowners' Claims* (see footnote 87 above).

<sup>574</sup> For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote 557 above), paras. 184–187.

<sup>575</sup> In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, e.g., *Robert H. May (United States v. Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, e.g., *Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote 561 above), and in *Shufeldt* (see footnote 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleum Ltd.* (see footnote 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140; and *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

<sup>576</sup> As in *Sylvania Technical Systems, Inc.* (see the footnote above).

<sup>577</sup> See footnote 385 above.

<sup>578</sup> See footnote 522 above.

which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.<sup>579</sup> Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

### Article 37. Satisfaction

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

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

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

### Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase “insofar as [the injury] cannot be made good by restitution or compensation”. It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obliga-

<sup>579</sup> Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of “E2” claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

tion to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces “any damage, whether material or moral, caused by the internationally wrongful act of a State”. Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”,<sup>580</sup> is well established in international law. The point was made, for example, by the tribunal in the “*Rainbow Warrior*” arbitration:

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.<sup>581</sup>

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,<sup>582</sup> violations of sovereignty or territorial integrity,<sup>583</sup> attacks on ships or aircraft,<sup>584</sup> ill-treatment or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons<sup>585</sup> and violations of the premises of embassies or consulates or of the residences of members of the mission.<sup>586</sup>

<sup>580</sup> See C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

<sup>581</sup> “*Rainbow Warrior*” (see footnote 46 above), pp. 272–273, para. 122.

<sup>582</sup> Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

<sup>583</sup> As occurred in the “*Rainbow Warrior*” arbitration (see footnote 46 above).

<sup>584</sup> Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid.*, vol. 84 (1980), pp. 1078–1079).

<sup>585</sup> See F. Przetacznik, “La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État”, RGDIP, vol. 78 (1974), p. 919, at p. 951.

<sup>586</sup> Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.<sup>587</sup> Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,<sup>588</sup> a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act<sup>589</sup> or the award of symbolic damages for non-pecuniary injury.<sup>590</sup> Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.<sup>591</sup> Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

[T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

(*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid.*, vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid.*, vol. 70 (1966), pp. 165–166).

<sup>587</sup> In the “*Rainbow Warrior*” arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation “to assist [the parties] in putting an end to the present unhappy affair”. Specifically, it recommended that France contribute US\$ 2 million to a fund to be established “to promote close and friendly relations between the citizens of the two countries” (see footnote 46 above), p. 274, paras. 126–127. See also L. Migliorino, “Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du *Rainbow Warrior*”, RGDIP, vol. 96 (1992), p. 61.

<sup>588</sup> For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

<sup>589</sup> Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1976), p. 257).

<sup>590</sup> See, e.g., the cases “*I'm Alone*”, UNRIAA, vol. III (Sales No. 1949.V2), p. 1609 (1935); and “*Rainbow Warrior*” (footnote 46 above).

<sup>591</sup> See paragraph (11) of the commentary to article 30.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.<sup>592</sup>

This has been followed in many subsequent cases.<sup>593</sup> However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,<sup>594</sup> *Kellett*<sup>595</sup> and *"Rainbow Warrior"*<sup>596</sup> cases, and were offered by the responsible State in the *Consular Relations*<sup>597</sup> and *LaGrand*<sup>598</sup> cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".<sup>599</sup>

<sup>592</sup> *Corfu Channel, Merits* (see footnote 35 above), p. 35, repeated in the operative part (p. 36).

<sup>593</sup> For example, *"Rainbow Warrior"* (see footnote 46 above), p. 273, para. 123.

<sup>594</sup> See footnote 590 above.

<sup>595</sup> Moore, *Digest*, vol. V, p. 44 (1897).

<sup>596</sup> See footnote 46 above.

<sup>597</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

<sup>598</sup> See footnote 119 above.

<sup>599</sup> *LaGrand, Merits (ibid.)*, para. 123.

(8) Excessive demands made under the guise of "satisfaction" in the past<sup>600</sup> suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.<sup>601</sup> In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

#### 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.**

#### Commentary

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.<sup>602</sup> Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.<sup>603</sup> In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due

<sup>600</sup> For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923; see C. Eagleton, *op. cit.* (footnote 582 above), pp. 187–188.

<sup>601</sup> The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

<sup>602</sup> Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses arbitration* (footnote 182 above), pp. 252–253.

<sup>603</sup> See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.) v. United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

has been fixed and the obligation to pay has been established".<sup>604</sup>

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.<sup>605</sup> The experience of the Iran-United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran v. The United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise ... of the discretion accorded to them in deciding each particular case".<sup>606</sup> On the issue of principle the tribunal said:

Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment". ... Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.<sup>607</sup>

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.<sup>608</sup> It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.<sup>609</sup>

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.

2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.

<sup>604</sup> See footnote 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and ... the conditions prevailing for public loans".

<sup>605</sup> In the *M/V "Saiga"* case (see footnote 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

<sup>606</sup> *The Islamic Republic of Iran v. The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote 357 above), pp. 475-476, points out that the practice of the three Chambers has not been entirely uniform.

<sup>607</sup> *The Islamic Republic of Iran v. The United States of America* (see footnote 606 above), pp. 289-290.

<sup>608</sup> See C. N. Brower and J. D. Brueschke, *op. cit.* (footnote 520 above), pp. 626-627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

<sup>609</sup> See the detailed analysis of Chamber Three in *McCullough and Company, Inc. v. Ministry of Post, Telegraph and Telephone*, Iran-U.S. C.T.R., vol. 11, p. 3, at pp. 26-31 (1986).

3. Interest will be paid after the principal amount of awards.<sup>610</sup>

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.<sup>611</sup>

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.<sup>612</sup> Some national court decisions have also dealt with issues of interest under international law,<sup>613</sup> although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran*, the tribunal failed to find:

any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the

<sup>610</sup> Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

<sup>611</sup> See, e.g., the *Velásquez Rodríguez*, Compensatory Damages case (footnote 516 above), para. 57. See also *Papamichalopoulos* (footnote 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote 521 above), pp. 270-272.

<sup>612</sup> See, e.g., the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote 551 above).

<sup>613</sup> See, e.g., *McKesson Corporation v. The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F. Supp. 2d 13 (2000).



subject of damages in international law that are better settled than the one that compound interest is not allowable" ... Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.<sup>614</sup>

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".<sup>615</sup> The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other ... is unanimous ... in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.<sup>616</sup>

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".<sup>617</sup> This view has also been supported by arbitral tribunals in some cases.<sup>618</sup> But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,<sup>619</sup> date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There

<sup>614</sup> Iran-U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote 568 above), p. 1997.

<sup>615</sup> *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote 357 above), pp. 477–478.

<sup>616</sup> *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

<sup>617</sup> F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

<sup>618</sup> See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, case No. ARB/96/1, *JCSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

<sup>619</sup> Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.<sup>620</sup> In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise ... of the discretion accorded to [individual tribunals] in deciding each particular case".<sup>621</sup> On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

### Article 39. Contribution to the injury

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

#### Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially

<sup>620</sup> See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid.*, pp. 38–40, with references).

<sup>621</sup> *The Islamic Republic of Iran v. The United States of America (Case No. A-19)* (see footnote 606 above).

contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as “contributory negligence”, “comparative fault”, “faute de la victime”, etc.<sup>622</sup>

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that “Germany may be criticized for the manner in which these proceedings were filed and for their timing”, and stated that it would have taken this factor, among others, into account “had Germany’s submission included a claim for indemnification”.<sup>623</sup>

(4) The relevance of the injured State’s contribution to the damage in determining the appropriate reparation is widely recognized in the literature<sup>624</sup> and in State practice.<sup>625</sup> While questions of an injured State’s contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.<sup>626</sup> While the notion of a negligent action or

omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being “serious” or “gross”, the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.<sup>627</sup> The phrase “account shall be taken” indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or “any person or entity in relation to whom reparation is sought”. This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

### CHAPTER III

#### SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

##### *Commentary*

(1) Chapter III of Part Two is entitled “Serious breaches of obligations under peremptory norms of general international law”. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.<sup>628</sup> The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

<sup>622</sup> See C. von Bar, *op. cit.* (footnote 315 above), pp. 544–569.

<sup>623</sup> *LaGrand, Judgment* (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (b), and commentary.

<sup>624</sup> See, e.g., B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages” (footnote 454 above) and B. Bollecker-Stern, *op. cit.* (footnote 454 above), pp. 265–300.

<sup>625</sup> In the *Delagoa Bay Railway* case (see footnote 561 above), the arbitrators noted that: “[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter’s liability and warrant ... a reduction in reparation.” In *S.S. “Wimbledon”* (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain’s conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote 432 above), p. 23.

<sup>626</sup> This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

<sup>627</sup> It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the “responsible” State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

<sup>628</sup> For full bibliographies, see M. Spinedi, “Crimes of State: bibliography”, *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>629</sup>

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".<sup>630</sup> At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*".<sup>631</sup> This finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.<sup>632</sup>

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").<sup>633</sup> There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function

of damages is essentially compensatory.<sup>634</sup> Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".<sup>635</sup>

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.<sup>636</sup> As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.<sup>637</sup> In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems".<sup>638</sup> The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole" (preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).<sup>639</sup>

(7) Accordingly, the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of

<sup>634</sup> See paragraph (4) of the commentary to article 36.

<sup>635</sup> International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (see footnote 321 above), p. 221.

<sup>636</sup> This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, Treaty Series, vol. 82, No. 251, p. 279, arts. 9 and 10.

<sup>637</sup> See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote 257 above).

<sup>638</sup> *Prosecutor v. Blaskić*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 bis, ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

<sup>639</sup> See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

<sup>629</sup> *Barcelona Traction* (see footnote 25 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

<sup>630</sup> See footnote 54 above.

<sup>631</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (see footnote 54 above), p. 616, para. 31.

<sup>632</sup> See article 26 and commentary.

<sup>633</sup> See *Yearbook ... 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

obligations towards the international community as a whole<sup>640</sup> all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention<sup>641</sup> involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

#### Article 40. Application of this chapter

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

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

#### Commentary

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish “serious breaches of obligations under peremptory norms of general international law” from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies

<sup>640</sup> According to ICJ, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction* (see footnote 25 above), at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

<sup>641</sup> The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: “(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate ... treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples”, *Yearbook ... 1966*, vol. II, p. 248.

the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.<sup>642</sup>

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission’s commentary to what was to become article 53,<sup>643</sup> uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,<sup>644</sup> the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court’s own position in that case.<sup>645</sup> There also seems to be widespread agreement with other examples listed in the Commission’s commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against

<sup>642</sup> For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

<sup>643</sup> *Yearbook ... 1966*, vol. II, pp. 247–249.

<sup>644</sup> In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

<sup>645</sup> *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

genocide, this is supported by a number of decisions by national and international courts.<sup>646</sup>

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.<sup>647</sup> In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.<sup>648</sup> Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.<sup>649</sup>

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of

breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.<sup>650</sup>

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.<sup>651</sup>

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

#### **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.**

<sup>650</sup> See the *Ireland v. the United Kingdom* case (footnote 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

<sup>651</sup> At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

"(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

"(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

*Yearbook ... 1976*, vol. II (Part Two), pp. 95–96.

<sup>646</sup> See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote 412 above), pp. 439–440; *Counter-Claims* (footnote 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel v. Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

<sup>647</sup> Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others v. The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adani v. Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga v. Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

<sup>648</sup> *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

<sup>649</sup> *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

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

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

#### *Commentary*

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of “serious breaches” in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to *paragraph 1* of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to *paragraph 2* of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of

article 40.<sup>652</sup> The obligation applies to “situations” created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.<sup>653</sup>

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.<sup>654</sup> As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration “may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”.<sup>655</sup>

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a “comprehensive and eternal merger” with Kuwait, the Security Council, in resolution 662 (1990) of 9 August 1990, decided that the annexation had “no legal validity, and is considered null and void”, and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the

<sup>652</sup> This has been described as “an essential legal weapon in the fight against grave breaches of the basic rules of international law” (C. Tomuschat, “International crimes by States: an endangered species?”, *International Law: Theory and Practice — Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259).

<sup>653</sup> Secretary of State’s note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

<sup>654</sup> General Assembly resolution 2625 (XXV), annex, first principle.

<sup>655</sup> *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 100, para. 188.

legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.<sup>656</sup> The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia<sup>657</sup> and the Bantustans in South Africa.<sup>658</sup> These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.<sup>659</sup>

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.<sup>660</sup>

<sup>656</sup> *Namibia* case (see footnote 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

<sup>657</sup> Cf. Security Council resolution 216 (1965) of 12 November 1965.

<sup>658</sup> See, e.g., General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

<sup>659</sup> See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

<sup>660</sup> *Namibia* case (see footnote 176 above), p. 56, para. 125.

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.<sup>661</sup>

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".<sup>662</sup> It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.<sup>663</sup> Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to *paragraph 3*, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

<sup>661</sup> *Loizidou, Merits* (see footnote 160 above), p. 2216; *Cyprus v. Turkey* (see footnote 247 above), paras. 89–98.

<sup>662</sup> *Namibia* case (see footnote 176 above), p. 56, para. 126.

<sup>663</sup> See, e.g., Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

### PART THREE

#### THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

#### CHAPTER I

##### INVOCATION OF THE RESPONSIBILITY OF A STATE

###### *Commentary*

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the international responsibility of the responsible

State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.<sup>664</sup> This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as “direct” versus “indirect” injury or “objective” versus “subjective” rights.

(3) Although article 42 is drafted in the singular (“an injured State”), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is “injured” in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision in the *S.S. “Wimbledon”* case.<sup>665</sup> It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

<sup>664</sup> Cf. the statement by ICJ that “all States can be held to have a legal interest” as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote 25 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

<sup>665</sup> Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. “Wimbledon”* (see footnote 34 above).



**Article 42. Invocation of responsibility  
by an injured State**

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

- (a) that State individually; or**
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:**
  - (i) specially affects that State; or**
  - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

*Commentary*

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the “injured State”. It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,<sup>666</sup> or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred

<sup>666</sup> An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and “informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute”.

by a treaty,<sup>667</sup> or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, “A State is entitled as an injured State to invoke the responsibility”.

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.<sup>668</sup> This is why article 60 is restricted to “material” breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called “integral” or “inter-

<sup>667</sup> In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

<sup>668</sup> Cf. the 1969 Vienna Convention, art. 73.

dependent” obligation.<sup>669</sup> In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is “injured” if the obligation breached was owed to it individually. The expression “individually” indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of *subparagraph* (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.<sup>670</sup> If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.<sup>671</sup>

(8) In addition, *subparagraph* (a) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of *subparagraph* (a) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilat-

eral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to “bundles” of bilateral relations”.<sup>672</sup>

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the “fundamentally unlawful character” of the Islamic Republic of Iran’s conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.<sup>673</sup>

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression “group of States”, article 42, *subparagraph* (b), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

<sup>669</sup> The notion of “integral” obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an “all or nothing” basis. The term “interdependent obligations” may be more appropriate.

<sup>670</sup> Cf. the 1969 Vienna Convention, art. 36.

<sup>671</sup> See, e.g., Article 59 of the Statute of ICJ.

<sup>672</sup> See, e.g., K. Sachariew, “State responsibility for multilateral treaty violations: identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, “Bilateralism and community interest in the law of State responsibility”, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, “The legal régime of *erga omnes* obligations in international law”, *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, “Solidarity and breaches of multilateral treaties”, *BYBIL*, 1988, vol. 59, p. 151, at pp. 154–155.

<sup>673</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph (b) (i)* stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. The term “specially affected” is taken from article 60, paragraph (2) (b), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (b), of the 1969 Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered “injured”. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph (b) (ii)* deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (c), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those “of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations”. Examples include a disarmament treaty,<sup>674</sup> a nuclear-free zone treaty, or any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Ant-

arctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (b) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

#### *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.**

#### *Commentary*

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.<sup>675</sup>

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

<sup>674</sup> The example given in the commentary of the Commission to what became article 60: *Yearbook ... 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

<sup>675</sup> See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".<sup>676</sup> The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".<sup>677</sup>

The Court summarized the communications between the parties as follows:

The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.<sup>678</sup>

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2 (a)* provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would

<sup>676</sup> *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

<sup>677</sup> *Ibid.*, p. 254, para. 35.

<sup>678</sup> *Ibid.*, pp. 254-255, para. 36.

satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2 (b)* deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,<sup>679</sup> or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.<sup>680</sup> Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

#### *Article 44. Admissibility of claims*

##### **The responsibility of a State may not be invoked if:**

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

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

#### *Commentary*

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

<sup>679</sup> As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

<sup>680</sup> In the *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskeniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.<sup>681</sup> By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph* (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.<sup>682</sup>

*Subparagraph* (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.<sup>683</sup>

(3) *Subparagraph* (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.<sup>684</sup> In the context of a claim

<sup>681</sup> For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

<sup>682</sup> *Mavrommatis* (see footnote 236 above), p. 12.

<sup>683</sup> Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic “Diplomatic protection” in *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

<sup>684</sup> *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappetz, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, “Local remedies, exhaustion of”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, “La naissance de la responsabilité internationale et l'épuisement des voies de recours internes

brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.<sup>685</sup>

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.<sup>686</sup>

(5) Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, *subparagraph* (b), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.<sup>687</sup>

#### *Article 45. Loss of the right to invoke responsibility*

**The responsibility of a State may not be invoked if:**

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

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

#### *Commentary*

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

dans le projet d'articles de la Commission du droit international”, *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

<sup>685</sup> *ELSI* (see footnote 85 above), p. 46, para. 59.

<sup>686</sup> *Ibid.*, p. 48, para. 63.

<sup>687</sup> The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) *Subparagraph* (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.<sup>688</sup>

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term “valid waiver” is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.<sup>689</sup> Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question “did not at any time effect a clear and unequivocal waiver of their claims”.<sup>690</sup> In particular, the statements relied on “[n]otwithstanding some ambiguity in the wording ... did not imply any departure from the point of view ex-

pressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”.<sup>691</sup>

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. *Subparagraph* (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.<sup>692</sup>

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.<sup>693</sup>

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.<sup>694</sup> In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.<sup>695</sup>

(9) Moreover, contrary to what may be suggested by the expression “delay”, international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit,

<sup>691</sup> *Ibid.*, p. 250, para. 20.

<sup>692</sup> *Ibid.*, pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru’s application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

<sup>693</sup> *LaGrand, Provisional Measures* (see footnote 91 above) and *LaGrand, Judgment* (see footnote 119 above), at pp. 486–487, paras. 53–57.

<sup>694</sup> See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid.*, vol. X (Sales No. 60.V.4), p. 551 (1903).

<sup>695</sup> See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote 694 above), pp. 386–387.

<sup>688</sup> *Russian Indemnity* (see footnote 354 above), p. 446.

<sup>689</sup> Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

<sup>690</sup> *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 247, para. 13.

expressed in terms of years, has been laid down.<sup>696</sup> The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.<sup>697</sup> Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.<sup>698</sup> None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.<sup>699</sup> It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.<sup>700</sup> Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.<sup>701</sup> In the *Tagliaferro* case, Umpire Ralston likewise held that, despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.<sup>702</sup>

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.<sup>703</sup>

<sup>696</sup> In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

<sup>697</sup> Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

<sup>698</sup> C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (see footnote 409 above), vol. 3, p. 1105, at p. 1107.

<sup>699</sup> A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes 230 and 232 above), see, e.g. *Gentini* (footnote 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

<sup>700</sup> For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

<sup>701</sup> *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 250, para. 20.

<sup>702</sup> *Tagliaferro* (see footnote 695 above), p. 593.

<sup>703</sup> See article 39 and commentary.

#### Article 46. Plurality of injured States

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

#### Commentary

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (b) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".<sup>704</sup> In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.<sup>705</sup> In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.<sup>706</sup>

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration

<sup>704</sup> *S.S. "Wimbledon"* (see footnote 34 above), p. 20.

<sup>705</sup> ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, *Judgment*, I.C.J. Reports 1959, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (see footnote 363 above), p. 106.

<sup>706</sup> See *Nuclear Tests (Australia v. France)* and *(New Zealand v. France)* (footnote 196 above), pp. 256 and 460, respectively.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.<sup>707</sup> In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, “International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case”.<sup>708</sup>

#### Article 47. Plurality of responsible States

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

##### 2. Paragraph 1:

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

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

#### Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a

<sup>707</sup> Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

<sup>708</sup> *Reparation for Injuries* (see footnote 38 above), p. 186.

common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.<sup>709</sup>

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions<sup>710</sup> and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.<sup>711</sup> In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,<sup>712</sup> Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,<sup>713</sup> the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was “solidary” and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of “solidary” responsibility it said:

Australia has raised the question whether the liability of the three States would be “joint and several” (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.<sup>714</sup>

The Court was careful to add that its decision on jurisdiction “does not settle the question whether reparation

<sup>709</sup> See article 17 and commentary.

<sup>710</sup> For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

<sup>711</sup> See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

<sup>712</sup> See footnote 230 above.

<sup>713</sup> See footnote 286 above. See also paragraph (11) of the commentary to article 16.

<sup>714</sup> *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.



would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems ... and, in particular, the special role played by Australia in the administration of the Territory".<sup>715</sup>

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.<sup>716</sup> A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

In all cases of joint and several liability referred to in paragraph 1 ... the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.<sup>717</sup>

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.<sup>718</sup> At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The conse-

<sup>715</sup> *Ibid.*, p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote 232 above) and the settlement agreement (*ibid.*).

<sup>716</sup> A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskeniemi, ed. (The Hague, Kluwer, 1998), p. 125.

<sup>717</sup> See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

<sup>718</sup> See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

quences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.<sup>719</sup> Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2. Subparagraph (a)* addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.<sup>720</sup> This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph (b)*, recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. *Subparagraph (b)* does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

<sup>719</sup> *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

<sup>720</sup> Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

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

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

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

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

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

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

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

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

*Commentary*

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase “[a]ny State other than an injured State” in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.<sup>721</sup> Although the Court noted that “all States can be held to have a legal interest in” the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as “interested States”. The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider

right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to “[a]ny State other than an injured State”. In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (a)), and obligations owed to the international community as a whole (paragraph 1 (b)).<sup>722</sup>

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*”.

(7) Obligations coming within the scope of paragraph 1 (a) have to be “collective obligations”, i.e. they must apply between a group of States and have been established in some collective interest.<sup>723</sup> They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.<sup>724</sup> But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

<sup>722</sup> For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

<sup>723</sup> See also paragraph (11) of the commentary to article 42.

<sup>724</sup> In the *S.S. “Wimbledon”* (see footnote 34 above), the Court noted “[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind” (p. 23).

<sup>721</sup> *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.<sup>725</sup>

(8) Under *paragraph 1 (b)*, States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”.<sup>726</sup> The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”.<sup>727</sup> With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.

(9) While taking up the essence of this statement, the articles avoid use of the term “obligations *erga omnes*”, which conveys less information than the Court’s reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.<sup>728</sup> In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.<sup>729</sup>

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by *paragraph 1 (a)* needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of *paragraph 1 (b)*. All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an

obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. “Wimbledon”* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.<sup>730</sup> In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.<sup>731</sup> In that case, as the Court itself pointed out in 1971, “the injured entity” was a people, viz. the people of South West Africa.<sup>732</sup>

(12) Under *paragraph 2 (a)*, any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2 (b)* allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with *paragraph 2 (b)*, such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, *paragraph 2*, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.<sup>733</sup> Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

<sup>725</sup> Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

<sup>726</sup> For the terminology “international community as a whole”, see *paragraph (18)* of the commentary to article 25.

<sup>727</sup> *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see *paragraphs (2) to (6)* of the commentary to chapter III of Part Two.

<sup>728</sup> *Barcelona Traction (ibid.)*, p. 32, para. 34.

<sup>729</sup> See footnote 54 above.

<sup>730</sup> *S.S. “Wimbledon”* (see footnote 34 above), p. 30.

<sup>731</sup> *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

<sup>732</sup> *Namibia* case (see footnote 176 above), p. 56, para. 127.

<sup>733</sup> See, e.g., the observations of the European Court of Human Rights in *Denmark v. Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.<sup>734</sup> Paragraph 2 (b) can do no more than set out the general principle.

(13) Paragraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph 3 subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

## CHAPTER II

### COUNTERMEASURES

#### *Commentary*

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.<sup>735</sup> This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response

to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.<sup>736</sup> More recently, the term “reprisals” has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.<sup>737</sup> Countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.<sup>738</sup> Countermeasures involve conduct taken in derogation from a subsisting treaty

<sup>734</sup> See also paragraphs (3) to (4) of the commentary to article 33.

<sup>735</sup> For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l’illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

<sup>736</sup> See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

<sup>737</sup> *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

<sup>738</sup> On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called “reciprocal countermeasures” and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State “if such obligations correspond to, or are directly connected with, the obligation breached”.<sup>739</sup> There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.<sup>740</sup> A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.<sup>741</sup> Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.<sup>742</sup>

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (a)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

<sup>739</sup> See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook ... 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

<sup>740</sup> Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

<sup>741</sup> Cf. *Ireland v. the United Kingdom* (footnote 236 above).

<sup>742</sup> See footnote 28 above.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.<sup>743</sup>

#### *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.**

<sup>743</sup> See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

*Commentary*

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.<sup>744</sup> Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo Nagymaros Project* case, in the following passage:

In order to be justifiable, a countermeasure must meet certain conditions ...

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.<sup>745</sup>

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.<sup>746</sup> In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.<sup>747</sup>

<sup>744</sup> For these obligations, see articles 30 and 31 and commentaries.

<sup>745</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83. See also “*Naulilaa*” (footnote 337 above), p. 1027; “*Cysne*” (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (footnote 88 above), p. 128.

<sup>746</sup> The tribunal’s remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that “each State establishes for itself its legal situation vis-à-vis other States” (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

<sup>747</sup> See paragraph (8) of the introductory commentary to chapter V of Part One.

(4) A second essential element of countermeasures is that they “must be directed against”<sup>748</sup> a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.<sup>749</sup> The word “only” in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.<sup>750</sup>

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to “obligations” in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.<sup>751</sup>

(7) The phrase “for the time being” in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

<sup>748</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

<sup>749</sup> In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia’s response was directed against it on that ground.

<sup>750</sup> On the specific question of human rights obligations, see article 50, paragraph (1) (b), and commentary.

<sup>751</sup> See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.<sup>752</sup> Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State “under Part Two”. It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State’s refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.<sup>753</sup> In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.<sup>754</sup>

(9) *Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.<sup>755</sup>

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount

to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase “as far as possible” in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

#### *Article 50. Obligations not affected by countermeasures*

##### 1. Countermeasures shall not affect:

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

(b) obligations for the protection of fundamental human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

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

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

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

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

#### *Commentary*

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) *Paragraph 1* of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; and (d) other obligations under peremptory norms of general international law.

<sup>752</sup> This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

<sup>753</sup> See paragraph (1) of the commentary to article 37.

<sup>754</sup> Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (b), and commentary.

<sup>755</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

(4) *Paragraph 1 (a)* deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that “States have a duty to refrain from acts of reprisal involving the use of force”.<sup>756</sup> The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial<sup>757</sup> and other bodies.<sup>758</sup>

(6) *Paragraph 1 (b)* provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the “*Naulilaa*” arbitration, the tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States”.<sup>759</sup> The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must “abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience”.<sup>760</sup> This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.<sup>761</sup>

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,<sup>762</sup> as well as with countermeasures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on

Economic, Social and Cultural Rights”,<sup>763</sup> and went on to state that:

it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.<sup>764</sup>

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited”.<sup>765</sup> Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that “In no case may a people be deprived of its own means of subsistence”.

(8) *Paragraph 1 (c)* deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.<sup>766</sup> The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.<sup>767</sup>

(9) *Paragraph 1 (d)* prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to “other” obligations under

<sup>756</sup> General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first “Basket” of that Final Act reads: “Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force.”

<sup>757</sup> See especially *Corfu Channel, Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

<sup>758</sup> See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

<sup>759</sup> “*Naulilaa*” (see footnote 337 above), p. 1026.

<sup>760</sup> *Annuaire de l’Institut de droit international*, vol. 38 (1934), p. 710.

<sup>761</sup> See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

<sup>762</sup> See below, article 59 and commentary.

<sup>763</sup> E/C.12/1997/8, para. 1.

<sup>764</sup> *Ibid.*, para. 4.

<sup>765</sup> See also paragraph 2 of article 54 (“objects indispensable to the survival of the civilian population”) and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

<sup>766</sup> Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

<sup>767</sup> See K. J. Partsch, “Reprisals”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, “Methods and means of combat”, D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.



peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.<sup>768</sup>

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (d). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.<sup>769</sup> Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.<sup>770</sup> Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations”.<sup>771</sup> To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”,<sup>772</sup> they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, *paragraph 2* provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with

respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in *paragraph 2 (a)*, applies to “any dispute settlement procedure applicable” between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council*:

Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.<sup>773</sup>

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.<sup>774</sup>

(14) The second exception in *paragraph 2 (b)* limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (b), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

<sup>768</sup> See paragraphs (4) to (6) of the commentary to article 40.

<sup>769</sup> On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities v. Italian Republic*), *ibid.*, p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities v. French Republic*), *ibid.*, p. 2729 (1979); and case C-5/94 (*The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I-2553 (1996).

<sup>770</sup> See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

<sup>771</sup> See WTO, Report of the Panel, United States—Sections 301–310 of the Trade Act of 1974 (footnote 73 above), paras. 7.35–7.46.

<sup>772</sup> To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

<sup>773</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, *Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

<sup>774</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.<sup>775</sup> The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions”,<sup>776</sup> and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.<sup>777</sup>

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.<sup>778</sup> On the other hand, no reference need be made in article 50, paragraph 2 (b), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

### Article 51. Proportionality

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

#### Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and

<sup>775</sup> See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

<sup>776</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

<sup>777</sup> *Ibid.*, p. 40, para. 86. Cf. article 45, subparagraph (a), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (a), of the Vienna Convention on Consular Relations (premises, property and archives to be protected “even in case of armed conflict”).

<sup>778</sup> See articles 9, 11, 26, 36, paragraph 2, 43 (b) and 47, paragraph 2 (a), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (b) and (c) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the “*Naulilaa*” case:

even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.<sup>779</sup>

(3) In the *Air Service Agreement* arbitration,<sup>780</sup> the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France’s refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States’ countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they “do not appear to be clearly disproportionate when compared to those taken by France”. In particular, the majority said:

It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the “proportionality” of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.<sup>781</sup>

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagyymaros Project* case.<sup>782</sup> ICJ, having accepted that

<sup>779</sup> “*Naulilaa*” (see footnote 337 above), p. 1028.

<sup>780</sup> *Air Service Agreement* (see footnote 28 above), para. 83.

<sup>781</sup> *Ibid.*; Reuter, dissenting, accepted the tribunal’s legal analysis of proportionality but suggested that there were “serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely” (p. 448).

<sup>782</sup> *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

"[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"...

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law ...

The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.<sup>783</sup> The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the

requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

#### *Article 52. Conditions relating to resort to countermeasures*

**1. Before taking countermeasures, an injured State shall:**

**(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;**

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

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

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

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

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

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

#### *Commentary*

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

<sup>783</sup> E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.<sup>784</sup> At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.<sup>785</sup> The first requirement, set out in *paragraph 1 (a)*, is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommation*”) was stressed both by the tribunal in the *Air Service Agreement* arbitration<sup>786</sup> and by ICJ in the *Gabčíkovo-Nagymaros Project* case.<sup>787</sup> It also appears to reflect a general practice.<sup>788</sup>

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with *paragraph 1 (a)*.

(5) *Paragraph 1 (b)* requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (a)

and (b) of *paragraph 1* is not strict. Notifications could be made close to each other or even at the same time.

(6) Under *paragraph 2*, however, the injured State may take “such urgent countermeasures as are necessary to preserve its rights” even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by *paragraph 1 (b)* might frustrate its own purpose. Hence, *paragraph 2* allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within *paragraph 2*, depending on the circumstances.

(7) *Paragraph 3* deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in *paragraph 3* are met, the injured State may not take countermeasures; if already taken, they must be suspended “without undue delay”. The phrase “without undue delay” allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not “pending before a court or tribunal” for the purposes of *paragraph 3 (b)* unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.<sup>789</sup> *Paragraph 3* is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.<sup>790</sup> The rationale behind *paragraph 3* is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

<sup>784</sup> See above, *paragraph (7)* of the commentary to the present chapter.

<sup>785</sup> *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

<sup>786</sup> *Ibid.*, p. 444, paras. 85–87.

<sup>787</sup> *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

<sup>788</sup> A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

<sup>789</sup> Hence, *paragraph 5* of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

<sup>790</sup> The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by *paragraph 6* of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.<sup>791</sup>

(9) *Paragraph 4* of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

#### *Article 53. Termination of countermeasures*

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

#### *Commentary*

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

<sup>791</sup> Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute” (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

#### *Article 54. Measures taken by States other than an injured State*

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

#### *Commentary*

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.<sup>792</sup>

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.<sup>793</sup> More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.<sup>794</sup>

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

<sup>792</sup> See, e.g., M. Akehurst, “Reprisals by third States”, *BYBIL*, 1970, vol. 44, p. 1; J. I. Charney, “Third State remedies in international law”, *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, “From bilateralism to community interest in international law”, *Collected Courses ... 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, “Reactions by not directly affected States to breaches of public international law”, *Collected Courses ... 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

<sup>793</sup> See article 59 and commentary.

<sup>794</sup> See article 57 and commentary.

- *United States-Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.<sup>795</sup> The legislation recited that “[t]he Government of Uganda ... has committed genocide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.<sup>796</sup>
- *Certain Western countries-Poland and the Soviet Union (1981)*. On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.<sup>797</sup> The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.<sup>798</sup> The suspension procedures provided for in the respective treaties were disregarded.<sup>799</sup>
- *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.<sup>800</sup> Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the Agreement.<sup>801</sup> The embargo adopted by the European countries also constituted a suspension of Argentina’s rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,<sup>802</sup> for which security exceptions of the Agreement did not apply.

<sup>795</sup> Uganda Embargo Act, Public Law 95-435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051-1053.

<sup>796</sup> *Ibid.*, sects. 5(a) and (b).

<sup>797</sup> RGDIIP, vol. 86 (1982), pp. 603-604.

<sup>798</sup> *Ibid.*, p. 606.

<sup>799</sup> See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People’s Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

<sup>800</sup> Security Council resolution 502 (1982) of 3 April 1982.

<sup>801</sup> Western States’ reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5-6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repräsentation* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328-334.

<sup>802</sup> The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

- *United States-South Africa (1986)*. When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.<sup>803</sup> Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on United States territory.<sup>804</sup> This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories<sup>805</sup> and was justified as a measure which should encourage the Government of South Africa “to adopt reforms leading to the establishment of a non-racial democracy”.<sup>806</sup>

- *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.<sup>807</sup> This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

- *Collective measures against the Federal Republic of Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.<sup>808</sup> For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.<sup>809</sup> Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that “President Milosevic’s ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally ap-

<sup>803</sup> Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote 735 above), p. 165.

<sup>804</sup> For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

<sup>805</sup> United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

<sup>806</sup> For the implementation order, see ILM (footnote 804 above), p. 105.

<sup>807</sup> See, e.g., President Bush’s Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903-905.

<sup>808</sup> Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid.*, No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

<sup>809</sup> See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

ply”.<sup>810</sup> The Federal Republic of Yugoslavia protested these measures as “unlawful, unilateral and an example of the policy of discrimination”.<sup>811</sup>

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

- *Netherlands-Suriname (1982)*. In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.<sup>812</sup> While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.<sup>813</sup>

- *European Community member States-the Federal Republic of Yugoslavia (1991)*. In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.<sup>814</sup> This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months’ notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.<sup>815</sup>

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those

<sup>810</sup> BYBIL, 1998, vol. 69, p. 581; see also BYBIL, 1999, vol. 70, pp. 555–556.

<sup>811</sup> Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998. See M. Weller, *The Crisis in Kosovo 1989-1999* (Cambridge, Documents & Analysis Publishing, 1999), p. 227.

<sup>812</sup> *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, “The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

<sup>813</sup> R. C. R. Siekmann, “Netherlands State practice for the parliamentary year 1982–1983”, *NYIL*, 1984, vol. 15, p. 321.

<sup>814</sup> *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

<sup>815</sup> See also the decision of the European Court of Justice in *A. Racke GmbH and Co. v. Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998-6, p. I-3655, at pp. 3706–3708, paras. 53–59.

States could not be considered “injured States” in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.<sup>816</sup>

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of “lawful measures” rather than “countermeasures” so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

#### PART FOUR

#### GENERAL PROVISIONS

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

<sup>816</sup> Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

*Article 55. Lex specialis*

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

*Commentary*

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

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

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be “determined” by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.<sup>818</sup> An

example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.<sup>819</sup> Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the “State” for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.<sup>820</sup> Or a treaty might exclude a State from relying on *force majeure* or necessity.

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

(5) Article 55 is designed to cover both “strong” forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as “weaker” forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. “Wimbledon”* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,<sup>823</sup>

which is inconsistent with a covered agreement”. For WTO purposes, “compensation” refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia—Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

<sup>819</sup> See paragraph (2) of the commentary to article 32.

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

<sup>821</sup> *Neumeister v. Austria*, Eur. Court H.R., Series A, No. 17 (1974), paras. 28–31, especially para. 30.

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

<sup>823</sup> *S.S. “Wimbledon”* (see footnote 34 above), pp. 23–24.

<sup>817</sup> See paragraph 3 of article 30 of the 1969 Vienna Convention.

<sup>818</sup> See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure



as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.<sup>824</sup>

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

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

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

*Commentary*

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

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

international law but also by some treaties; hence article 56 refers to the “applicable rules of international law”.

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

**Article 57. Responsibility of an international organization**

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

*Commentary*

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

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

<sup>826</sup> 1969 Vienna Convention, art. 52.

<sup>827</sup> *Ibid.*, art. 62, para. 2 (b).

<sup>828</sup> *Ibid.*, art. 60, para 1.

<sup>829</sup> See article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the 1986 Vienna Convention”).

<sup>830</sup> A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

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

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

<sup>825</sup> Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of “approximate application”, formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that “even if such a principle existed, it could by definition only be employed within the limits of the treaty in question” (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

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

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

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or second-

ary liability of member States for the acts or debts of an international organization.<sup>834</sup>

### Article 58. Individual responsibility

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

#### Commentary

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

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

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.<sup>839</sup> The

<sup>832</sup> Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and Herzegovina; in the latter respect, the High Representative’s acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

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

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

<sup>835</sup> See footnote 636 above.

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

<sup>837</sup> See paragraph (6) of the commentary to chapter III of Part Two.

<sup>838</sup> See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

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

State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.<sup>840</sup> Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.<sup>841</sup>

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

<sup>840</sup> Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

<sup>841</sup> See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

### *Article 59. Charter of the United Nations*

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

#### *Commentary*

(1) In accordance with Article 103 of the Charter of the United Nations, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.<sup>842</sup> More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

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



## **Annex 14**

**GCC Anti-Terrorism Agreement,  
signed at Kuwait City on 4 May 2004**

## ▶ Natural Language

---

FED DECREE No. 54 of 2004

**Gazette No. 422**

### UAE Official Gazette

#### **Federal Decree No. 54 of 2004 concerning Arab Gulf Cooperation Council Countries Agreement for Fighting Terrorism.**

I, Zayed Bin Sultan Al Nahyan, the President of the United Arab Emirates,

After reviewing the Constitution constitution:

Federal Law No. 1 of 1972 concerning the jurisdictions of the Ministries and the powers of the Ministers, as amended; and

In accordance with the proposal by the Minister of the Interior, as approved by the Cabinet and as ratified by the Supreme Council of the Federation,

Have resolved as follows:

#### **Article 1**

The GCC Anti-Terrorism Agreement, a copy of which is attached, is hereby ratified.

#### **Article 2**

The Minister of the Interior shall apply this Decree. This Decree shall be published in the official Gazette.

#### **[Signed]**

Zayed Bin Sultan Al Nahyan,

President of the United Arab Emirates

Issued by us in the Presidential Palace in Abu Dhabi on 18 Ramadan 1425 Hijri, corresponding to 1 November 2004

#### **GCC Anti-Terrorism Agreement**

The Gulf Co-operation Council States:

In accordance with the Articles of Association of the Council and the principles and rules established by the Council and in confirmation of the Supreme Council's resolutions concerning anti-terrorism;

In compliance with the religious principles and ethics, the cultural and human heritage of the international Arab and Muslim communities and the values and traditions of the Gulf community, which invite to reject violence and terrorism in all its forms and images;

In confirmation of their compliance with the international Conventions, including the Arab League Charter and

the United Nations Charter;

Being aware of the growth and risks of the phenomenon of terrorism, its threats to the international community and civil life and its effects on the Region;

Within the framework of collective responsibility to maintain security and stability, according to the principle of collective security and in consideration of the security and stability of the GCC countries as an indivisible whole;

Being desirous of protecting the GCC communities and peoples and their historical benefits and cultural achievements and their interests from the risk of terrorism;

In confirmation of the rights of the peoples to fight the foreign occupation and the hostilities by various means;

In confirmation of their intention to confront and fight terrorism collectively, to promote and develop joint co-operation between the GCC countries and to achieve comprehensiveness and integration in the process of fighting terrorism;

In confirmation by the GCC countries of their respect of human rights;

Expressing their worries concerning terrorism that constitutes serious prejudice to human rights, destabilization of the states, disturbance of international relationships and the hindrance of the social, economical, cultural and ideological development,

Being convinced that terrorism cannot be justified in any circumstance or by any incentive or objective and therefore must be fought in all its forms and aspects, irrespective of the basis, reasons and goals of terrorism;

Being determined to destroy terrorism in all its forms and aspects and means of support and to prevent any financing sources to reach any terrorist members or organizations or to provide any means of assistance to them,

Now therefore it is hereby agreed as follows:

## **Chapter One Definition and General Provisions**

### **Article 1**

For the purpose of this Agreement, the following terms and expressions shall have the meanings as set out therewith:

1. Contracting State: means any member state of the GCC countries which has ratified this Agreement and filed the ratification documents with the Secretary General of the Gulf Cooperation Council.

2. Terrorism: means any act or threatened act of violence, irrespective of its motives or purposes, in performance of any individual or collective criminal project, intended to terrify or horrify people by hurting them or endangering their lives, freedom or security, to cause damage to the environment or any public or private property or to occupy or take possession of such property or to endanger any national resources.

3. Terrorist Crime: means any crime or purported crime committed for any criminal purpose in any State which is a party hereto against its property interests, citizens or against the property of such citizens punishable by its law; encouraging, promoting or tempting to commit Terrorist Crimes, by the printing, publication or acquisition of documents, printings or recordings of any type whatsoever if prepared for distribution to, or inspection by third parties of such documents, printings or recordings, then the expression "Terrorist Crime" shall apply; the provision or raising of funds of any kind whatsoever to finance Terrorist Crimes, provided that the person providing or raising such funds is aware of such purpose.

Terrorist Crimes shall also include such crimes as contemplated in the following Conventions, except those excluded by the laws of the Contracting States or not ratified by those States:

A. Islamic Conference Organization Anti Terrorism Treaty.

B. Arab Anti Terrorism Agreement.

- C. Tokyo Convention concerning crimes and acts committed on board airplanes executed on 14.9.1963.
- D. The Hague Convention concerning the prevention of unlawful seizure of airplanes, executed on 16.12.1970
- E. Montreal Convention preventing unlawful acts against the safety of civil aviation, executed on 23.9.1971 and its protocol executed in Montreal on 10.5.1984.
- F. New York Convention preventing and punishing crimes against internationally protected persons, including diplomatic personnel, as approved by the General Assembly on 14 December 1970.
- G. The Convention Against the Taking of Hostages executed on 17 December 1979.
- H. Nuclear Substance Physical Protection Convention, executed in Vienna on 3 March 1980.
- I. UN Overseas Law Convention of 1983, particularly in connection with piracy.
- J. The protocol concerning unlawful acts of violence in airports serving international civil aviation, supplementing the Montreal Convention of 1971, executed on 24 February 1988.
- K. The protocol concerning unlawful acts against the safety in fixed rigs on the continental shelf, executed in Rome in 1988.
- L. The Convention concerning unlawful acts against marine navigation, executed in Rome in 1988.
- M. Anti Bomb Terrorist Attacks International Convention, New York 1997.
- N. The Convention for the identification of plastic explosives for the purpose of detection thereof, Montréal 1991.
- O. International Anti Terrorism Financing Convention, 1999.

4. Terrorism Support and Financing Activities: mean every act involving the collection, receipt, delivery, allocation, transfer or remittance of any assets or their revenues for any individual or collective terrorist activity, whether locally or abroad; to perform, for the benefit or elements of such activity, any bank or commercial transactions; to obtain, directly or indirectly, funds to be utilized for the benefit of such activity; to promote or invite to adopt the principle of such activity; to arrange for training places or places to accommodate the terrorists; to provide any types of weapons or forged documents or to provide any other supporting and financing means, being aware thereof.

5. Assets: mean any type of cash money and movable and immovable assets, documents, deeds and instruments of any form whatsoever, including the form of electronic or digital systems, bank credits and all types of cheques, drafts, shares, securities, bonds, bills of exchange and letters of credit.

## Article 2

A. The term "crime" shall not include the events of struggle, including the armed struggle against the foreign occupation and enemy for the purpose of liberation and self-determination, in accordance with the provision of the international law, excluding any act affecting the regional unity of any of the Contracting States.

B. No Terrorist Crime as set forth in the preceding Article shall be deemed as a political crime.

Upon the application of the provisions of this Agreement, political crimes shall not, even if committed for a political motive, include the following crimes:

1. To assault the kings and presidents of the Contracting States or their spouses, children and relatives;
2. To assault the crown princes, the vice presidents, the prime ministers or the ministers of any of the Contracting States;
3. To assault those persons enjoying international protection, including the ambassadors, diplomats or consuls in the Contracting States;
4. Premeditated murder and robbery against individuals, authorities or the means of transport.



5. Acts of sabotage of public property and such property allocated for public service, even if such property is held by another Contracting State;
6. The manufacture, smuggling or acquisition of weapons, ammunition, explosives and other materials prepared to commit Terrorist Crimes.

## **Chapter Two Security Co-operation and Integration**

### **Article 3**

The Contracting States shall integrate the Terrorism preventive plans and actions and shall face and fight Terrorism.

### **Article 4**

The Contracting States shall co-operate to provide security support and assistance as required by any Contracting State that may suffer Terrorism risks, crimes and effects, according to the requirements and circumstances of every State.

### **Article 5**

The Contracting States shall procure to intensify, follow up and monitor security challenges, assess the contingent risks and terrorist threats, make such assessment and projection studies and analyses and researches as required in this respect and lay such security plans to prevent, fight and frustrate the goals of Terrorism.

### **Article 6**

The Contracting States shall use all such efforts as possible to prevent the entrance or infiltration of terrorists to their lands, and shall procure to prevent any opportunities to tempt any of their citizens to join any unlawful groups or to be involved in any terrorist activity in any circumstances or by any false allegations.

### **Article 7**

The Contracting States shall take all such measures to prevent the use of their lands as a platform to plan, organize or commit or procure to commit or participate in terrorist acts or crimes, and shall develop and activate such systems in connection with control procedures and securing the borders and all the passages, so as to integrate the measures taken by such States to prevent such events of breaching or penetrating security procedures.

### **Article 8**

The Contracting States shall take all such measures and procedures as necessary to protect individuals and public and private property, to consolidate protection and security systems for facilities, means of transport, diplomatic and consular missions, international and local organizations and the interests of other States at the Contracting States.

### **Article 9**

To achieve the objectives of this Agreement, the Contracting States shall:

1. Promptly exchange information and data in connection with terrorist threats and risks and such assumptions and prospects in connection with Terrorist Crimes.
2. Report terrorist members or those suspected of connections or communications with such members.

3. Promptly exchange information and documents concerning Terrorist Crimes that may target any of the Contracting States, whether inside their borders or abroad, and the results of enquiries or investigations made and to report the identity of those involved.
4. Immediately and regularly co-operate to exchange information on the methods and tools used to commit Terrorist Crimes, the actions taken to detect, frustrate and fight Terrorist Crimes and such information and experiences in connection with technical and security methods used to prevent and fight Terrorism.
5. Hold joint meetings for the officers of the relevant anti Terrorism offices and to regularly exchange visits, as necessary.
6. Set up an integrated advanced common data base for such information in connection with fighting Terrorism and to link the relevant security authorities.
7. Make studies and researches, hold advanced training courses and make common drills for all the relevant anti Terrorism security authorities.
8. Take the required steps and adequate measures to protect those involved in fighting Terrorism and the members of their families.

#### **Article 10**

The Contracting States shall take such steps and measures as required to keep such information, materials and documents exchanged between the Contracting States on Terrorism confidential; such information, materials and documents may not be disclosed to any State other than the Contracting States, without the consent of the disclosing State.

#### **Article 11**

The Contracting States shall take prompt steps to trace, pursue and arrest those who may commit Terrorist Crimes in any such States and to prosecute such persons in accordance with the laws and regulations of each State and to provide effective protection for those working in the criminal judicial institutions and full protection to the providers of information on Terrorist Crimes, witnesses and experts.

#### **Article 12**

The Contracting States shall procure to coordinate, integrate and consolidate the efforts concerning the Terrorism related issues and matters on the agendas of the regional and international conferences and meetings.

#### **Article 13**

The Contracting States shall deepen the security and legal culture by laying effective educational programmes to strengthen positive cooperation between individuals and the relevant anti-Terrorism authorities and to find adequate guarantees and incentives to be able to detect Terrorist Crimes, to report the involved persons and to provide such information that may assist in such detection.

### **Chapter Three Cooperation to Prevent Supporting and Financing Terrorism**

#### **Article 14**

The Contracting States shall take the required steps and measures to trace the financial activities of individuals and entities to be able to detect any Terrorism Support and Financing Activities inside their territory, in accordance with their local laws and regulations.

#### **Article 15**

The Contracting States shall use all such efforts as possible to prevent the transfer or remittance of money to or from those States if such money is suspected to be used in Terrorism Finance and Support Activities and to prevent any individuals or public or private entities belonging to, or on the lands of, the Contracting States from getting involved in such activities.

#### **Article 16**

The Contracting States shall promptly exchange any data or information in connection with Terrorism Support or Financing Activities and shall report such activities and the relevant preventive measures taken.

#### **Article 17**

The Contracting States shall exchange such experiences and security methods to detect such activities, including the use of wireless and electronic means of communication and the Internet, to hold conferences and meetings and to set up a common database among the Contracting States against such activities.

#### **Article 18**

Each of the Contracting States takes such adequate steps in accordance with their respective national laws and regulations, to identify, detect, freeze or attach any Assets used or allocated for any Terrorism support and finance activity, and the revenues of such Assets to be confiscated, exchanged or divided with other Contracting States if related to a terrorist activity extending to the territory of any other Contracting States or causing damage to their own interests, provided that the benefit of detecting such activity so requires.

### **Chapter Four Legal and Judicial Cooperation**

#### **Article 19**

The Contracting States shall deliver such suspects or persons convicted of Terrorist Crimes, who are required to be delivered by any of those States, in accordance with the terms and conditions of this Agreement.

#### **Article 20**

Extradition may not be made in any of the following events:

- A. If the subject crime is deemed, under the applicable legal provisions of the Contracting State receiving the request for extradition, as a political crime.
- B. If the crime, the subject matter of extradition, is limited to the breach of military duties.
- C. If the subject crime has been committed in the territory of the Contracting State receiving the request for extradition, unless the crime has caused damage to the interests of the requesting Contracting State, and its laws provide for pursuing and punishing those who commit such crimes, unless the State receiving such request has already commenced the investigation or trial process.
- D. If a final judgment having the power of the adjudged issue has been issued by the Contracting State receiving such request or by another Contracting State in connection with the relevant crime.
- E. If, at the time of receiving the request for extradition, the relevant case or penalty is time barred in accordance with the law of the requesting Contracting State.
- F. If the subject crime is committed outside the territory of the requesting Contracting State by a person not a national of such State, provided that the law of the Contracting State receiving the request for extradition prohibits to press charge against such crime if committed outside the territory of the latter State by such a person.
- G. If a general law of amnesty including those who commit crimes is issued by the requesting Contracting State.

H. If the legal system of the requested State prohibits to extradite its citizens, the requested State shall charge such persons who commit a Terrorist Crime in any of the other Contracting States, provided that such act is punished in either State by a freedom restricting penalty for at least one year or a more severe penalty. The nationality of the person requested to be extradited shall be determined on the date of the relevant crime, relying in this respect on the investigations conducted by the requesting State:

**Article 21**

If the person requested to be extradited is under investigation or trial or convicted of any other crime in the requested State, such extradition shall be extended until the completion of the investigation or trial or the execution of the penalty. However, the requested State may deliver such person temporarily for investigation or trial, provided that such person shall be redelivered to such State prior to the execution of the penalty against such person in the requesting State.

**Article 22**

For the purpose of extradition hereunder, the difference in the legal adaptation of a crime, whether as a felony or a misdemeanor, or the applicable penalty in the local laws of the two Contracting States shall not apply, provided that such crime is punishable under the laws of both States by a freedom restricting penalty for at least one year or a more severe penalty.

**Article 23**

The Contracting States shall provide the maximum legal and judicial assistance as required for enquiries, investigations or judicial proceedings in connection with Terrorist Crimes.

**Article 24**

The Contracting States shall provide such assistance and help to make such enquiries and investigations in connection with Terrorist Crimes committed in any Contracting State, on demand by such State.

**Article 25**

The Contracting States shall provide such maximum possible cooperation to execute the requests for legal assistance in connection with a criminal case arising from a Terrorist Crime, in accordance with the GCC Agreement to execute judgments, requests for legal assistance and summons.

**Article 26**

The Contracting States shall cooperate to seize items and revenues from, used in or related to a Terrorist Crime and to deliver such items and revenues to the requesting State, whether in the possession of the persons to be delivered or in the possession of third parties, and whether such persons are delivered or not, without prejudice to the rights of any Contracting State or bona fide third parties.

**Article 27**

A State requested to deliver the above items and revenues shall take all such measures and precautions as required to perform its obligation to deliver the same. Such state may also temporarily keep such items or revenues if required for criminal proceedings taken by such State or deliver such items or revenues to the requesting State, provided that such items and revenues shall be recovered from that State for the same reason.

**Article 28**

The Contracting States shall examine the clues and traces arising from any Terrorist Crime committed in the

territory of a Contracting State against another Contracting State, and take such steps as required to preserve such clues and traces and procure to confirm their effect as legal evidence. The Contracting States may provide the State against whose interests the crime has been committed of the result on demand. Neither State may provide such result to any other State without the consent of both States.

## **Chapter Five Jurisdiction**

### **Article 29**

The Contracting States shall take such legal procedures to confirm their respective jurisdiction to consider the crimes provided herein:

- A. If the crime is committed in the territory of the State.
- B. If the crime is committed on board a vessel flying the flag of the State or an airplane registered in that State at the time of the crime.
- C. If the crime is committed by a national of the State.

### **Article 30**

The jurisdiction of a Contracting State may extend to any of the crimes as provided hereunder:

- A. If the crime is committed against one of its nationals.
- B. If the crime is planned or prepared for outside the territory of the State to be committed in that territory.
- C. If the person who committed the crime has no known nationality, but his ordinary place of residence is located in that State.
- D. If the crime is committed against a public utility of the State outside its territory.

### **Article 31**

Every Contracting State shall follow the required procedures to confirm its jurisdiction to consider the crimes as contemplated by this Agreement if the suspect is inside its territory, or deliver such suspect to another Contracting State on its demand.

### **Article 32**

If any Contracting State having jurisdiction to a crime contemplated by this Agreement is notified or learns by any other means that one or more other Contracting State is conducting an investigation or taking a legal action in connection with the same acts, the competent authorities in such States shall cooperate concerning the procedures to be taken.

## **Chapter Six Extradition Mechanisms**

### **Article 33**

Requests for extradition, security or legal assistance and documents, items and revenues and the summons for witnesses or experts shall be directly exchanged between the competent authorities in the Contracting States or through the Ministries of Interior or Justice or any similar authority or by diplomatic ways.

The procedures as provided by the requesting and requested States' laws and regulations and the Conventions and Treaties to which the requesting or requested State is a party shall apply.

#### **Article 34**

The request for extradition shall be in writing and accompanied by:

- A. The original conviction judgment, the arrest order or any other papers having the same power, issued according to such circumstances as provided by the law of the requesting State, or a true copy thereof.
- B. A statement of the acts, the subject matter of the request for extradition, including the time, venue and legal adaptation of such acts, referring to the applicable legal provisions, and a copy of those articles.
- C. The description of the person requested to be extradited to the largest possible extent of accuracy, and any other statements that may identify such person and his nationality and identity.

#### **Article 35**

1. The judicial authorities in the requesting State may request the other State by any means of communication in writing to keep a person in protective custody until the arrival of the request for extradition.
2. In such event, the requested State may keep the concerned person in protective custody. However, if the request for extradition is not accompanied by the required documents as set out in the preceding Article, such person may not be detained in excess of 30 days from the date (of arrest/conviction?)

#### **Article 36**

The requesting State shall send a request, together with the documents as set out in Article 34 of this Agreement. If the requested State finds that such application is valid, the competent authorities shall execute such request in accordance with its laws, provided that the requesting State shall be notified without any delay of any steps taken in connection with such request.

#### **Article 37**

1. Notwithstanding the provisions of the preceding Articles 35 and 36, the period of the protective custody may not exceed 60 days from the date of arrest.
2. Temporary release may be ordered during the period as set out in the preceding clause, provided that the requested State shall take such steps as necessary to prevent the escape of the wanted person.
3. Such release shall not prevent the re-arrest and subsequent extradition of such person if the request for extradition is received after such release.

#### **Article 38**

If the requested State decides that further explanations are required to confirm that the conditions of this Chapter are met, the requesting State shall be notified accordingly and a date to provide such explanations shall be agreed.

#### **Article 39**

If the requested State receives several requests for extradition by different States, either for the same acts or for different acts, the requested State shall decide on such requests, taking into account all the circumstances, particularly possible subsequent extradition, the date of receiving each request, the extent of gravity of the crimes and where the crimes have been committed.

#### **Article 40**

Subject to the applicable laws and regulations, the Contracting States shall cooperate in connection with the appearance of the witnesses and experts before the competent authorities of the requesting State. No step or

measure may be taken and no penalty may be applied to the extent it involves coercion of the witness or expert that may reject to come to the requesting State. If such witness or expert comes to the requesting State voluntarily, he/she shall be summoned to appear in accordance with the provisions of its laws or regulations.

Irrespective of his/her nationality, no witness or expert may be interrogated or prosecuted and no freedom restricting action against former acts or judgments prior to coming to the requesting State may be taken.

A witness or expert shall not benefit from the protection as provided by the preceding clauses if such witness or expert stays in the requesting State for over 30 days upon completion of his/her task and was able to leave, or if such witness or expert returns to the territory of the requesting State after leaving it.

The requesting State shall make all such arrangements as required to ensure proper security and legal protection of the witness or expert.

#### **Article 41**

Each State shall bear its own costs for the enforcement of the provisions of this agreement.

The requesting State shall bear the costs related to the extradition of wanted persons, the delivery of items and revenues related to the crime or the appearance of the witnesses and experts.

### **Chapter Seven Final Provisions**

#### **Article 43**

The Contracting States shall procure to include the Terrorist Crimes as contemplated by this Agreement in their respective local laws and regulations as serious crimes, and shall decide the appropriate penalties to reflect how serious such Terrorist Crimes are.

#### **Article 44**

This Agreement shall be without prejudice to the bipartite or multipartite Conventions or Treaties to which any of the Contracting States is a party.

#### **Article 45**

The Contracting GCC States shall ratify this Agreement in accordance with their respective local regulations. The ratification documents shall be filed with the GCC Secretary General, which shall take the required steps to file the ratification documents and to notify the Contracting States thereof.

#### **Article 46**

This Agreement shall come in force after 30 days from the date of filing the ratification documents by two thirds of the GCC States. This Agreement shall not be effective against any other State until the ratification document is filed with the GCC Secretary General, and only after 30 days from the date of such filing.

#### **Article 47**

No Contracting State may make any reservations in conflict with the purpose of this Agreement.

#### **Article 48**

This Agreement may not be amended after its effective date other than with the consent of the GCC Supreme Council, subject to the provision of Article 45 hereof.

**Article 49**

Any Contracting State may withdraw from this Agreement under a notice in writing to the GCC Secretary General. Such withdrawal shall be effective only after 6 months from the date of the notice. However, this Agreement shall remain applicable to such requests made prior to the expiry of such period.

This Agreement is made in the city of Kuwait, State of Kuwait, on 15 Rabia Awal 1425 Hijri, corresponding to 4 May 2004 in one original copy to be filed with the GCC Secretary General and true copies to be delivered to each of the Contracting States signing or joining this Agreement.

**[Signed]**

In witness whereof, the GCC Ministers of Interior have executed this Agreement.

United Arab Emirates:	(signed)
Kingdom of Bahrain:	(signed)
Kingdom of Saudi Arabia:	(signed)
Sultanate of Oman:	(signed)
State of Qatar:	(signed)
State of Kuwait:	(signed)



**مرسوم اتحادي رقم (٥٤) لسنة ٢٠٠٤م  
في شأن  
اتفاقية دول مجلس التعاون لدول الخليج العربية لمكافحة الإرهاب**

نحن زايد بن سلطان آل نهيان  
بعد الإطلاع على الدستور ،  
وعلى القانون الاتحادي رقم ( ١ ) لسنة ١٩٧٢ ، بشأن اختصاصات الوزارات  
وصلاحيات الوزراء والقوانين المتعلقة له .  
وبناءً على ما عرضه وزير الداخلية ، وموافقة مجلس الوزراء ، وتصديق  
المجلس الأعلى للاتحاد ،  
رسمنا بما هو آت :

**المادة الأولى**

صودق على اتفاقية دول مجلس التعاون لدول الخليج العربية لمكافحة الإرهاب ،  
والمرفق نصها .

**المادة الثانية**

على وزير الداخلية تنفيذ هذا المرسوم ، ويُنشر في الجريدة الرسمية.

**زايد بن سلطان آل نهيان  
رئيس دولة الإمارات العربية المتحدة**

صدر عنا في قصر الرئاسة بأبوظبي:  
بتاريخ : ١٨ رمضان ١٤٢٥ هـ  
الموافق : ١ نوفمبر ٢٠٠٤م.

## اتفاقية

### دول مجلس التعاون لدول الخليج العربية

#### مكافحة الإرهاب

إن دول مجلس التعاون لدول الخليج العربية انطلاقاً من النظام الأساسي للمجلس ، والمبادئ والثوابت التي أرساها ، وتأكيداً لقرارات المجلس الأعلى الخاصة بمكافحة الإرهاب ،

والتزاماً بالمبادئ الدينية والأخلاقية ، والتراث الحضاري والإنساني للمجتمع الدولي والأمين العربية والإسلامية وقيم وتقاليد المجتمع الخليجي ، والتي تدعو جميعها إلى نبذ العنف والإرهاب بكل أشكاله وصوره ،

وتأكيداً على الالتزام بالمواثيق الدولية بما فيها ميثاق جامعة الدول العربية ، وميثاق الأمم المتحدة .

وإدراكاً لتنامي ظاهرة الإرهاب وخطورتها وتهديدها للمجتمع الدولي والحياة المدنية وانعكاساتها على المنطقة .

وفي إطار المسؤولية الجماعية في المحافظة على الأمن والاستقرار ، بناء على مبدأ الأمن الجماعي واعتبار أمن واستقرار دول المجلس كلاً لا يتجزأ .

ورغبة من دول المجلس في وقاية مجتمعاتها وشعوبها ومكتسباتها التاريخية ومنجزاتها الحضارية ومصالحها من خطر الإرهاب .

وتأكيداً على حق الشعوب في الكفاح ضد الإحتلال الأجنبي والعدوان بمختلف الوسائل .

وتأكيداً لعزمها على التصدي للإرهاب ومكافحته بشكل جماعي ، وسعياً لتعميق وتطوير التنسيق المشترك فيما بينها وتحقيق الشمولية والتكامل في مكافحة الإرهاب .

وتأكيداً منها على احترام حقوق الإنسان .

وتعبيراً عن قلقها من الإرهاب الذي يشكل انتهاكاً خطيراً لحقوق الإنسان ، وزعزعة استقرار الدول واضطراب العلاقات الدولية ، وإعاقة التنمية الاجتماعية والاقتصادية والثقافية والفكرية .

واقناعاً منها بأن الإرهاب لا يمكن تبريره بأي ظرف أو باحث أو غاية، وبالتالي يجب مكافحته بجميع أشكاله ومظاهره، بغض النظر عن أساسه وأسبابه وأهدافه .  
وتصميماً منها على القضاء على الإرهاب بجميع أشكاله وأنشطته وسبل دعمه، والحيلولة دون بلوغ أي مصادر تمويل لأعضائه أو منظماته أو تقديم أية وسائل مساعدة لهم .

فقد اتفقت على عقد هذه الإتفاقية وفقاً للأحكام المبينة في المواد التالية :

## الفصل الأول

### تعريفات وأحكام عامة

#### المادة (١)

لأغراض هذه الإتفاقية يقصد بالمصطلحات التالية التعريف المبين إزاء كل

منها :

١ - الدولة المتعاقدة : كل دولة عضو في مجلس التعاون لدول الخليج العربية

صدقت على هذه الإتفاقية وأودعت وثائق تصديقها لدى الأمانة العامة لمجلس

التعاون .

٢ — الإرهاب : كل فعل من أفعال العنف أو التهديد به ، أياً كانت بواعثه أو أغراضه ، يقع تنفيذاً لمشروع إجرامي فردي أو جماعي ، ويهدف إلى إلقاء الرعب بين الناس أو ترويعهم بإيذائهم أو تعريض حياتهم أو حريتهم أو أمنهم للخطر ، أو إلحاق الضرر بالبيئة أو بأحد المرافق أو الممتلكات العامة أو الخاصة أو احتلالها أو الاستيلاء عليها ، أو تعريض أحد الموارد الوطنية للمخطر.

٣ — الجريمة الإرهابية : هي أي جريمة أو شروع فيها ترتكب تنفيذاً لفرض إرهابي في أي دولة متعاقدة أو على ممتلكاتها أو مصالحها أو على رعاياها أو ممتلكاتهم يعاقب عليها قانونها الداخلي ، وكذلك التحريض على الجرائم الإرهابية أو الترويج لها أو تحييدها ، وطبع أو نشر أو حيازة محررات أو مطبوعات أو تسجيلات ، أياً كان نوعها ، إذا كانت معدة للتوزيع أو لاطلاع الغير عليها ، وكانت تتضمن ترويحاً أو تحييداً لتلك الجرائم .  
ويعد جريمة إرهابية تقدم أو جمع الأموال ، أياً كان نوعها ، لتمويل الجرائم الإرهابية مع العلم بذلك .

كما يعد من الجرائم الإرهابية ، الجرائم المنصوص عليها في الاتفاقيات التالية ،  
عدا ما استنته منها تشريعات الدول المتعاقدة أو لم تصادق عليها :

أ — معاهدة منظمة المؤتمر الإسلامي لمكافحة الإرهاب .

ب — الاتفاقية العربية لمكافحة الإرهاب .

ج — اتفاقية طوكيو الخاصة بالجرائم والأفعال التي ترتكب على متن الطائرات  
والموقعة عام ١٩٦٣ م .

د — اتفاقية لاهاي بشأن قمع الاستيلاء غير المشروع على الطائرات والموقعة عام  
١٩٧٠ م .

- هـ — اتفاقية مونتريال الخاصة بقمع الأعمال غير المشروعة الموجهة ضد سلامة الطيران المدني والموقعة عام ١٩٧١م ، والبروتوكول الملحق بها والموقع في مونتريال عام ١٩٨٤م .
- و — اتفاقية نيويورك الخاصة بمنع الجرائم المرتكبة ضد الأشخاص المتمتعين بحماية دولية ، بمن فيهم الموظفون الدبلوماسيون ، والمعاقبة عليها ، والتي اعتمدها الجمعية العامة في ١٤ كانون الأول / ديسمبر ١٩٧٣م .
- ز — الاتفاقية الدولية لمناهضة أخذ الرهائن ، التي اعتمدها الجمعية العامة في ١٧ كانون الأول / ديسمبر ١٩٧٩م .
- ح — اتفاقية الحماية المادية للمواد النووية ، المعتمدة في فيينا في ٣ آذار / مارس ١٩٨٠م .
- ط — اتفاقية الأمم المتحدة لقانون البحار لعام ١٩٨٣م ، وما تعلق منها بالقرصنة البحرية.
- ي — البروتوكول المتعلق بقمع أعمال العنف غير المشروعة في المطارات التي تخدم الطيران المدني الدولي ، المكمل لاتفاقية قمع الأعمال غير المشروعة الموجهة ضد سلامة الطيران المدني، والموقع في مونتريال في ٢٤ شباط/فبراير ١٩٨٨م .
- ك — البروتوكول الخاص بقمع الأعمال غير المشروعة التي ترتكب ضد سلامة المنصات الثابتة الواقعة على الجرف القاري ، والموقعة في روما عام ١٩٨٨م .
- ل — الاتفاقية الخاصة بقمع الأعمال غير المشروعة للموجهة ضد الملاحة البحرية والموقعة في روما عام ١٩٨٨م .
- م — الاتفاقية الدولية لمنع الهجمات الإرهابية بالقنابل ، نيويورك عام ١٩٩٧م .
- ن — الاتفاقية الخاصة بتمييز المتفجرات البلاستيكية بغرض الكشف عنها ، مونتريال عام ١٩٩١م .

س — الاتفاقية الدولية لقمع تمويل الإرهاب لعام ١٩٩٩ م .

٤ — أنشطة دعم وتمويل الإرهاب : كل فعل يتضمن جمع أو تسلّم أو تسليم أو تخصيص أو نقل أو تحويل أموال أو عائداتها لأي نشاط إرهابي فردي أو جماعي في الداخل أو في الخارج ، أو القيام لمصلحة هذا النشاط أو عناصره بأي عمليات بنكية أو مصرفية أو تجارية ، أو التحصل مباشرة أو بالواسطة على أموال لاستغلالها لمصلحته ، أو الدعوة والترويج لمبادئه أو تدبير أماكن للتدريب أو الإيواء لعناصره، أو تزويدهم بأية أنواع من الأسلحة أو المستندات المزورة ، أو تقديم أية وسيلة مساعدة أخرى من وسائل الدعم والتمويل ، مع العلم بذلك .

٥ — الأموال : أي نوع من الأموال المادية وغير المادية المنقولة وغير المنقولة والوثائق والصكوك والمستندات أيّاً كان شكلها بما في ذلك شكل النظم الإلكترونية أو الرقمية ، والائتمانات المصرفية وجميع أنواع الشيكات والحواتل والأسهم والأوراق المالية والسندات والكمبيالات وخطابات الاعتماد .

#### مادة ( ٢ )

أ — لا تعد جريمة ، حالات الكفاح بمختلف الوسائل ، بما في ذلك الكفاح المسلح ضد الاحتلال الأجنبي والعدوان من أجل التحرر وتقرير المصير ، وفقاً لمبادئ القانون الدولي ، ولا يعتبر من هذه الحالات كل عمل يمس بالوحدة الإقليمية لأي من الدول المتعاقدة .

ب — لا تعد أي من الجرائم الإرهابية المشار إليها في المادة السابقة من الجرائم السياسية .

- وفي تطبيق أحكام هذه الاتفاقية لا تعد من الجرائم السياسية — ولو كانت بدافع سياسي — الجرائم التالية :
- ١ — التعدي على ملوك ورؤساء الدول المتعاقدة والحكام وزوجاتهم أو أصولهم أو فروعهم .
  - ٢ — التعدي على أولياء العهد أو نواب رؤساء الدول أو رؤساء الحكومات أو الوزراء في أي من الدول المتعاقدة .
  - ٣ — التعدي على الأشخاص المتمتعين بحماية دولية ، بمن فيهم السفراء والدبلوماسيون في الدول المتعاقدة أو المعتمدون لديها .
  - ٤ — القتل العمد والسرقة المصحوبة بإكراه ضد الأفراد أو السلطات أو وسائل النقل والمواصلات .
  - ٥ — أعمال التخريب والإتلاف للممتلكات العامة والممتلكات المخصصة لخدمة عامة حتى ولو كانت مملوكة لدولة أخرى من الدول المتعاقدة .
  - ٦ — جرائم تصنيع أو تهريب أو حيازة الأسلحة أو الذخائر أو المتفجرات أو غيرها من المواد التي تعد لارتكاب جرائم إرهابية .

## الفصل الثاني

### التعاون والتكامل الأمني

#### المادة (٣)

تعمل الدول المتعاقدة على تكامل خطط وإجراءات الوقاية من الإرهاب والتصدي له ومكافحته .

#### المادة (٤)

تعهد الدول المتعاقدة بأن تتعاون فيما بينها ، بتقديم الدعم والمساندة الأمنية اللازمة لأي دولة منها تتعرض لخطر أو جرائم الإرهاب ، وآثاره ، وذلك وفقاً لمتطلبات وظروف كل دولة .

#### المادة (٥)

تعمل الدول المتعاقدة على تكثيف المتابعة ، ورصد التحديات الأمنية ، وتقييم احتمالات المخاطر والتهديدات الإرهابية ، وإجراء الدراسات والتحليلات التقديرية والتوقعية والبحوث الاستشراعية اللازمة في هذا الشأن ، والمبادرة إلى وضع الخطط الأمنية الكفيلة بالوقاية من الإرهاب ومكافحته وإفشال أهدافه .

#### المادة (٦)

تبذل الدول المتعاقدة الجهود الممكنة لمنع دخول العناصر الإرهابية أو تسليها إلى أراضيها ، كما تعمل على منع أي فرص للتفرير بأي من مواطنيها للانضمام إلى أي جماعات غير مشروعة ، أو التورط في أي أنشطة إرهابية تحت أي ظروف أو مزاعم .

#### المادة (٧)

تتخذ الدول المتعاقدة تدابير المنع الكفيلة بالحيلولة دون اتخاذ أراضيها مسرحاً لتخطيط أو تنظيم أو تنفيذ الأفعال أو الجرائم الإرهابية ، أو الشروع أو المساهمة فيها ، وتعمل على تطوير وتفعيل الأنظمة المتصلة بإجراءات المراقبة وتأمين الحدود وكافة المنافذ ، بشكل يؤدي إلى التكامل فيما بينها، لمنع حالات التسلل أو اختراق الإجراءات الأمنية .



### المادة (٨)

تتخذ الدول المتعاقدة كافة الإجراءات والتدابير الضرورية لحماية الأفراد ،  
والممتلكات العامة والخاصة ، وتعزيز نظم الحماية والتأمين للمنشآت ووسائل النقل  
والبعثات الدبلوماسية والقنصلية والمنظمات الإقليمية والدولية ومصالح الدول  
الأخرى لدى الدول المتعاقدة .

### المادة (٩)

من أجل تحقيق أهداف هذه الاتفاقية تلتزم الدول المتعاقدة بما يلي :

- ١ — التبادل الفوري للمعلومات والبيانات المتعلقة بالتهديدات والمخاطر الإرهابية  
والاحتمالات والتوقعات المتعلقة بالجرائم الإرهابية .
- ٢ — الإبلاغ عن العناصر الإرهابية أو تلك التي يشبه في اتصالها أو ارتباطها  
بهذه العناصر .
- ٣ — تبادل المعلومات والوثائق بشكل فوري حول الجرائم الإرهابية التي تستهدف  
أياً من الدول المتعاقدة ، سواء داخل حدودها أو خارجها ، ونتائج التحريات  
أو التحقيقات التي يتم التوصل إليها ، وكذلك الإبلاغ عن هوية الأشخاص  
المتورطين فيها .
- ٤ — التعاون الفوري والمنتظم بشأن تبادل المعلومات حول الأساليب والأدوات  
المستخدمة في ارتكاب جرائم إرهابية ، والإجراءات التي تم اتخاذها لكشفها  
وإجباطها ومكافحتها ، وكذلك المعلومات والخبرات التي تتعلق بالأساليب  
الفنية والأمنية المستخدمة في التصدي للإرهاب ومكافحته.
- ٥ — عقد لقاءات واجتماعات مشتركة لمسئولي الأجهزة المختصة بمكافحة  
الإرهاب ، وتبادل الزيارات بشكل دوري ، وكلما دعت الحاجة إلى ذلك .

- ٦ — إنشاء قاعدة مشتركة متكاملة ومتطورة ، للمعلومات المتعلقة بمكافحة الإرهاب ، والربط بين الأجهزة الأمنية المختصة بذلك.
- ٧ — إجراء البحوث والدراسات ، وعقد الدورات التدريبية المتقدمة ، وإجراء التمارين المشتركة لكافة الأجهزة الأمنية المعنية بمكافحة الإرهاب.
- ٨ — اتخاذ الإجراءات اللازمة والتدابير الكافية لحماية العاملين في مجال مكافحة الإرهاب وأفراد أسرهم .

#### المادة (١٠)

تلتزم الدول المتعاقدة باتخاذ النظم والتدابير الواجبة للمحافظة على سرية المعلومات والمواد والوثائق المتبادلة بينها حول الإرهاب ، ولا يجوز تمريرها إلى دولة أخرى غير الدول المتعاقدة إلا بموافقة دولة المصدر .

#### المادة (١١)

تلتزم الدول المتعاقدة باتخاذ الإجراءات العاجلة لتتبع وملاحقة وضبط مرتكبي الجرائم الإرهابية في أي منها ومحاكمتهم طبقاً لنظام وقانون كل دولة، والحماية الفعالة للعاملين في مؤسسات العدالة الجنائية والحماية الكاملة لمصادر المعلومات عن الجرائم الإرهابية والشهود والخبراء .

#### المادة (١٢)

تلتزم الدول المتعاقدة بالعمل على تنسيق وتكامل الجهود وتوحيد المواقف تجاه المسائل والمواضيع المتعلقة بالإرهاب المطروحة على جداول أعمال المؤتمرات والاجتماعات الإقليمية والدولية .

#### المادة (١٣)

تعمل الدول المتعاقدة على تعميق الوعي الأمني والقانوني بوضع برامج توعوية

فعالة ، لتعزيز التعاون الإيجابي بين الأفراد وبين الأجهزة المعنية بمكافحة الإرهاب ، وإيجاد ضمانات وحوافز مناسبة ، بما يساهم في كشف الجرائم الإرهابية والإرشاد عن العناصر المتورطة فيها وتقديم المعلومات التي تساعد في كشفها .

### الفصل الثالث

#### التعاون الخاص في مجال منع دعم وتمويل الإرهاب

##### المادة (١٤)

تتخذ الدول المتعاقدة الإجراءات والتدابير اللازمة ، التي تكفل لها متابعة الأنشطة المالية للأفراد والهيئات ، التي يمكنها من كشف أنشطة دعم وتمويل الإرهاب في نطاق إقليمها ، وذلك بما يتفق مع تشريعاتها وأنظمتها الداخلية .

##### المادة (١٥)

تتخذ الدول المتعاقدة كل الجهود الممكنة لمنع دخول أو نقل أو تحويل أموال منها أو إليها يشبه في استخدامها في أنشطة تمويل الإرهاب ودعمه ، ومنع تورط الأفراد أو الهيئات العامة والخاصة المتمية إليها أو الكائنة على أراضيها في هذه الأنشطة .

##### المادة (١٦)

تلتزم الدول المتعاقدة بإجراء التبادل الفوري للمعلومات والبيانات المتعلقة بأنشطة دعم أو تمويل الإرهاب والإبلاغ عنها وبالإجراءات التحفظية التي تم اتخاذها بشأنها .

##### المادة (١٧)

تبادل الدول المتعاقدة الخبرات والأساليب المستخدمة في الأنشطة المتعلقة بدعم وتمويل الإرهاب ، والسبل العلمية والأمنية في الكشف عنها ، بما فيها سبل

استخدام وسائل الاتصال اللاسلكية والإلكترونية وشبكات المعلومات الدولية،  
وعقد اللقاءات والاجتماعات وإنشاء قاعدة معلومات مشتركة فيما بينها في  
مواجهة هذا النشاط .

#### المادة (١٨)

تتعهد كل دولة من الدول المتعاقدة التدابير المناسبة ، وفقاً لتشريعاتها وأنظمتها  
الوطنية ، لتحديد أو كشف أو تجميد أو حجز أي أموال مستخدمة أو مخصصة  
لغرض من أغراض أنشطة دعم وتمويل الإرهاب وعائلاتها لمصادرهما أو تبادلها أو  
اقتسامها مع الدول المتعاقدة الأخرى إذا كانت تتعلق بنشاط إرهابي امتد على  
إقليمها أو أضر بمصالحها وكانت مصلحة الكشف عن هذا النشاط تقتضي ذلك .

#### الفصل الرابع

#### التعاون القانوني والقضائي

#### المادة (١٩)

تعهد الدول المتعاقدة ، بتسليم المتهمين أو المحكوم عليهم في الجرائم الإرهابية  
المطلوب تسليمهم من أي من هذه الدول ، وذلك طبقاً للقواعد والشروط  
المنصوص عليها في هذه الاتفاقية .

#### المادة (٢٠)

لا يجوز التسليم في أي من الحالات التالية :

أ — إذا كانت الجريمة المطلوب من أجلها التسليم معتبرة، بمقتضى القواعد القانونية  
النافذة لدى الدولة المتعاقدة المطلوب إليها التسليم ، جريمة لها صبغة سياسية .

ب — إذا كانت الجريمة المطلوب من أجلها التسليم تنحصر في الإخلال بواجبات  
عسكرية.

ج — إذا كانت الجريمة المطلوب من أجلها التسليم ، قد ارتكبت في إقليم الدولة المتعاقدة المطلوب إليها التسليم ، إلا إذا كانت هذه الجريمة قد أضرت بمصالح الدولة المتعاقدة طالبة التسليم ، وكانت قوانينها تنص على تتبع مرتكبي هذه الجرائم ومعاقبتهم ، ما لم تكن الدولة المطلوب إليها التسليم قد بدأت إجراءات التحقيق أو المحاكمة .

د — إذا كانت الجريمة قد صدر بشأنها حكم نهائي — له قوة الأمر المقضي — لدى الدولة المتعاقدة المطلوب إليها التسليم ، أو لدى دولة متعاقدة ثالثة .

هـ — إذا كانت الدعوى عند وصول طلب التسليم قد انقضت ، أو العقوبة قد سقطت بمضي المدة طبقاً لقانون الدولة المتعاقدة طالبة التسليم .

و — إذا كانت الجريمة قد ارتكبت خارج إقليم الدولة المتعاقدة طالبة من شخص لا يحمل جنسيتها ، وكان قانون الدولة المتعاقدة المطلوب إليها التسليم لا يميز توجيه الاتهام عن مثل هذه الجريمة إذا ارتكبت خارج إقليمه من مثل هذا الشخص .

ز — إذا صدر عفو يشمل مرتكبي هذه الجرائم لدى الدولة المتعاقدة طالبة .

ح — إذا كان النظام القانوني للدولة المطلوب إليها التسليم لا يميز لها تسليم مواطنيها ، فلتتزم الدولة المطلوب إليها التسليم بتوجيه الاتهام ضد من يرتكب منهم لدى أي من الدول المتعاقدة الأخرى جريمة من الجرائم الإرهابية ، إذا كان الفعل معاقباً عليه في كل من الدولتين بعقوبة سالبة للحرية لا تقل مدتها عن سنة أو بعقوبة أشد ، وتحدد جنسية المطلوب تسليمه بتاريخ وقوع الجريمة المطلوب التسليم من أجلها ، ويستعان في هذا الشأن بالتحقيقات التي أجرتها الدولة طالبة التسليم .

## المادة (٢١)

إذا كان الشخص المطلوب تسليمه قيد التحقيق أو المحاكمة أو محكوماً عليه عن جريمة أخرى في الدولة المطلوب إليها التسليم ، فإن تسليمه يوجـل لـحين التصرف في التحقيق أو انتهاء المحاكمة أو تنفيذ العقوبة ، ويجوز مع ذلك للدولة المطلوب إليها التسليم تسليمه مؤقتاً للتحقيق معه أو محاكمته ، بشرط إعادته للدولة التي سلمته قبل تنفيذ العقوبة عليه في الدولة طالبة التسليم .

## المادة (٢٢)

لغرض تسليم مرتكبي الجرائم بموجب هذه الاتفاقية لا يعتد بما قد يكون بين التشريعات الداخلية للدولة المتعاقدة من اختلاف في التكييف القانوني للجريمة ، جنائية كانت أو جنحة ، أو بالعقوبة المقررة لها ، بشرط ان تكون معاقباً عليها بموجب قوانين كلتا الدولتين بعقوبة سالبة للحرية لمدة لا تقل عن سنة أو بعقوبة أشد .

## المادة (٢٣)

تعهد الدول المتعاقدة بتقديم أقصى مساعدة قانونية وقضائية ممكنة تكون لازمة للتحريات أو التحقيقات أو الإجراءات القضائية المتعلقة بالجرائم الإرهابية.

## المادة (٢٤)

تلتزم الدول المتعاقدة بتقديم المعونة والمساعدة اللازمة من أجل إجراء الاستدلالات والتحقيقات المتعلقة بالجرائم الإرهابية التي تعرضت لها أي منها وذلك بناء على طلبها .

## المادة (٢٥)

تعهد الدول المتعاقدة بأن تقدم أقصى تعاون ممكن في تنفيذ طلبات الإنابة

القضائية المتعلقة بدعوى جنائية ناشئة عن جريمة إرهابية ، وذلك وفقاً لاتفاقية تنفيذ الأحكام والإنايات والإعلانات القضائية بدول مجلس التعاون لدول الخليج العربية.

#### المادة (٢٦)

تعاون الدول المتعاقدة في ضبط الأشياء والعائدات المتحصلة من جريمة إرهابية أو المستعملة فيها أو المتعلقة بها وتسليمها للدولة الطالبة ، سواء وجدت لدى أشخاص مطلوب تسليمهم أو لدى الغير ، وسواء تم تسليم الأشخاص أو لم يتم تسليمهم ، وذلك مع عدم الإخلال بحقوق أي من الدول المتعاقدة أو حسني النية من الغير.

#### المادة (٢٧)

للدولة المطلوب إليها تسليم الأشياء والعائدات ، اتخاذ جميع التدابير والإجراءات التحفظية اللازمة لتنفيذ التزامها بتسليمها ، ولها أيضاً أن تحتفظ مؤقتاً بهذه الأشياء أو العائدات إذا كانت لازمة لإجراءات جزائية تتخذ عندها ، أو أن تسلمها إلى الدولة الطالبة بشرط استردادها منها لذات السبب .

#### المادة (٢٨)

تعهد الدول المتعاقدة بالقيام بأعمال فحص الأدلة والآثار الناتجة عن أي جريمة إرهابية تقع على إقليمها ضد أي دولة متعاقدة ، وتقوم باتخاذ الإجراءات اللازمة للمحافظة على هذه الأدلة والآثار والعمل على إثبات دلالتها القانونية ، ولها أن تزود الدولة التي وقعت الجريمة ضد مصالحها بالنتيجة متى ما طلبت ذلك ، ولا يحق لأي من الدولتين تزويد أي دولة أخرى بما إلا بناء على موافقتهما.

## الفصل الخامس

### الولاية القضائية

#### المادة (٢٩)

- على الدول المتعاقدة اتخاذ التدابير التشريعية لتأكيد سريان ولايتها القضائية على الجرائم المنصوص عليها في هذه الاتفاقية :-
- أ - عندما ترتكب الجريمة في إقليم الدولة .
- ب - عندما ترتكب الجريمة على متن سفينة ترفع علم الدولة أو طائرة مسجلة لديها وقت ارتكاب الجريمة .
- ج - عندما يرتكب الجريمة أحد مواطني الدولة .

#### المادة (٣٠)

- يجوز للدولة المتعاقدة أن تمد ولايتها القضائية على أي من الجرائم المنصوص عليها في الاتفاقية :-
- أ - عندما ترتكب الجريمة ضد أحد مواطنيها .
- ب - عندما يتم الإعداد أو التخطيط للجريمة خارج إقليم الدولة بهدف ارتكابها داخل إقليمها .
- ج - إذا كان مرتكب الجريمة شخصاً مجهول الجنسية يوجد محل إقامته المعتاد فيها .
- د - عندما ترتكب الجريمة ضد مرفق عام للدولة خارج إقليمها .

#### المادة (٣١)

بتعين على كل دولة متعاقدة أن تعتمد ما يلزم من تدابير لتأكيد سريان ولايتها القضائية على الجرائم المشمولة بهذه الاتفاقية عندما يكون المتهم موجوداً في إقليمها، أو أن تسلمه للدولة أخرى متعاقدة طلبت ذلك .



### المادة (٣٦)

إذا تم إخطار أي دولة متعاقدة لها ولاية قضائية على إحدى الجرائم المشمولة بهذه الاتفاقية ، أو علمت بطريقة أخرى أن دولة أو أكثر من الدول المتعاقدة الأخرى تجري تحقيقاً أو تتخذ إجراءً قضائياً بشأن ذات الأفعال ، فيتعين على السلطات المختصة في تلك الدول التنسيق بشأن ما يجب اتخاذه من إجراءات .

## الفصل السادس

### آليات التنفيذ

### المادة (٣٣)

يكون تبادل طلبات تسليم المطلوبين والمساعدة الأمنية أو القانونية أو الإنابة القضائية ، وكذلك تبادل المستندات والأشياء والعائدات ، وطلب حضور الشهود أو الخبراء ، بين الجهات المختصة في الدول المتعاقدة مباشرة ، أو عن طريق وزارات الداخلية أو العدل أو ما يقوم مقامهما ، أو بالطرق الدبلوماسية .  
وتتبع في هذه الطلبات والمستندات المصاحبة لها أو المتصلة بها الإجراءات القانونية وفقاً لقوانين وأنظمة الدولة الطالبة والمطلوب إليها والمعاهدات والاتفاقيات التي تكون طرفاً فيها .

### المادة (٣٤)

يقدم طلب التسليم كتابة مصحوباً بما يلي :  
— أصل حكم الإدانة أو أمر القبض أو أية أوراق أخرى لها نفس القوة ، صادرة طبقاً للأوضاع المقررة في قانون الدولة الطالبة ، أو صورة رسمية مما تقدم .

ب — بيان بالأفعال المطلوب التسليم من أجلها ، يوضح فيه زمان ومكان ارتكابهما وتكييفها القانوني ، مع الإشارة إلى المواد القانونية المطبقة عليها ، وصورة من هذه المواد .

ج — أوصاف الشخص المطلوب تسليمه بأكثر قدر ممكن من الدقة ، وأية بيانات أخرى من شأنها تحديد شخصه وجنسيته وهويته .

#### المادة (٣٥)

١ — للسلطات القضائية في الدولة الطالبة ، أن تطلب من الدولة المطلوب إليها — بأي طريق من طرق الإتصال الكتابية — حبس (توقيف) الشخص احتياطياً إلى حين وصول طلب التسليم .

٢ — ويجوز في هذه الحالة للدولة المطلوب إليها التسليم أن تحبس (توقف) الشخص المطلوب احتياطياً ، وإذا لم يقدم طلب التسليم مصحوباً بالمستندات اللازمة المبينة في المادة السابقة ، فلا يجوز حبس (توقيف) الشخص المطلوب تسليمه مدة تزيد على ثلاثين يوماً من تاريخ القبض عليه .

#### المادة (٣٦)

على الدولة الطالبة ، أن ترسل طلباً مصحوباً بالمستندات المبينة في المادة الرابعة والثلاثين من هذه الاتفاقية، وإذا تبينت الدولة المطلوب إليها التسليم سلامة الطلب، تتولى السلطات المختصة فيها تنفيذه طبقاً لتشريعها ، على أن تحاط الدولة الطالبة دون تأخير بما اتخذ بشأن طلبها .

#### المادة (٣٧)

١ — في جميع الأحوال المنصوص عليها في المادتين السابقتين ، لا يجوز أن تتجاوز مدة الحبس الاحتياطي ستين يوماً من تاريخ القبض .

٢ - يجوز الإفراج المؤقت خلال المدة المعينة في الفقرة السابقة ، على أن تتخذ الدولة المطلوب إليها التسليم التدابير التي تراها ضرورية للحيلولة دون هروب الشخص المطلوب .

٣ - لا يجوز الإفراج دون إعادة القبض على الشخص وتسليمه إذا ورد طلب التسليم بعد ذلك .

#### المادة (٣٨)

إذا رأت الدولة المطلوب إليها التسليم حاجتها إلى إيضاحات تكميلية للتحقق من توافر الشروط المنصوص عليها في هذا الفصل ، تخطر بذلك الدولة الطالبة ، وتحدد لها موعداً لاستكمال هذه الإيضاحات .

#### المادة (٣٩)

إذا تلقت الدولة المطلوب إليها عدة طلبات تسليم من دول مختلفة ، إما عن ذات الأفعال أو عن أفعال مختلفة ، فيكون لهذه الدولة أن تفصل في هذه الطلبات مراعية كافة الظروف ، وعلى الأخص إمكان التسليم اللاحق ، وتاريخ وصول الطلبات ، ودرجة خطورة الجرائم ، والمكان الذي ارتكبت فيه .

#### المادة (٤٠)

مع عدم الإخلال بالتشريعات أو النظم المعمول بها ، تتعاون الدول المتعاقدة في مجال تبادل حضور الشهود والخبراء أمام السلطات المختصة. بالدولة الطالبة ، ولا يجوز اتخاذ أي إجراء أو توقيع أي جزاء أو تدبير ينطوي على إكراه للشاهد أو الخبير الذي لا يمثل بالحضور إلى الدولة الطالبة ، وإذا حضر الشاهد أو الخبير إلى الدولة الطالبة طواعية فيتم تكليفه بالحضور وفق أحكام تشريعها أو نظامها . ولا يجوز أن يخضع الشاهد أو الخبير أيّاً كانت جنسيته في الدولة الطالبة

للمساءلة أو المحاكمة أو أي إجراء مقيد للحرية عن أفعال أو أحكام سابقة على حضوره .

ولا يستفيد الشاهد أو الخبير من الحماية المنصوص عليها في الفقرات السابقة إذا استمر في البقاء بالدولة طالبة ثلاثين يوماً بعد انقضاء مهمته وقدرته على المغادرة أو إذا عاد إلى إقليم الدولة طالبة بعد مغادرته لها .  
وتلتزم الدولة طالبة باتخاذ كافة الترتيبات اللازمة لكفالة الحماية الأمنية والقانونية للشاهد أو الخبير .

#### المادة (٤١)

تتحمل كل دولة ما يخصها من نفقات من أجل تنفيذ أحكام هذه الاتفاقية.  
وتتحمل الدولة طالبة النفقات الخاصة بتسليم المطلوبين أو الأشياء والعائدات المتعلقة بالجريمة أو حضور الشهود والخبراء .

#### المادة (٤٢)

تضع الأمانة العامة لمجلس التعاون لدول الخليج العربية بالاتفاق مع الدول المتعاقدة الآليات والإجراءات والنماذج اللازمة لتنفيذ أحكام هذه الاتفاقية .

### الفصل السابع

#### أحكام ختامية

#### المادة (٤٣)

تعمل الدول المتعاقدة على إدراج الجرائم الإرهابية المشار إليها بهذه الاتفاقية في القوانين والتشريعات المحلية بوصفها جرائم خطيرة ، وأن تقرر لها العقوبات المناسبة التي تعكس جسامة تلك الجرائم الإرهابية.

## المادة (٤٤)

لا تخل هذه الاتفاقية بالاتفاقيات أو المعاهدات الثنائية أو المتعددة الأطراف المرتبطة بها أي من الدول المتعاقدة.

## المادة (٤٥)

يصدّق على هذه الاتفاقية من دول المجلس الموقعة وفقاً لنظمها الداخلية ، وتودع وثائق التصديق لدى الأمانة العامة لمجلس التعاون لدول الخليج العربية التي عليها اتخاذ الإجراءات اللازمة لإيداع وثائق التصديق وإخطار الدول المتعاقدة بذلك .

## المادة (٤٦)

تسري هذه الاتفاقية بعد مضي ثلاثين يوماً من تاريخ إيداع وثائق التصديق عليها من ثلثي دول المجلس ، ولا تكون نافذة بحق أي دولة أخرى إلا بعد إيداع وثيقة التصديق عليها لدى الأمانة العامة لمجلس التعاون لدول الخليج العربية ومضي ثلاثين يوماً على تاريخ الإيداع .

## المادة (٤٧)

لا يجوز لأي دولة من الدول المتعاقدة أن تبدي أي تحفظ يؤدي إلى مخالفة الغرض من هذه الاتفاقية .

## المادة (٤٨)

لا يجوز تعديل هذه الاتفاقية بعد سريانها إلا بموافقة من المجلس الأعلى لمجلس التعاون لدول الخليج العربية ، وذلك مع مراعاة أحكام المادة (٤٥) .

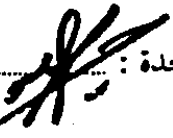
## المادة (٤٩)

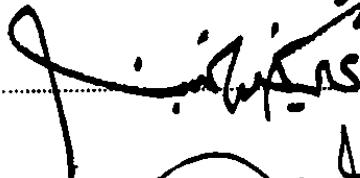
يجوز لأي دولة متعاقدة أن تنسحب من هذه الاتفاقية بناء على إخطار كتابي


ترسله إلى الأمين العام لمجلس التعاون لدول الخليج العربية ، ويرتب الانسحاب أثره بعد مضي سنة أشهر من تاريخ الإخطار ، وتظل الاتفاقية سارية المفعول في شأن الطلبات التي قدمت قبل انقضاء هذه المدة .

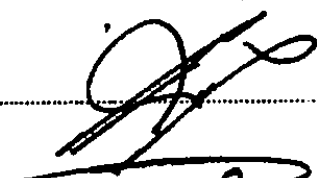
حررت هذه الاتفاقية باللغة العربية في مدينة الكويت بدولة الكويت بتاريخ ١٥ ربيع الأول ١٤٢٥هـ الموافق ٤ مايو ٢٠٠٤ م . من أصل واحد ، يودع بالأمانة العامة لمجلس التعاون لدول الخليج العربية ، ونسخة مطابقة للأصل ، تسلم لكل من الدول المتعاقدة على هذه الاتفاقية أو المنضمة إليها .


وإثباتا لما تقدم تفضل أصحاب السمو والمعالي وزراء الداخلية في دول مجلس التعاون لدول الخليج العربية بتوقيع هذه الاتفاقية :

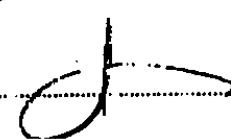
..... دولة الإمارات العربية المتحدة : 

..... مملكة البحرين : 

..... المملكة العربية السعودية : 

..... سلطنة عمان : 

..... دولة قطر : 

..... دولة الكويت : 

## **Annex 15**

UNCITRAL Model Law on International Commercial Arbitration 1985,  
with amendments as adopted in 2006

United Nations, Vienna, 2008, United Nations Publication Sales No. E.08.V.4.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

# UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments  
as adopted in 2006



UNITED NATIONS  
Vienna, 2008



**NOTE**

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

UNITED NATIONS PUBLICATION

Sales No. E.08.V.4

ISBN 978-92-1-133773-0

## Contents

	<i>Page</i>
Resolutions adopted by the General Assembly .....	<i>vii</i>
General Assembly Resolution 40/72 (11 December 1985).....	<i>vii</i>
General Assembly Resolution 61/33 (4 December 2006).....	<i>viii</i>

### *Part One*

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION .....	1
<i>Chapter I. General provisions.</i> .....	1
Article 1. Scope of application .....	1
Article 2. Definitions and rules of interpretation .....	2
Article 2A. International origin and general principles .....	3
Article 3. Receipt of written communications .....	3
Article 4. Waiver of right to object .....	3
Article 5. Extent of court intervention .....	4
Article 6. Court or other authority for certain functions of arbitration assistance and supervision.....	4
<i>Chapter II. Arbitration agreement</i> .....	4
Article 7. <i>Option I</i> Definition and form of arbitration agreement .....	4
<i>Option II</i> Definition of arbitration agreement .....	5
Article 8. Arbitration agreement and substantive claim before court ...	5
Article 9. Arbitration agreement and interim measures by court .....	5
<i>Chapter III. Composition of arbitral tribunal</i> .....	6
Article 10. Number of arbitrators .....	6
Article 11. Appointment of arbitrators .....	6
Article 12. Grounds for challenge .....	7
Article 13. Challenge procedure .....	7
Article 14. Failure or impossibility to act .....	8
Article 15. Appointment of substitute arbitrator .....	8
<i>Chapter IV. Jurisdiction of arbitral tribunal</i> .....	8
Article 16. Competence of arbitral tribunal to rule on its jurisdiction ...	8

	<i>Page</i>
<i>Chapter IV A. Interim measures and preliminary orders</i> . . . . .	9
Section 1. Interim measures . . . . .	9
Article 17. Power of arbitral tribunal to order interim measures. . . . .	9
Article 17 A. Conditions for granting interim measures. . . . .	10
Section 2. Preliminary orders . . . . .	10
Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders . . . . .	10
Article 17 C. Specific regime for preliminary orders . . . . .	10
Section 3. Provisions applicable to interim measures and preliminary orders . . . . .	11
Article 17 D. Modification, suspension, termination. . . . .	11
Article 17 E. Provision of security . . . . .	11
Article 17 F. Disclosure . . . . .	12
Article 17 G. Costs and damages. . . . .	12
Section 4. Recognition and enforcement of interim measures . . . . .	12
Article 17 H. Recognition and enforcement . . . . .	12
Article 17 I. Grounds for refusing recognition or enforcement . . . . .	13
Section 5. Court-ordered interim measures . . . . .	13
Article 17 J. Court-ordered interim measures . . . . .	13
<i>Chapter V. Conduct of arbitral proceedings</i> . . . . .	14
Article 18. Equal treatment of parties . . . . .	14
Article 19. Determination of rules of procedure. . . . .	14
Article 20. Place of arbitration. . . . .	14
Article 21. Commencement of arbitral proceedings . . . . .	14
Article 22. Language. . . . .	15
Article 23. Statements of claim and defence. . . . .	15
Article 24. Hearings and written proceedings . . . . .	15
Article 25. Default of a party. . . . .	16
Article 26. Expert appointed by arbitral tribunal . . . . .	16
Article 27. Court assistance in taking evidence . . . . .	16
<i>Chapter VI. Making of award and termination of proceedings</i> . . . . .	17
Article 28. Rules applicable to substance of dispute . . . . .	17
Article 29. Decision-making by panel of arbitrators. . . . .	17
Article 30. Settlement . . . . .	17
Article 31. Form and contents of award . . . . .	18
Article 32. Termination of proceedings . . . . .	18
Article 33. Correction and interpretation of award; additional award . . . . .	18

	<i>Page</i>
<i>Chapter VII. Recourse against award</i> .....	19
Article 34. Application for setting aside as exclusive recourse against arbitral award .....	19
<i>Chapter VIII. Recognition and enforcement of awards</i> .....	20
Article 35. Recognition and enforcement .....	20
Article 36. Grounds for refusing recognition or enforcement .....	21

### ***Part Two***

EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION .....	23
A. Background to the Model Law .....	24
1. Inadequacy of domestic laws .....	24
2. Disparity between national laws .....	25
B. Salient features of the Model Law .....	25
1. Special procedural regime for international commercial arbitration .....	25
2. Arbitration agreement .....	27
3. Composition of arbitral tribunal .....	29
4. Jurisdiction of arbitral tribunal .....	30
5. Conduct of arbitral proceedings .....	31
6. Making of award and termination of proceedings .....	33
7. Recourse against award .....	34
8. Recognition and enforcement of awards .....	36

### ***Part Three***

“Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958”, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session .....	39
---	----

## Resolutions adopted by the General Assembly

### *40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*

*The General Assembly,*

*Recognizing* the value of arbitration as a method of settling disputes arising in international commercial relations,

*Convinced* that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

*Noting* that the Model Law on International Commercial Arbitration<sup>1</sup> was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

*Convinced* that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>2</sup> and the Arbitration Rules of the United Nations Commission on International Trade Law<sup>3</sup> recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

*112th plenary meeting  
11 December 1985*

---

<sup>1</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.*

<sup>2</sup>United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38.

<sup>3</sup>United Nations publication, Sales No. E.77.V.6.

[on the report of the Sixth Committee (A/61/453)]

*61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*

*The General Assembly,*

*Recognizing* the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

*Recalling* its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,<sup>1</sup>

*Recognizing* the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

*Believing* that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

*Noting* that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

*Believing* that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,<sup>2</sup> is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,<sup>3</sup> and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

<sup>1</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.*

<sup>2</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>3</sup>*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).*

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,<sup>2</sup> the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;<sup>3</sup>

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

*64th plenary meeting  
4 December 2006*





## *Part One*

# **UNCITRAL Model Law on International Commercial Arbitration**

(United Nations documents A/40/17,  
annex I and A/61/17, annex I)

**(As adopted by the United Nations Commission on  
International Trade Law on 21 June 1985,  
and as amended by the United Nations Commission  
on International Trade Law on 7 July 2006)**

### CHAPTER I. GENERAL PROVISIONS

#### *Article 1. Scope of application<sup>1</sup>*

(1) This Law applies to international commercial<sup>2</sup> arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

*(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

---

<sup>1</sup>Article headings are for reference purposes only and are not to be used for purposes of interpretation.

<sup>2</sup>The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

- (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
- (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

#### *Article 2. Definitions and rules of interpretation*

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

*Article 2 A. International origin and general principles*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

*Article 3. Receipt of written communications*

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

*Article 4. Waiver of right to object*

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

*Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

*Article 6. Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

## CHAPTER II. ARBITRATION AGREEMENT

*Option I**Article 7. Definition and form of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

### *Option II*

#### *Article 7. Definition of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

#### *Article 8. Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

#### *Article 9. Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

## CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

*Article 10. Number of arbitrators*

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

*Article 11. Appointment of arbitrators*

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### *Article 12. Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

#### *Article 13. Challenge procedure*

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

*Article 14. Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

*Article 15. Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

*Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the



matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

##### ***Section 1. Interim measures***

###### *Article 17. Power of arbitral tribunal to order interim measures*

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

*Article 17 A. Conditions for granting interim measures*

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

*Section 2. Preliminary orders**Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

*Article 17 C. Specific regime for preliminary orders*

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

### ***Section 3. Provisions applicable to interim measures and preliminary orders***

#### *Article 17 D. Modification, suspension, termination*

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

#### *Article 17 E. Provision of security*

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

*Article 17 F. Disclosure*

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

*Article 17 G. Costs and damages*

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

***Section 4. Recognition and enforcement of interim measures****Article 17 H. Recognition and enforcement*

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

*Article 17 I. Grounds for refusing recognition or enforcement<sup>3</sup>*

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

***Section 5. Court-ordered interim measures****Article 17 J. Court-ordered interim measures*

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

---

<sup>3</sup>The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

## CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

### *Article 18. Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

### *Article 19. Determination of rules of procedure*

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

### *Article 20. Place of arbitration*

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

### *Article 21. Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

*Article 22. Language*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

*Article 23. Statements of claim and defence*

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

*Article 24. Hearings and written proceedings*

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

*Article 25. Default of a party*

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

*Article 26. Expert appointed by arbitral tribunal*

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

*Article 27. Court assistance in taking evidence*

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.



The court may execute the request within its competence and according to its rules on taking evidence.

## CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

### *Article 28. Rules applicable to substance of dispute*

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

### *Article 29. Decision-making by panel of arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

### *Article 30. Settlement*

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

*Article 31. Form and contents of award*

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
- (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
- (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

*Article 32. Termination of proceedings*

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
  - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
  - (b) the parties agree on the termination of the proceedings;
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

*Article 33. Correction and interpretation of award; additional award*

- (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
  - (a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII. RECOURSE AGAINST AWARD

### *Article 34. Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

- valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (i) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (ii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

### *Article 35. Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.<sup>4</sup>

*(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

### *Article 36. Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

---

<sup>4</sup>The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
  - (b) if the court finds that:
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
    - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

## *Part Two*

### **Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006<sup>1</sup>**

1. The UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”. The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended “that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)”.

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

---

<sup>1</sup>This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E.87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

#### **A. Background to the Model Law**

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

##### ***1. Inadequacy of domestic laws***

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a “one-off” arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national



laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

## **2. *Disparity between national laws***

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

## **B. *Salient features of the Model Law***

### **1. *Special procedural regime for international commercial arbitration***

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) *Substantive and territorial scope of application*

11. Article 1 defines the scope of application of the Model Law by reference to the notion of “international commercial arbitration”. The Model Law defines an arbitration as international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States” (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term “commercial”, the Model Law provides no strict definition. The footnote to article 1 (1) calls for “a wide interpretation” and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, “whether contractual or not”. The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of “commercial law” that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a “foreign” law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

*(b) Delimitation of court assistance and supervision*

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

**2. Arbitration agreement**

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

*(a) Definition and form of arbitration agreement*

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York

Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (“*compromis*”) or a future dispute (“*clause compromissoire*”). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another”. It also states that “the reference in a contract to any document” (for example, general conditions) “containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract”. It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made “by reference”. The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958” (A/61/17, Annex 2).<sup>2</sup> The General Assembly, in its resolution 61/33 of 4 December 2006 noted that “in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

---

<sup>2</sup>Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely”. The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the “more favourable law provision” contained in article VII (1) of the New York Convention, the Recommendation clarifies that “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

*(b) Arbitration agreement and the courts*

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

**3. Composition of arbitral tribunal**

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

#### **4. Jurisdiction of arbitral tribunal**

##### *(a) Competence to rule on own jurisdiction*

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of “*Kompetenz-Kompetenz*” and of separability or autonomy of the arbitration clause. “*Kompetenz-Kompetenz*” means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators’ jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) *Power to order interim measures and preliminary orders*

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that “a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested”. Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if “it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure”. Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case “at the earliest practicable time”. In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term “preliminary order” is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that “a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts”. That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

### **5. Conduct of arbitral proceedings**

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) *Fundamental procedural rights of a party*

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) *Determination of rules of procedure*

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.



36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

*(c) Default of a party*

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 (b)). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 (c)). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 (a)).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

**6. Making of award and termination of proceedings**

*(a) Rules applicable to substance of dispute*

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

*(b) Making of award and other decisions*

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal “place of arbitration”, the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is “on agreed terms” (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits “dissenting opinions”.

**7. *Recourse against award***

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

*(a) Application for setting aside as exclusive recourse*

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating “recourse” (i.e., the means through which a party may actively “attack” the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

*(b) Grounds for setting aside*

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

### ***8. Recognition and enforcement of awards***

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

#### *(a) Towards uniform treatment of all awards irrespective of country of origin*

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between “international” and “non-international” awards instead of relying on the traditional distinction between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

#### *(b) Procedural conditions of recognition and enforcement*

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

*(c) Grounds for refusing recognition or enforcement*

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if “the parties to the arbitration agreement were, under the law applicable to them, under some incapacity”) was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

UNCITRAL secretariat  
Vienna International Centre  
P.O. Box 500  
1400 Vienna  
Austria

Telephone: (+43-1) 26060-4060  
Telefax: (+43-1) 26060-5813  
Internet: [www.uncitral.org](http://www.uncitral.org)  
E-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org)



### *Part Three*

## **Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session**

*The United Nations Commission on International Trade Law,*

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

*Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

*Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

*Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,<sup>1</sup> has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

*Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes”,

*Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

---

<sup>1</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

*Considering* the wide use of electronic commerce,

*Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,<sup>2</sup> as subsequently revised, particularly with respect to article 7,<sup>3</sup> the UNCITRAL Model Law on Electronic Commerce,<sup>4</sup> the UNCITRAL Model Law on Electronic Signatures<sup>5</sup> and the United Nations Convention on the Use of Electronic Communications in International Contracts,<sup>6</sup>

*Taking into account also* enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

*Considering that*, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

---

<sup>2</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I, and United Nations publication, Sales No. E.95.V.18.

<sup>3</sup>*Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

<sup>4</sup>*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

<sup>5</sup>*Ibid.*, *Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

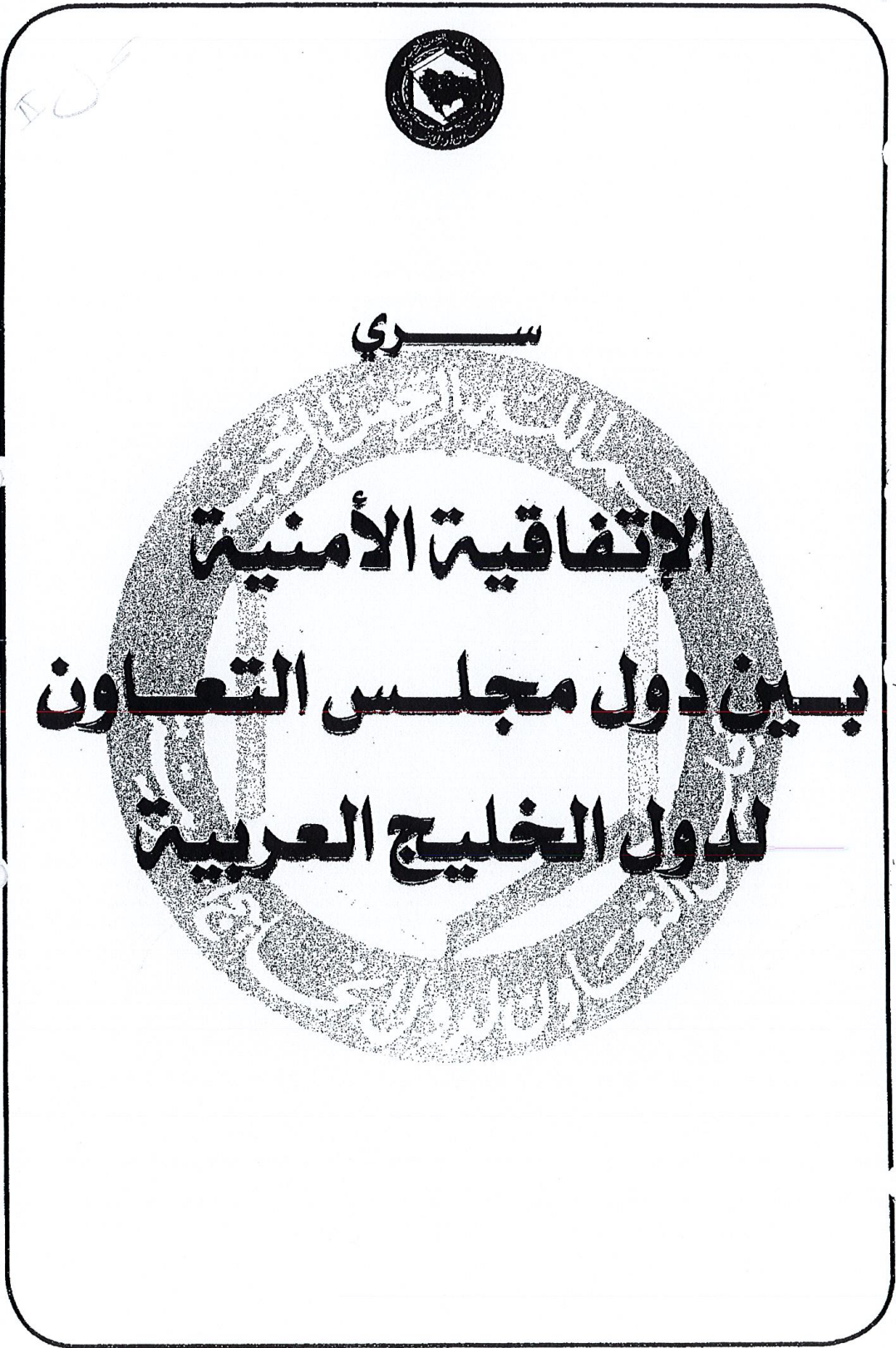
<sup>6</sup>General Assembly resolution 60/21, annex.



## **Annex 16**

**Security Agreement Between the States of the Gulf Cooperation  
Council, signed at Riyadh on 13 November 2012**

Archives of the Kingdom of Bahrain Ministry of Foreign Affairs



**Confidential**

**Security Agreement Between the States of the  
Gulf  
Cooperation Council**



## الاتفاقية الأمنية

### بين دول مجلس التعاون لدول الخليج العربية

إن الدول الأعضاء في مجلس التعاون لدول الخليج العربية،  
ويشار إليها فيما بعد بـ (الدول الأطراف)،  
إيماناً منها بمبادئ الشريعة الإسلامية السمحة،  
وانطلاقاً من روح الأخوة الصادقة والروابط الوثيقة التي تجمع في ما بينها،  
واقتراناً منها بأواصر الروابط التي تجمع بين أبنائها ووحدتها الإقليمية  
ومصيرها الواحد ومصالحها المشتركة،  
وتأكيداً للأسس والمبادئ التي أرساها مجلس التعاون لدول الخليج  
العربية،  
وتحقيقاً للمبدأ الذي ينص على أن المحافظة على أمن واستقرار دول  
المجلس هو مسئولية جماعية يقع عبؤها على هذه الدول،  
وحرصاً منها على تحقيق أكبر قدر من التعاون من أجل المساهمة  
الفاعلة في مكافحة الجريمة بكافة أشكالها وصورها ورفع كفاءة  
الأجهزة الأمنية،  
وتعزيزاً للعلاقات التعاونية بينها بما يخدم المصالح المشتركة،  
واقتراناً بأن التنسيق والتعاون والتكامل فيما بينها، إنما يخدم أهدافها  
ومصالحها العليا،  
وإدراكاً منها بخطورة الجريمة وآثارها الضارة على الجوانب الاقتصادية  
 والاجتماعية والسياسية للمجتمع،  
ووصولاً بالتعاون الأمني القائم بين دول المجلس إلى مستوى أمثل وأشمل،  
فقد اتفقت على ما يلي:-

## **Security Agreement Between the States of the Gulf Cooperation Council**

The Member States of the Gulf Cooperation Council, hereinafter referred to as the “States Parties,”

BELIEVING in the principles of Islamic law,

IN THE SPIRIT of the sincere brotherhood and close ties that bind them together, and recognizing the bonds that unite their people, their territorial unity, their destiny and common interests,

EMPHASIZING the foundations and principles laid down by the Gulf Cooperation Council,

IN ORDER to achieve the principle asserting that the preservation of the security and stability of the Gulf Cooperation Council States is a collective responsibility of all members,

OUT OF THE KEENNESS to achieve the greatest possible level of cooperation in order to contribute effectively to the fight against crime in all its forms and manifestations and to improve the competencies of security bodies,

IN ORDER TO enhance cooperation between them to serve the common interests,

CONVINCED that coordination, cooperation and integration among them serves their goals,

IN RECOGNITION of the gravity of crime and its negative effects on the economic, social and political aspects of society,

WITH THE AIM TO reach an optimal and comprehensive level of the existing security cooperation among the Gulf Cooperation Council States, have agreed as follows:



## الفصل الأول أحكام عامة

### المادة (1)

تتعاون الدول الأطراف في إطار هذه الاتفاقية، وفقاً لتشريعاتها الوطنية والتزاماتها الدولية.

### المادة (2)

تتعاون الدول الأطراف في ما بينها، لملاحقة الخارجين على القانون أو النظام، أو المطلوبين من الدول الأطراف، أياً كانت جنسياتهم، واتخاذ الإجراءات اللازمة بحققهم.

### المادة (3)

تعمل كل دولة طرف على اتخاذ الإجراءات القانونية فيما بعد جريمة، وفقاً للتشريعات النافذة لديها، عند تدخل مواطنيها أو المقيمين بها في الشؤون الداخلية لأي من الدول الأطراف الأخرى.

## الفصل الثاني مجالات التعاون والتنسيق الأمني

### المادة (4)

تتعاون كل دولة طرف بإحاطة الأطراف الأخرى - عند الطلب - بالمعلومات والبيانات الشخصية عن مواطني الدولة الطالبة أو المقيمين بها، في مجال اختصاصات وزارات الداخلية.

**CHAPTER I**  
**General Provisions**

**ARTICLE (1)**

The State Parties shall cooperate in the framework of this agreement according to its national legislation and international commitments.

**ARTICLE (2)**

State Parties shall cooperate with one another to prosecute and take necessary action regarding those who are out of law or order or are wanted by States Parties regardless of their nationality.

**ARTICLE (3)**

Each State Party shall take legal action in respect of offenses in accordance with its legislation in force when its nationals or residents interfere in the internal affairs of any other State Party.

**CHAPTER II**  
**Areas of Security Cooperation and Coordination**

**ARTICLE (4)**

Each State Party shall cooperate with the other parties, upon request, regarding personal information and data of the nationals or residents of the Requesting States within the area of competence of the Ministries of Interior.



### المادة (5)

لا يجوز توظيف مواطن أي دولة طرف، سبق له العمل في أحد الأجهزة الأمنية بدولته، للعمل في جهاز أمني بدولة طرف أخرى، إلا بموافقة وزارة الداخلية بدولته وفقا لقوانينها (أنظمتها) واجراءاتها المرعية.

### المادة (6)

تعمل الدول الأطراف، قدر الإمكان، على الآتي:

(أ) تبادل المعلومات والخبرات التي من شأنها الإسهام في تطوير سبل منع ومكافحة الجريمة على اختلاف أشكالها وأنواعها، لاسيما الجريمة المنظمة عبر الوطنية والمستجدة، وتقديم الدعم الفني في كافة الشئون الأمنية بما يحقق التكامل المنشود.

(ب) توحيد القوانين (الأنظمة) والإجراءات، بما يكفل مكافحة الجريمة بمختلف أشكالها وأنواعها، تحقيقا لأمن الدول الأطراف.

(ج) تبادل القوانين (الأنظمة) واللوائح المتعلقة بعمل وزارات الداخلية وأجهزة الأمن الأخرى ذات الصلة، وكذلك الأبحاث والكتب والمطبوعات والتشترات التي تصدرها الوزارات والأجهزة المماثلة، ووسائل الإيضاح، والأفلام التدريبية الموجودة لديها.

(د) تقديم التسهيلات اللازمة في مجالات التعليم والتدريب لمنتسبي وزارات الداخلية والأجهزة المماثلة في الدول الأطراف في المعاهد والكلية والمؤسسات المتخصصة لديها.

(هـ) إنشاء مراكز تدريب أمنية متخصصة في القروع المختلفة التي تحتاج إليها أجهزة الأمن في الدول الأطراف.

(و) تزويد الدول الأطراف ببرامج المؤتمرات والندوات والحلقات الدراسية التي تعقدتها في مجال اختصاص وزارات الداخلية وأجهزة الأمن.



**ARTICLE (5)**

A citizen of any State Party who has previously worked in one of his State's security bodies may not be employed in a security body of another State Party, except with the consent of his State's Ministry of the Interior in accordance with its laws (regulations) and procedures.

**ARTICLE (6)**

To the extent possible, State Parties shall:

- a) Exchange information and expertise that will contribute to the development of ways to prevent and combat crime in all its forms and manifestations, in particular the emerging organized transnational crime, and to provide technical support in all security matters in order to achieve the desired integration.
- b) Unify laws (regulations) and procedures, to ensure the fight against crime in all its forms and manifestations, for the security of State Parties.
- c) Exchange of laws (regulations) and rules related to the work of the Ministries of Interior and other relevant security bodies, as well as research, books, publications and leaflets issued by ministries and similar bodies, and the visual aids and training films that they have.
- d) Provide the necessary support in the fields of education and training for employees of the Ministries of Interior and similar bodies in the Party States in their institutes, colleges and specialized institutions.
- e) Establish specialized security training centers in the various branches required by the security bodies of the State Parties;
- f) Provide State Parties with the agenda of conferences, symposia and seminars held in the field of competence of the Ministries of the Interior and the security bodies.



ن دعم الأجهزة الأمنية بأحدث التقنيات، وتدريب العاملين من خلال دورات تدريبية مشتركة.

ح عقد اللقاءات الدورية، وتبادل الزيارات الميدانية بين العاملين في وزارات الداخلية وأجهزة الأمن، على كافة المستويات، وفي مختلف الأنشطة بهدف تعميق الصلات، وتوثيق التعاون والاطلاع على النظم المطبقة.

#### المادة (7)

تتشاور وزارات الداخلية، وأجهزة الأمن المماثلة في الدول الأطراف مسبقاً، ويتعاون ممثلوها لتنسيق وتوحيد مواقفهم تجاه المواضيع المطروحة على جداول أعمال المؤتمرات والاجتماعات الإقليمية والدولية.

#### المادة (8)

تتبادل الدول الأطراف أسماء المبعدين وأصحاب السوابق الخطرة، والبيانات والمعلومات المتعلقة بهم، والإبلاغ عن تحركاتهم.

#### المادة (9)

تتبادل الدول الأطراف المعلومات المتعلقة بالجرائم التي تم ارتكابها أو يتم الإعداد لارتكابها على إقليم دولة طرف أخرى، والتي لها علاقة بالعصابات الإجرامية، وما تم اتخاذه من إجراءات لتعقبها ومكافحتها.

#### المادة (10)

تعمل الدول الأطراف، بشكل جماعي أو ثنائي، على تحقيق التكامل الفعلي للأجهزة الأمنية والتعاون الميداني فيما بينها، وتقديم الدعم والمساندة -في حالة الطلب- لأي دولة طرف، وفقاً لظروف الدولة أو الدول الأطراف المطلوب منها، وذلك لمواجهة الاضطرابات الأمنية والكوارث.

- g) Support security bodies with the latest technologies and train staff through joint training courses.
- h) Hold periodic meetings and exchange field visits between the staffs of the Ministries of Interior and bodies services at all levels and in various activities with the purpose of strengthening relations and reinforcing cooperation as well as reviewing the applied systems.

#### **ARTICLE (7)**

The Ministries of Interior and similar security bodies of the State Parties shall consult in advance and their representatives shall cooperate to coordinate and consolidate their positions on the topics on the agendas of regional and international conferences and meetings.

#### **ARTICLE (8)**

State Parties shall exchange the names of deportees and ex-convicts, their data and reports on their movements.

#### **ARTICLE (9)**

State Parties shall exchange information on crimes committed or being planned for in the territory of another State Party relating to criminal gangs, and the measures taken to track and combat them.

#### **ARTICLE (10)**

State Parties shall act collectively or bilaterally to ensure the effective integration and field cooperation between security bodies, as well as to provide support - upon request - to any Party State, in accordance with the circumstances of the requested States or Party States, to address security disturbance and disasters.



### المادة (11)

تعمل الدول الأطراف، وفقاً لكل حالة، وبناءً على طلب دولة طرف، بالسماح للمختصين في الدولة الطرف الطالبة بحضور مرحلة جمع الاستدلالات التي تجري في جرائم وقعت فيها ولها صلة بأمنها، أو بجرائم مماثلة وقعت في إقليمها، أو كان مرتكبوها ممن يتمتعون بجنسيتها، أو كان لهم شركاء يقيمون فيها، أو من المقرر أن تترتب نتائجها في إقليمها.

## الفصل الثالث

### ضبط الحدود

### المادة (12)

تتعاون الدول الأطراف على منع الدخول أو الخروج غير المشروع للأشخاص، ومكافحة التهريب والتسلل عبر حدودها، وتتخذ الإجراءات القانونية (النظامية) المناسبة بحق من يقوم بهذه الأعمال أو يثبت له دور فيها.

### المادة (13)

تقوم السلطات المختصة في الدول الأطراف بالقبض على من يدخلون إقليمها بطريقة غير مشروعة، وتتخذ الإجراءات المناسبة بحقهم، وإعادتهم وفقاً لما يلي:

أ) الداخلون بطريقة غير مشروعة إلى إقليم إحدى الدول الأطراف الذين كانوا قد دخلوا حدود إحداهما بطريقة مشروعة، يعادون إلى مركز أمن حدودي أو منفذ الدولة التي دخلوها بطريقة مشروعة، ما لم يكونوا من مواطني الدولة التي دخلوا إقليمها.

ب) مجهولو الهوية ومن لا يحملون وثائق ثبوتية، وكذلك الداخلون بطريقة غير مشروعة الذين كانوا قد دخلوا إقليم إحداهما بطريقة غير مشروعة

**ARTICLE (11)**

State Parties shall, on a case-by-case basis and upon the request of a State Party, permit specialists from the requesting State Party to be present at the gathering of evidence involving security crimes or similar offenses committed in their territory or by their nationals or those who have been granted their citizenship or have partners who reside in them or if the crime has direct outcomes on their territory.

**CHAPTER III  
Border Control****ARTICLE (12)**

State Parties shall cooperate in preventing the illegal entry or exit of persons, combating smuggling and infiltration across their borders and taking appropriate legal measures against those who carry out such activities or found to have a role in doing them.

**ARTICLE (13)**

The relevant authorities of State Parties shall arrest persons who illegally enter their territory, take appropriate measures in their regard and repatriate them according to the following:

- a) Those who illegally enter the territory of one of the State Parties through legally entering one of them previously shall be returned to a border security center or the port of the State in which they entered legally, unless they are nationals of the State which they entered.
- b) Unidentified persons and those who do not carry identity documents, as well as illegal entrants who have entered the territory of one of the State Parties illegally after



بعد أن دخلوا إقليم دولة أخرى أو أكثر بطريق غير مشروع، تتولى الدولة إعادتهم إلى الدولة التي قدموا منها، ما لم يكونوا من مواطني الدولة التي دخلوا إقليمها.

#### المادة (14)

أ) تعمل الدول الأطراف على إيجاد آلية لتنظيم سلطات الحدود، تكون ثنائية بين كل دولتين من الدول الأطراف، يتم في ضوءها التعاون في مجال ضبط الحدود المشتركة، من حيث:

- 1- عقد اجتماعات دورية.
- 2- تنظيم وتنسيق دوريات تلاقي، ودوريات مشتركة.
- 3- تنظيم عمليات المطاردة البرية والبحرية.
- 4- تقديم المساعدة والإسعافات الأولية اللازمة على الحدود عند الطلب.
- 5- تنظيم الاتصالات المشتركة في المراكز الحدودية.
- 6- التنسيق بشأن فتح المنافذ الحدودية بين الطرفين.

ب) في حال عدم وجود اتفاق ثنائي، وفقا لما ورد في الفقرة (أ)، لا يجوز لدوريات المطاردة التابعة لأي دولة من الدول الأطراف اجتياز الحدود البرية للدولة المجاورة، ويجوز لدوريات المطاردة البحرية اجتياز الحدود حتى نقطة تلاقي الدوريات بحرا، والتي يتفق عليها بين الدولتين المتجاورتين، وتتولى دوريات الدولة التي دخلت المطاردون إلى حدودها - بعد إبلاغها بذلك - مطاردتهم، وإلقاء القبض عليهم، وتسليمهم وجميع ما في حوزتهم، ووسائل نقلهم إلى أقرب مركز أو دورية تابعة للدولة التي بدأت المطاردة في إقليمها متى كانت القوانين (الأنظمة) المعمول بها في الدولة التي تم إلقاء القبض فيها تسمح بذلك.

entering another or other State's territory, shall be returned by the State to the State from which they came, unless they are nationals of the State which they entered.

#### ARTICLE (14)

- a) State Parties shall work to devise a mechanism for the organization of border authorities, which shall be bilateral between each two State Parties, to cooperate in the area of joint borders control, in terms of:
- 1- Holding periodic meetings
  - 2- Organization and coordination of rendezvous patrols and joint patrols
  - 3- Organization of pursuits by land or sea
  - 4- Providing the necessary assistance and first aid at borders upon request.
  - 5- Organization of joint communications at border posts
  - 6- Coordination on the opening of border crossings between the parties.
- b) In case a bilateral agreement did not exist, in accordance with paragraph (a), the pursuit patrols of any State Party may not cross the land borders of the neighboring State. The maritime pursuit patrols may cross the border to the rendezvous point at sea which is agreed upon by the two neighboring States. The patrols of the State in which the offenders have entered – after being informed – shall continue to pursue, arrest, and extradite them and their possessions, and transfer them to the nearest center or patrol affiliated to the State in which the pursuit has started, whenever the laws (regulations) applicable in that state allowed it.



## الفصل الرابع التعاون في مجال عمليات إنقاذ الأشخاص في الحوادث

### المادة (15)

- (أ) تتعاون الدول الأطراف على تسهيل إجراءات فيضوت الإسعاف الجوي، أو دخول الإسعاف البري والبحري لإقليمها، لإنقاذ المصابين في الحوادث.
- (ب) يتم نقل المصابين وطواقم الإسعاف المصاحب بدون انتظار إجراءات الدخول أو الخروج الرسمية لدى أي دولة طرف، مع مراعاة استيفائها لاحقاً.

## الفصل الخامس تسليم المتهمين والمحكومين

### المادة (16)

تعامل الدول الأطراف، وفقاً لما تقضي به التشريعات الوطنية والاتفاقيات التي تلتزم بها الدولة الطرف المطلوب منها التسليم، على تسليم الأشخاص الموجودين في إقليمها، الموجه إليهم اتهام، أو المحكوم عليهم من السلطات المختصة لدى أي منها.



**CHAPTER IV**  
**Cooperation in the Field of Rescue Operations in Accidents**

**ARTICLE (15)**

- a) State Parties shall cooperate to facilitate the landing of air ambulance, or the entry of land or sea ambulance to their territory, in order to save persons injured in accidents.
  
- b) The injured persons and accompanying ambulance crew shall be transferred without waiting for official entry or exit procedures of any State Party, taking into account completing the procedures later.

**CHAPTER V**  
**Extradition of Accused and Sentenced Persons**

**ARTICLE (16)**

State Parties shall, in accordance with national legislation and conventions to which the requested State Party commits to extradition, extradite persons found in their territory who are accused or sentenced by the relevant authorities of any other State Parties.



## الفصل السادس أحكام ختامية

### المادة (17)

تعقد الدول الأطراف الاجتماعات والمشاورات اللازمة لتدعيم فاعلية التعاون وتطويره وفقا لهذه الاتفاقية.

### المادة (18)

تتخذ الدول الأطراف الإجراءات الضرورية للمحافظة على سرية المعلومات والمواد والوثائق والمستندات المتبادلة بينها، بموجب هذه الاتفاقية، ولا يتم استخدامها في غير الأغراض التي طلبت من أجلها، أو تسليمها أو الإفصاح عنها أو إفشائها لطرف ثالث، دون موافقة كتابية من الطرف الذي قدمها.

### المادة (19)

لا تخل أحكام هذه الاتفاقية بالاتفاقيات الثنائية المرتبطة بها بعض الدول الأطراف في ما بينها، وفي حالة تعارض أحكام هذه الاتفاقية مع أحكام إحدى هذه الاتفاقيات الثنائية، تطبق الدولتان في علاقتهما المتبادلة الأحكام الأكثر تحقيقا للتعاون الأمني الشامل.

### المادة (20)

(أ) تقر هذه الاتفاقية من المجلس الأعلى، وتخضع لإجراءات المصادقة المعمول بها لدى كل دولة طرف، وتدخل حيز النفاذ بعد مضي ثلاثين يوما من تاريخ إيداع وثائق تصديق ثلثي الدول الموقعة، وتحل هذه الاتفاقية محل الاتفاقية الأمنية بين دول مجلس التعاون لدول الخليج العربية الموقعة بتاريخ 25 جمادى الآخرة 1415 هـ الموافق 28 نوفمبر 1994 م.

## **CHAPTER VI**

### **Final Provisions**

#### **Article (17)**

The State Parties shall hold the necessary meetings and consultations to enhance the effectiveness and development of cooperation in accordance with this agreement.

#### **Article (18)**

State Parties shall take the necessary measures to keep the confidentiality of information, materials, and documents exchanged between them under this agreement, and not use them for purposes other than those for which they were requested. The State Parties also shall also not reveal them to a third party without a written consent of the State Party that provided them.

#### **Article (19)**

The provisions of this agreement are without prejudice to the bilateral agreements to which certain States Parties are committed. Should the provisions of this agreement conflict with the provisions of one of bilateral agreements, the two States shall in their mutual relations apply the provisions most suitable to achieve comprehensive security cooperation.

#### **Article (20)**

- a) This agreement shall be approved by the Supreme Council and shall be subject to the ratification procedures of each State Party. It shall enter into force thirty days after the date of deposit of the instruments and the ratification of two thirds of the signatory States. This agreement supersedes the Security Agreement between the States of the Gulf Cooperation Council that was signed on 25 Jumada Al-Thani 1415 corresponding to 28 November 1994.



ب) يجوز لكل دولة طرف أن تنسحب من هذه الاتفاقية بإخطار كتابي ترسله إلى الأمين العام لمجلس التعاون لدول الخليج العربية، ولا ينتج الإنسحاب أثره إلا بعد مضي ستة أشهر من تاريخ استلام الإخطار، مع عدم الإخلال بتنفيذ الطلبات السابقة على استلام الإخطار.

ج) يجوز تعديل هذه الاتفاقية بموافقة المجلس الأعلى، ويخضع التعديل للإجراءات المنصوص عليها في هذه المادة.

حررت هذه الاتفاقية باللغة العربية في مدينة الرياض بتاريخ 1433/12/28 هـ الموافق 2012/11/13 م، من أصل واحد يودع لدى الأمانة العامة لمجلس التعاون لدول الخليج العربية، وتسلم نسخة منه مطابقة للأصل لكل دولة من الدول الأطراف في هذه الاتفاقية.

وأثباتاً لما تقدم، تفضل أصحاب السمو والمعالي وزراء الداخلية بدول مجلس التعاون لدول الخليج العربية بتوقيع هذه الاتفاقية:-

1. دولة الإمارات العربية المتحدة:
2. مملكة البحرين:
3. المملكة العربية السعودية:
4. سلطنة عمان:
5. دولة قطر:
6. دولة الكويت:

\*\*\*\*\*

- b) Each State Party may withdraw from this agreement through submitting a written notice to the Secretary-General of the Gulf Cooperation Council. The withdrawal shall not take effect until six months have passed from the date of receipt of the notice, and it shall be without prejudice to the implementation of requests made prior to the receipt of the withdrawal notice.
- c) This agreement may be amended with the approval of the Supreme Council. The amendment shall be subject to the procedures provided for in this Article.

Done in Riyadh on 28/12/1433 Hijri corresponding to 13/11/2012 in one copy to be kept in the General Secretariat of the Gulf Cooperation Council. A copy of this agreement shall be given to each State of the State Parties in this agreement.

IN WITNESS THEREOF, Their Highnesses and Excellencies the Ministers of Interior of the Gulf Cooperation Council signed the agreement.

- 1- The United Arab Emirates
- 2- The Kingdom of Bahrain
- 3- The Kingdom of Saudi Arabia
- 4- The Sultanate of Oman
- 5- The State of Qatar
- 6- The State of Kuwait



## **Annex 17**

ICAO, Rules of Procedure for the Council, Ninth Edition 2013

ICAO document 7559/9

**Doc 7559/9**



# Rules of Procedure for the Council

---

Approved by the Council and  
published by its decision

Ninth Edition — 2013

International Civil Aviation Organization





**Doc 7559/9**



# Rules of Procedure for the Council

---

Approved by the Council and  
published by its decision

Ninth Edition — 2013

*Note.— Throughout these Rules of Procedure, the use of the male gender should be understood to include male and female persons.*

International Civil Aviation Organization

Published in separate English, Arabic, Chinese, French, Russian  
and Spanish editions by the  
INTERNATIONAL CIVIL AVIATION ORGANIZATION  
999 University Street, Montréal, Quebec, Canada H3C 5H7

For ordering information and for a complete listing of sales agents  
and booksellers, please go to the ICAO website at [www.icao.int](http://www.icao.int)

*Eighth Edition, 2007*

*Ninth Edition, 2013*

**Doc 7559, *Rules of Procedure for the Council***

Order Number: 7559

ISBN 978-92-9249-382-0

© ICAO 2013

All rights reserved. No part of this publication may be reproduced, stored in  
a retrieval system or transmitted in any form or by any means, without prior  
permission in writing from the International Civil Aviation Organization.

## Table of Contents

	<i>Page</i>
PRELIMINARY SECTION	
Definitions .....	1
SECTION I	
Representatives, Alternates and Observers, and their credentials.....	3
SECTION II	
Officers of the Council and the Secretary General .....	4
SECTION III	
Commissions, Committees and Working Groups of the Council .....	6
SECTION IV	
Sessions of the Council.....	7
SECTION V	
Work Programme and Order of Business .....	8
SECTION VI	
Conduct of business.....	12
SECTION VII	
Voting.....	17
SECTION VIII	
Approval of proposals with respect to administrative matters.....	19

	<i>Page</i>
SECTION IX	
Languages of the Council .....	20
SECTION X	
Records of proceedings .....	21
SECTION XI	
Interpretation, revocation, suspension and amendment of the Rules of Procedure .....	22
APPENDIX A	
Rules and Procedures for the election of the President of the Council .....	24
APPENDIX B	
Rules and Procedures for the election of the Vice-Presidents of the Council .....	26
APPENDIX C	
Rules and Procedures for the appointment of the Secretary General .....	27
APPENDIX D	
Rules and Procedures governing the appointment of the Members, Alternates and President of the Air Navigation Commission .....	29
APPENDIX E	
Rules and Procedures governing the appointment of the Members, Alternates and Chairmen of Commissions (other than the Air Navigation Commission), Committees and Working Groups .....	31
APPENDIX F	
Guidelines on when Council meetings should be held in closed session (Rule 37) and when Council documents should be marked “Restricted” .....	32

## **RULES OF PROCEDURE FOR THE COUNCIL\***

### **PRELIMINARY SECTION**

#### **DEFINITIONS**

For the purpose of these Rules, the expression:

*Alternate* — means a person designated and authorized by a Member of the Council to act on its behalf in the absence\*\* of the Representative, and holding credentials as evidence thereof.

*Convention* — means the Convention on International Civil Aviation.

*Majority of the Members of the Council* — means more than half of the total membership of the Council.

*Meeting* — means a single sitting of the Council from the time the Council comes to order until it adjourns.

*Member of the Council* — means a Contracting State elected by the Assembly to form part of the Council in accordance with Article 50 of the Convention.

*Observer* — means a person representing a Contracting State not represented on the Council, a non-Contracting State, an inter-

---

\* Revised on 28 November 1969, entered into force on 27 April 1970; amended by the Council on 12 May 1971 (Rule 50), 17 March 1976 (Rules 56 and 57), 13 April 1976 (Rule 16 a)), 12 September 1980 (Rule 56), 9 June 1999 (Rule 56), 9 June 2006 (entered into force on 1 August 2006), 16 March 2007 and 20 June 2013 (Rule 12).

\*\* This does not require the Representative to leave the room in the case of a Council meeting.

national organization or other body, designated and authorized by his State or organization to participate in one or more of the meetings of the Council without the right to vote or to move or second motions or amendments, under such further conditions as the Council may determine and holding credentials as evidence of his appointment.

*Order of business* — means a list of items of business for consideration at one meeting.

*President* — means the President of the Council.

*Representative* — means a person designated and authorized by a Member of the Council to act on the Council, and holding credentials as evidence thereof.

*Secret Ballot* — means a ballot where the marking of the ballot paper by a Representative takes place in private and cannot be overseen by any person other than the Representative's Alternate. All ballot papers distributed should be exactly alike so that it cannot be determined how any one Representative voted.

*Work Programme* — means the list of items to be considered during a session of the Council.

*Working Day* — means a weekday on which the Organization conducts business at Headquarters and does not observe a public holiday.

*Working paper* — means a paper proposing Action by the Council.

## SECTION I

### REPRESENTATIVES, ALTERNATES AND OBSERVERS, AND THEIR CREDENTIALS

#### *Rule 1*

Each Member of the Council shall have one Representative, whose place may be taken by an Alternate. No person may represent more than one State.

*Rule 2*

Credentials of Representatives, of their Alternates and of Observers shall be signed on behalf of the State, organization or body concerned and indicate the capacity in which the individual is to serve, and shall be deposited with the Secretary General.

*Rule 3*

The credentials shall be examined by the President, one of the Vice-Presidents and the Secretary General, who shall report to the Council.

*Rule 4*

Any Representative, Alternate or Observer shall be entitled, pending the presentation of the report on his credentials and Council action thereon, to attend meetings and to participate in them subject, however, to the limits set forth in these Rules. The Council may bar from any further part in the activities of the Council, Commissions, Committees and Working Groups any Representative, Alternate or Observer whose credentials it finds to be insufficient.

**SECTION II**

**OFFICERS OF THE COUNCIL  
AND THE SECRETARY GENERAL**

*Rule 5*

The Council shall elect its President for a term of three years, the exact dates of commencement and termination of which will be determined by the Council. Candidates shall be nominated by Contracting States. The rules and procedures governing the election of the President are set out in Appendix A.



*Rule 6*

The President of the Council may be removed from office at any time by a decision of the Council taken by a majority of its Members, provided that the motion for that purpose is introduced in writing and is moved jointly by not less than one third of the Members of the Council. Upon the introduction of such a motion, the meeting shall be adjourned. As soon as practicable thereafter, a meeting to consider the motion shall be called by the Vice-President entitled to act under Rule 10. Pending the decision of the Council, the President shall refrain from carrying out the normal functions of the President.

*Rule 7*

In the event of the President's death, removal from office, or resignation, or if the President is otherwise unable to complete his term of office, a new President shall be elected by the Council as soon as possible thereafter and the latter shall hold office for the remainder of the term of his predecessor. If the President gives prior notice of resignation, the election shall be held on a date to be decided by the Council, if possible before the resignation takes effect.

*Rule 8*

The Council shall elect from among Representatives a First, a Second and a Third Vice-President. Candidates shall be nominated by one or more Council Members. The rules set out in Appendix B shall govern the election of each Vice-President.

*Rule 9*

The term of office of a Vice-President shall extend for one year from the date of his election, but he may continue to hold office thereafter until his successor is elected, provided that his term of office shall not extend beyond the end of the term of the Council unless the State which he represents continues to be a Member of the Council.

*Rule 10*

In the absence of the President, the First Vice-President, the Second Vice-President or the Third Vice-President in that order shall exercise the functions vested in the President by these Rules of Procedure.

*Rule 11*

A Vice-President when acting in the absence of the President shall retain his right to vote.

*Rule 12*

The Council shall appoint the Secretary General for a term of three years. Candidates shall be nominated by Contracting States. A Secretary General who has served for two terms shall not be appointed for a third term. The rules and procedures governing the appointment of the Secretary General are set out in Appendix C.

*Rule 13*

The Secretary General of the Organization shall be the Secretary of the Council.

*Rule 14*

The Secretary General may be removed from office by a decision of the Council taken by a majority of its Members, provided that the motion for that purpose is introduced in writing and is moved jointly by not less than one third of the Members of the Council. As soon as practicable thereafter, a meeting to consider the motion shall be called by the President. Pending the decision of the Council, the Secretary General shall refrain from carrying out the normal functions of the Secretary General.

*Rule 15*

In the event of the Secretary General's death, removal from office, or resignation, or if the Secretary General is otherwise unable to complete his term of office, the Council shall, notwithstanding the procedure in Appendix C, draw up an appropriate timetable for appointing a successor. If the Secretary General gives prior notice of resignation, the appointment shall be held on a date to be decided by the Council, if possible before the resignation takes effect.

**SECTION III****COMMISSIONS, COMMITTEES AND  
WORKING GROUPS OF THE COUNCIL***Rule 16*

- a) The Council shall appoint the Members of the Air Navigation Commission from candidates nominated by Contracting States. Such appointment shall be for a term of three years, or for the remainder of the term of a predecessor.
- b) The Council may appoint Alternates to act in the absence of a member of the Air Navigation Commission.
- c) The Council shall appoint the President of the Air Navigation Commission in accordance with the Guidelines set out in paragraph 4 of Appendix D.
- d) The rules and procedures governing the appointment of the Members, Alternates and President of the Air Navigation Commission are set out in Appendix D.

*Rule 17*

- a) In addition to the Air Navigation Commission, the Air Transport Committee and the Finance Committee, the Council may establish

other Commissions, Committees or Working Groups, either Standing or Temporary. The Council shall elect the Members and Alternates of standing bodies and shall specify at the time of establishing such bodies whether the body shall also elect its own Chairman. Standing bodies shall elect their own vice-Chairmen.

- b) The Council may elect an Alternate who may act and vote on behalf of a Member of the Standing Commission, Committee or Working Group who is absent or who is discharging the functions of Chairman.
- c) The rules and procedures governing the election of the Members, Alternates and Chairmen of Commissions (other than the Air Navigation Commission), Committees and Working Groups are set out in Appendix E.
- d) The temporary bodies mentioned in paragraph a) shall elect their own officers, unless the Council decides otherwise.
- e) The method of selection, terms of reference and working methods of Temporary Commissions, Committees or Working Groups shall be determined by the Council in each case.

## **SECTION IV**

### **SESSIONS OF THE COUNCIL**

#### *Rule 18*

The Council shall meet at such times and for such periods as it deems necessary for the proper discharge of its responsibilities. The Council shall determine the dates of the opening and termination of each session.

*Rule 19*

- a) Between two consecutive sessions of the Council, the President, on his own initiative or at the request of a Contracting State, after consulting the Members of the Council and with the approval of the majority of the Members of the Council, shall call an extraordinary session or change the date which the Council has set for the opening of the next session. No such action shall result in a Council Meeting being held on less than seven days' notice.
- b) When the President considers that the urgency of a situation so warrants, he may, after consultation with the most senior Vice-President available, convene a special session of the Council provided that no less than 48 hours' notice is given.

*Rule 20*

If a part of a Council session is devoted primarily to Committee meetings, the President may call such Council meetings as he considers necessary. No such meetings shall be called on less than 48 hours' notice without the approval of the majority of the Council.

*Rule 21*

The Council shall meet at the seat of the Organization unless the Council decides that a particular session or meeting shall take place elsewhere.

**SECTION V****WORK PROGRAMME AND ORDER OF BUSINESS***Rule 22*

A Provisional Work Programme of each session of the Council shall be prepared by the Secretary General after consultation with the President,

and presented to the Council for approval. The presentation to the Council should normally, and wherever practicable, be made during the preceding session. The Council should indicate the priority which it attaches to the consideration of the various items in the Provisional Work Programme.

*Rule 23*

In preparing the Provisional Work Programme, the Secretary General shall include therein:

- a) subjects which require consideration by the Council by virtue of provisions of the Convention or other international agreement;
- b) subjects to be considered by virtue of decisions of the Assembly or decisions taken by the Council at a previous session;
- c) reports presented or references made to the Council by bodies of the Organization or other international bodies;
- d) any subject proposed by a Member of the Council and transmitted directly to the President or the Secretary General;
- e) any subject referred by a Contracting State for consideration by the Council;
- f) any subject which the President or the Secretary General desires to bring before the Council;
- g) a report on action carried out to implement the decisions of the Council taken at its previous session;
- h) a report on the financial situation of the Organization; and
- i) a report on the progress made by the Organization towards its strategic objectives and the objectives of the Business Plan.

*Rule 24*

- a) Supplementary items may be placed on the Work Programme during a session at the request of any Member of the Council, or of the President or the Secretary General, subject to the approval of the Council.
- b) Any additional subject which fulfils the conditions specified in Rule 26, paragraph d), shall be deemed to be included in the Work Programme of the session concerned.
- c) Supplements to the Work Programme should be issued by the Secretary General showing results of the application of paragraphs a) and b) of this Rule.

*Rule 25*

The Order of Business for each meeting shall be prepared by the Secretary General and approved by the President.

*Rule 26*

- a) The Order of Business shall be distributed to all Representatives at least 24 hours before the meeting of the Council.
- b) All documents listed in the Order of Business shall be distributed to all Representatives in advance of the meeting of the Council to which the Order of Business relates as follows:
  - i) for working papers containing proposals for adopting or amending the Annexes under Article 90 of the Convention — at least 10 working days before the meeting;
  - ii) for other working papers — at least 5 working days before the meeting;

- iii) for reports from Standing Commissions or Committees of the Council or reports of other bodies established under Rule 17 — at least 48 hours before the meeting; and
  - iv) for all other documents — at least 24 hours before the meeting.
- c) A revised Order of Business may be distributed less than 24 hours before the meeting of the Council to include, without substantial change, items of business included in the Order of Business already distributed for that meeting or an item carried over from the immediately preceding meeting provided that the revised Order of Business shall not list any documents not distributed in accordance with paragraph b) of this Rule.
- d) If the Secretary General, or the President, or a Contracting State requests that a new subject, whether or not included in the Work Programme, be considered at a meeting of the Council, such subject shall be listed in an Addendum to the Order of Business to be issued by the Secretary General. Any such additional item shall be considered only if the Council so decides by a majority of its Members.
- e) Notwithstanding paragraphs a) and b), for special sessions of the Council convened pursuant to Rule 19 b), the Order of Business and other documents shall be distributed as soon as practicable in advance of the meeting.

#### *Rule 27*

Any subject on the Work Programme of the Council and any document presented in connection therewith may be referred by the Council to an appropriate existing Committee, Commission or Working Group for consideration and report before its consideration by the Council.

#### *Rule 28*

Any Member of the Council may have placed on the Order of Business any item of the Work Programme which it wishes to be considered



forthwith by the Council. This right is subject to the provisions of the second sentence of paragraph d) of Rule 26, and subject also to the proviso contained in clause b) of Rule 30.

#### *Rule 29*

- a) Any Member of the Council, the President or the Secretary General may introduce for the consideration of the Council documents bearing upon any item on the Council Work Programme, or present any recommendations with respect thereto.
- b) The Council shall, as necessary, issue guidelines on the structure and presentation of working papers and other documents.

#### *Rule 30*

The Council may at any time:

- a) amend the Work Programme of a session; or
- b) decide, by a majority of its Members, to amend the Order of Business of a meeting, provided that no item or other matter which was not included in the Order of Business as distributed in accordance with the provisions of Rule 26, shall be brought to final action at that meeting except by the unanimous consent of all the Members of the Council represented at the meeting.

## **SECTION VI**

### **CONDUCT OF BUSINESS**

#### *Rule 31*

Any Contracting State may participate, without a vote, in the consideration by the Council and by its Committees and Commissions of any question which especially affects its interests (Article 53 of the

Convention). Subject to the approval of the Council, the President may invite such participation where he considers that the condition of special interest is fulfilled. If a Contracting State requests permission to participate on the grounds of special interest, the President shall refer the request to the Council for decision.

*Rule 32*

- a) The Council may invite non-Contracting States and international organizations or other bodies to be represented at any of its meetings by one or more Observers.
- b) The President shall invite the United Nations to be represented by Observers at meetings of the Council.
- c) Subject to the approval of the Council, the President may invite Specialized Agencies in relationship with the United Nations to be represented by Observers at meetings of the Council in which matters of special interest to them are to be discussed.

*Rule 33*

A majority of the Members of the Council shall constitute a quorum for the conduct of the business of the Council.

*Rule 34*

- a) The President shall convene meetings of the Council (Article 51 a) of the Convention); he shall preside at, and declare the opening and closing of each meeting, direct the discussion in a structured and focused way, accord the right to speak, put questions and announce the decisions.
- b) He shall ensure the observance of these Rules.
- c) During the discussion of any matter, a Representative may raise a point of order or any other matter related to the interpretation or

application of these Rules. The point of order or matter related to the interpretation or application of these Rules shall be decided immediately by the President, in accordance with these Rules. A Representative raising a point of order may only speak in relation to that point of order.

#### *Rule 35*

- a) The President shall call upon speakers in the order in which, in his opinion, they have expressed their desire to speak, taking into account the desirability of maintaining a structured and focused discussion; he may call a speaker to order if he considers that the speaker's observations are not relevant to the subject under discussion, or for any other appropriate reason.
- b) Generally, no speaker shall be called to intervene a second time on any question, except for clarification, until all others desiring to intervene have had the opportunity to do so.
- c) The President of the Air Navigation Commission and the Chairman of a Commission, Committee or Working Group may be accorded precedence for the purpose of explaining the conclusions arrived at by the body concerned.

#### *Rule 36*

Rulings given by the President during a meeting of the Council on the interpretation or application of these Rules of Procedure may be appealed by any Member of the Council and the appeal shall be put to vote immediately. The ruling of the President shall stand unless overruled by a majority of the votes cast.

#### *Rule 37*

Meetings of the Council shall be open to the public unless the Council rules by a majority of votes cast that any particular meeting or part

thereof be closed. Guidelines on when Council meetings should be held in closed session and when Council documents should be marked “Restricted” are found in Appendix F.

*Rule 38*

Closed meetings of the Council shall be open to the Alternates and Advisers accompanying the Representatives; to Observers from any other Contracting State, unless the Council decides otherwise; to the members of the Secretariat whose attendance is necessary to the conduct of the meeting or is desired by the Secretary General; and to any other persons invited by the Council. Closed meetings shall not be broadcast by the Organization’s monitoring exchange.

*Rule 39*

Subject to the approval of the Council, the President may invite the President of the Air Navigation Commission and the Chairmen of Commissions, Committees or Working Groups who are not Representatives to attend any open or closed meeting of the Council and participate in its discussion without the right to vote when business relating to the work of their Commission, Committee or Working Group, or to any documentation connected therewith, is before the Council.

*Rule 40*

Any Member of the Council may introduce a motion or amendment thereto, subject to the following rules:

- a) with the exception of motions and amendments relative to nominations, no motion or amendment shall be discussed unless it has been seconded;
- b) no motion or amendment may be withdrawn by its author if an amendment to it is under discussion or has been adopted;

- c) if a motion has been moved, no motion other than one for an amendment to the original motion shall be considered until the original motion has been disposed of. The President shall determine whether such additional motion is so related to the motion already before the Council as to constitute a proper amendment thereto, or whether it is to be regarded as an alternative motion, consideration of which shall be postponed as stipulated above;
- d) if an amendment to a motion has been moved, no amendment other than an amendment to the original one shall be moved until the original amendment has been disposed of. The President shall determine whether such additional amendment is so related to the original one as to constitute an amendment thereto, or whether it is to be regarded as an alternative amendment, consideration of which shall be postponed as stipulated above.

*Rule 41*

- a) The following motions shall have priority over all other motions and shall be taken in the following order:
  - 1) a motion to reverse a ruling by the President;
  - 2) a motion to adjourn the meeting;
  - 3) a motion to fix the time to adjourn the meeting;
  - 4) a motion to suspend the meeting for a limited time;
  - 5) a motion to defer further debate on a particular question, either indefinitely or for a limited period greater than that covered by Rule 42;
  - 6) a motion to refer the matter to a Commission, Committee or Working Group;
  - 7) a motion to invite the opinions of Contracting States on a matter, and to postpone final action thereon until reasonable time for the receipt of such opinions has been allowed;

- 8) a motion to terminate the debate on a particular motion and to take at once a decision thereon.
- b) Action on these matters will be determined by a majority of the votes cast.

*Rule 42*

Upon the request of any Member of the Council, and unless objection is raised by the majority of the Members of the Council, further debate on any item of business shall be deferred for a period of not over two working days, or until the next Council meeting following the second day; but no such action under this paragraph shall be admissible when it would have the effect, due to the anticipated adjournment of a Council session, of making it impossible to resume consideration of the deferred item by the seventh day following the action of deferment. Any such request shall be privileged, and shall be considered immediately on its presentation.

*Rule 43*

The Council may decide, by a majority of its Members, to reopen the discussion of an item already disposed of by the Council in the same session. In that event, and unless the Council by a majority of its Members decides that the item be dealt with forthwith, the item concerned shall be placed on the Order of Business of the next meeting.

**SECTION VII**

**VOTING**

*Rule 44*

Each Member of the Council has one vote.

*Rule 45*

With the exception of motions and amendments relative to nominations, no motion or amendment shall be voted on, unless it has been seconded.

*Rule 46*

Upon the request of any Member of the Council, and unless a majority of its Members decide otherwise:

- a) final action on any motion or amendment thereto shall be delayed until the proposed text of the motion or amendment thereto has been available to Representatives for at least 24 hours;
- b) a vote or final action on any item which has been considered shall, after any initial discussion of the item, be postponed for a period not exceeding that indicated in Rule 42.

*Rule 47*

Any amendment shall be voted on before the motion or amendment to which it refers.

*Rule 48*

On the request of any Member of the Council, and unless opposed by a majority of the votes cast, parts of a motion shall be voted on separately. The resulting motion shall then be put to a final vote in its entirety.

*Rule 49*

Except in the case of a secret ballot, the vote or the abstention from voting of any Member of the Council shall be recorded upon his request. Subject to the same exception, upon the request of any Member of the Council, the individual votes of all the Members of the Council shall be recorded. In the latter case, the roll-call shall be taken

in the English alphabetical order of the names of the Members, beginning with the Member whose name is drawn by lot by the President.

*Rule 50*

Unless opposed by a majority of the Members of the Council, the vote shall be taken by secret ballot if a request to that effect is supported, if made by a Member of the Council, by one other Member, and, if made by the President, by two Members.

*Rule 51*

A vote received by correspondence or electronically shall not be counted unless, in a particular case, the Council has previously decided otherwise. In the latter event, a communication approved by the Council or under its authority shall be sent to the Member of the Council concerned for the purpose of ensuring that due consideration is given to the major points of view expressed on the question before the vote is sent, and reasonable time shall be allowed for a reply.

*Rule 52*

In the event of a tie vote, a second vote on the motion concerned shall be taken at the next meeting of the Council, unless by a majority of the votes cast the Council decides that such second vote be taken during the meeting at which the tie vote took place. Unless there is a majority in favour of the motion on the second vote, it shall be considered lost.

*Rule 53*

The President may take a preliminary informal vote or poll of the Members of the Council on any issue, in terms to be phrased by him, for the purpose of facilitating the subsequent framing of a motion. Such



informal procedure shall not commit the Council or any Member thereof. The results of such informal procedure may be recorded in the Minutes, but no mention of the vote of any Member of the Council shall be made.

## SECTION VIII

### APPROVAL OF PROPOSALS WITH RESPECT TO ADMINISTRATIVE MATTERS

#### *Rule 54*

Notwithstanding the other provisions of these Rules of Procedure, proposals of the Secretary General with respect to such administrative matters including amendments to administrative regulations as require approval of the Council may be approved in accordance with the following procedure:

- 1) the Secretary General shall distribute to the Representatives of the Members of the Council a paper explaining his proposals, and the existence of this paper shall be noted on the Orders of Business of two Council meetings, the first of which shall be held at least one week after the date of the distribution of the paper;
- 2) upon the request of any Member of the Council, filed with the President at least 24 hours before either of these two meetings, the paper shall be brought before the Council for consideration under the normal procedure;
- 3) in the absence of a request for discussion under the provisions of paragraph 2) of this Rule, the proposal of the Secretary General shall be deemed to have been approved on the date of the second of the two Council meetings in the Orders of Business of which the existence of the paper has been noted.

## **SECTION IX**

### **LANGUAGES OF THE COUNCIL**

#### *Rule 55*

The discussions of the Council shall be conducted in the English, Arabic, Chinese, French, Russian and Spanish languages, and interpretation shall take place accordingly.

#### *Rule 56*

The Council shall decide from time to time in which language or languages, specified in Rule 55, the documentation for the Council shall be drawn up.

## **SECTION X**

### **RECORDS OF PROCEEDINGS**

#### *Rule 57*

- a) The Secretary General shall prepare Draft Decisions taken at each meeting within five working days of the meeting to which they relate. These shall be submitted to the President for agreement and shall be distributed to Representatives who shall have three working days to comment thereon. If there are no objections raised by Representatives to the content of the Draft Decisions, the President shall declare them approved. If any objections are raised, the President shall attempt to resolve them with the Representative concerned. If the objections are not so resolved, the matter shall be considered by the Council, without reopening the substance of the debate, if at least two Representatives ask for it to be so.
- b) The Secretary General shall prepare Draft Minutes of each meeting within six weeks of the session of the Council to which they relate. These shall be submitted to the President for agreement, distributed

to Representatives who shall have ten working days to comment thereon and adopted by the Council either through written procedure or at a subsequent meeting.

- c) After adoption, the text of Decisions and Minutes shall be made available to Representatives and to Contracting States.

#### *Rule 58*

Council documents other than the Minutes of closed meetings may be provided to non-Contracting States, to international organizations and to the public, unless otherwise directed by the Council or, between sessions of the Council, by the President.

#### *Rule 59*

The final texts of all resolutions and decisions of the Council, together with Council working and other papers, shall be made available by the Secretary General to all Contracting States as soon as possible.

#### *Rule 60*

Press releases concerning the proceedings of the Council shall be prepared by the Secretary General and shall be approved by the President after consulting with the most senior Vice-President available, before being made public.

### **SECTION XI**

#### **INTERPRETATION, REVOCATION, SUSPENSION AND AMENDMENT OF THE RULES OF PROCEDURE**

#### *Rule 61*

Any Member of the Council may request that any application or interpretation of these Rules by the President otherwise than during a

meeting of the Council, be reviewed by the Council. Such request shall be considered by the Council at its next regular meeting, unless the President considers it advisable to call a special meeting for that purpose under Rule 20 of these Rules of Procedure. The action taken by the President shall stand confirmed unless decided otherwise by a majority of the votes cast.

*Rule 62*

In the case of any provision herein which does not specify the majority by which a decision shall be taken, it is understood that a majority of the votes cast will be sufficient, provided that if a Member of the Council has requested that the decision be taken by a majority of Members of the Council, the latter majority shall apply.

*Rule 63*

- a) These Rules of Procedure or any portion thereof may be revoked, temporarily suspended or amended by Council decision taken by a majority of its Members, provided that no such action is in conflict with the Convention or with any direction given or decision taken by the Assembly. The Secretary General shall maintain and make available to Council Members a central record of all such temporary suspensions.
- b) Notwithstanding Rule 26, proposals to amend or revoke these Rules of Procedure shall be circulated to Representatives at least ten working days in advance of the meeting of the Council in which they will be considered.

## **Appendix A**

### **Rules and Procedures for the election of the President of the Council**

1. The Council shall, not less than three months before the opening of the ordinary session of the Assembly which will elect a new Council, inform Contracting States that the Council to be elected at that Session of the Assembly will elect the President of the Council. The communication should also:

- a) invite attention to the provisions of Article 51 of the Convention;
- b) set out the qualifications, experience and abilities which candidates are expected to demonstrate; and
- c) indicate the date by which the names of candidates for the Presidency should be in the hands of the Secretary General.

2. The names of the candidates shall be circulated by the Secretary General to all Contracting States as soon as they are received.

3. The Council shall invite candidates, at an appropriate date before the election, to present their views and ideas to a meeting of Representatives, and to answer any questions which may be posed.

4. The election of the President shall require a majority of the Members of the Council.

5. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

6. The election shall take place by secret ballot, unless waived by unanimous decision of the Members represented at the meeting.

## **Appendix B**

### **Rules and Procedures for the election of the Vice-Presidents of the Council**

1. The election of each Vice-President shall require a majority of the Members of the Council.
2. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.
3. The election shall take place by secret ballot, unless waived by unanimous decision of the Members represented at the meeting.

## **Appendix C**

### **Rules and Procedures for the appointment of the Secretary General**

1. The appointment of the Secretary General will take place approximately five months before the termination of the period for which the incumbent was appointed.

2. Ten months before the termination of that period, the Council shall inform Contracting States that it will proceed to the appointment of the Secretary General. The communication should also:

- a) invite attention to the provisions of Articles 54 (h), 58 and 59 of the Convention;
- b) set out the qualifications, experience and abilities which candidates are expected to demonstrate; and
- c) indicate the date by which the names of candidates for the Secretary General should be in the hands of the President; that date to provide Contracting States three full months for reply.

3. The names of the candidates shall be circulated by the President to all Contracting States as soon as they are received.

4. The Council shall invite candidates, at an appropriate date before the election, to present their views and ideas to a meeting of Representatives, and to answer any questions which may be posed.

5. The appointment of the Secretary General shall require a majority of the Members of the Council.



6. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

7. The election shall take place by secret ballot, unless waived by unanimous decision of the Members represented at the meeting.

## **Appendix D**

### **Rules and Procedures governing the appointment of the Members, Alternates and President of the Air Navigation Commission**

1. The appointment of the Members, Alternates and President of the Air Navigation Commission shall require a majority of the Members of the Council and, unless waived by unanimous agreement of the Members represented at the meeting, shall be by secret ballot.

#### *Appointment of Members and Alternates*

2. If the number of candidates receiving the required majority on the first ballot is in excess of the number of places to be filled, those receiving the highest number of votes shall be appointed. If the number of candidates appointed on the first ballot is less than the number of places to be filled, additional ballots shall be held as necessary. In each ballot subsequent to the first one, the names considered shall be those having received the highest number of votes in the previous ballot, up to a total number of candidates equal to twice the total number of places to be filled. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

#### *Appointment of President*

3. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

4. Pursuant to Rule 16 c), the following constitutes the Guidelines relating to the appointment of the President of the Air Navigation Commission:

- a) the candidacies to the post of the President of the Commission should be declared to the President of the Council;
- b) the Commission should indicate to the Council what is expected of its future President, the major tasks to be performed during its mandate, and the main qualities needed by its future President in this context;
- c) the Commission should refrain from voting on this issue.

## Appendix E

### **Rules and Procedures governing the appointment of the Members, Alternates and Chairmen of Commissions (other than the Air Navigation Commission), Committees and Working Groups**

1. In cases where the Council has to elect Members, Alternates or a Chairman of a Standing Commission (other than the Air Navigation Commission), Committee or Working Group, each Member of the Council may present names from among the Representatives or Alternates, with their consent, for inclusion in a list to be presented to the Council by the President. Not more than one Representative or Alternate of any State may be elected.

2. The election of Members, Alternates and Chairmen of such Commissions, Committees and Working Groups shall require a majority of the Members of the Council and, unless waived by unanimous agreement of the Members represented at the meeting, shall be by secret ballot.

#### *Election of Members, Alternates and Chairmen*

3. If the number of candidates receiving the required majority on the first ballot is in excess of the number of places to be filled, those receiving the highest number of votes shall be elected. If the number of candidates elected on the first ballot is less than the number of places to be filled, additional ballots shall be held as necessary. In each ballot subsequent to the first one, the names considered shall be those having received the highest number of votes in the previous ballot, up to a total number of candidates equal to twice the total number of places to be filled. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

## **Appendix F**

### **Guidelines on when Council meetings should be held in closed session (Rule 37) and when Council documents should be marked “Restricted”**

1. Meetings of the Council should normally be open to the public. In general, meetings should only be held in closed session if discussion involves the following:

- a) the level of aviation security in specified States or in general;
- b) current or future provisions concerning aviation security;
- c) salaries or allowances of an individual member of staff or of a category of staff;
- d) disputes between Contracting States; and
- e) issues where Representatives’ personal security could be endangered if their statements were made public.

2. Normally, only documents relating to meetings considering the subjects listed under a) to e) above should be marked “Restricted”.

**— END —**



## **Annex 18**

UNCITRAL Arbitration Rules 2013, Article 17

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

# UNCITRAL Arbitration Rules

(with new article 1, paragraph 4,  
as adopted in 2013)

# UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration



UNITED NATIONS  
New York, 2014



### **Section III. Arbitral proceedings**

#### ***General provisions***

##### *Article 17*

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted

because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

### ***Place of arbitration***

#### ***Article 18***

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

### ***Language***

#### ***Article 19***

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

### ***Statement of claim***

#### ***Article 20***

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within

## **Annex 19**

First Riyadh Agreement, 23 and 24 November 2013

\_ United Nations, *Treaty Series* \_ (no. I-55378)

### **First Riyadh Agreement**

On Saturday, 19/1/1435 (Hijri Calendar, November 2013), the Custodian of the Two Holy Mosques King Abdullah Bin Abdel Aziz Al-Saud, the King of Saudi Arabia, and his brother His Highness Sheikh Sabbah Al-Ahmad Al-Jabber Al-Sabbah, the Prince of Kuwait, and his brother His Highness Sheikh Tamim bin Hamad bin Khalifa Al-Thani, the prince of Qatar, met in Riyadh.

They held extensive deliberations in which they conducted a full revision of what taints the relations between the [Gulf Cooperation] Council states, the challenges facing its security and stability, and means to abolish whatever muddies the relations.

Due to the importance of laying the foundation for a new phase of collective work between the Council's states, in order to guarantee it operating within a unified political framework based on the principles included in the main system of the Cooperation Council, the following has been agreed upon: (here there three signature)

1. No interference in the internal affairs of the Council's states, whether directly or indirectly. Not to give harbor or naturalize any citizen of the Council states that has an activity which opposes his country's regimes, except with the approval of his country; no support to deviant groups that oppose their states; and no support for antagonistic media.
2. No support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council states through direct security work or through political influence.
3. Not to present any support to any faction in Yemen that could pose a threat to countries neighboring Yemen.

[Signatures]

In the name of God the Merciful the Compassionate

A review was conducted of the Agreement dated 1/19/1435AH, corresponding to 11/23/2013AD, and signed by the Custodian of the Two Holy Shrines, King Abdullah bin Abdul Aziz Al Saud of the Kingdom of Saudi Arabia, His Highness Sheikh Sabah Al-Ahmed Al-Jaber Al-Sabah, Emir of the State of Kuwait, and His Highness Sheikh Tamim bin Hamad bin Khalifa Al Thani, Emir of the State of Qatar, which includes the means for eliminating anything that affects the security and stability of the Council States.

We hereby support the conclusions reached in the agreement. Success is from Allah.,,,

*Sheikh Mohamed bin Zayed*

[signature]

*H.M. King Hamad bin Isa Al Khalifa*

[signature]

[signature]

*1/20/1435AH*

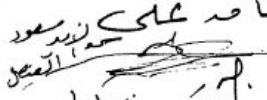

*11/24/2013AD*

Official Arabic Text

First Riyadh Agreement

لله الحمد والبر

إنه في يوم السبت الموافق ١٩/١/١٤٣٥ هـ فقد  
اجتمع خدام الحرمين الشريفين الملك عبد العزيز بن  
آل سعود بن عبد العزيز آل سعود ملك المملكة العربية السعودية ، وأخيه  
صاحب السمو الشيخ صباح الأحمد الجابر الصباح أمير دولة  
الكويت وأخيه صاحب السمو الشيخ ميم بن حمد بن خليفة  
آل ثاني أمير دولة قطر في الرياض .  
وقد تم عقد باحتماع مفضلة من خلال  
اجراء مراجعة جامعة لائتواء العراقات  
بيد دول المجلس والتدابير التي تواجه  
أمنك واستقرارها ، والسبل الكفيلة لادان  
طالعك صنف العراقات بينك .  
وللهجة تأمير من صرحك جديدة في العمل  
الجماعي بيد دول المجلس بما يخلق خيرها من  
إطار جبار موحدة تقوم على الأمن  
التي تم تضمينك في النظام الأساسي لمجلس  
التعاون فقد تم الاتفاق على ما يلي  
التوقيع

الملك عبد العزيز بن سعود  
الأمير ثاني بن حمد آل ثاني

- ١- عدم التمكن من الشؤون الداخلية لأي من دول المجلس بكل مباشر أو غير مباشر وعدم الواد أو تجنيس أي من مواطني دول المجلس من نشاط يتعارض مع أنظمة دولته الرضيه حان حصول موافقة دولته ، وعدم دعم الفئات البارزة المعارضة للإسلام ، وعدم دعم الإعلام المعارض
- ٢- عدم دعم الدخول المسبق أو أي من المنظمات أو التنظيمات أو الأفراد لغيرين مهددون أمن واستقرار دول المجلس عند طرحه العمل الرضيه المباشر أو عند طرحه محاولة التأثير السياسي .
- ٣- عدم قيام أي من دول مجلس التعاون بتقديم الدعم لأي فئة كانت في اليمن ممن تطول خطراً على الدول المجاورة لليمن ، والله الموفق .


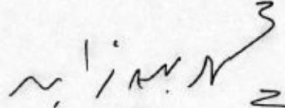
صاحب السرد الشيخ محمد بن عبد الله بن خالد  
أمير دولة قطر

صاحب السرد الشيخ صباح الأحمد  
الخابر الصباح  
أمير دولة الكويت

عبدالله

بسم الله الرحمن الرحيم

تم الاطلاع على الاتفاق المؤرخ في ١٩/١/١٤٣٥هـ الموافق  
 ٢٣/١١/٢٠١٣م والموقع من خادم الحرمين الشريفين الملك/ عبدالله  
 بن عبدالعزيز آل سعود ملك المملكة العربية السعودية، وصاحب السمو  
 الشيخ/ صباح الأحمد الجابر الصباح أمير دولة الكويت، وصاحب السمو  
 الشيخ/ تميم بن حمد بن خليفة آل ثاني أمير دولة قطر، والمتضمن  
 السبل الكفيلة بإزالة ما يؤثر على أمن واستقرار دول المجلس.  
 ونؤيد ما تم التوصل إليه في الاتفاق. والله الموفق.،،،



  
 محمد بن عبد العزيز  
 أمير دولة الكويت  
 ١٤٣٥ - ١ - ١٩  
 ٢٣ - ١١ - ٢٠١٣



## **Annex 20**

Mechanism Implementing the Riyadh Agreement, 17 April 2014

\_ United Nations, *Treaty Series* \_ (no. I-55378)

## **Mechanism Implementing the Riyadh Agreement**

### **Top Secret**

Having the Foreign Ministers of the Cooperation Council Countries considered the Agreement signed in Riyadh on 19/1/1435 AH corresponding to 23/11/2013 AD by the Custodian of the Two Holy Mosques King Abdullah bin Abdul Aziz King of the Kingdom of Saudi Arabia, his brother his Highness Sheikh Sabah Al-Ahmed Al-Jabir Al-Sabah Emir of Kuwait and his brother his Highness Sheikh Tamim bin Hamad bin Khalifa Al-Thani Emir of Qatar. Having the Agreement been considered and signed by His Majesty King Hamad bin Isa Al-Khalifa King of Bahrain, His Majesty Sultan Qaboos bin Saeed the Sultan of Oman and His Highness Sheikh Mohammed bin Zayed bin Sultan Al-Nahyan the Crown Prince of Abu Dhabi and Deputy Supreme Commander of the UAE Armed Forces.

Given the importance of the signed Agreement that never before had any similar agreement been signed, out of the leaders' realization to the importance of its content, and for the urgency of the matter that calls for taking the necessary executive procedures to enforce its content. An agreement has been reached to set a mechanism that shall guarantee implementation of the same according to the following:

#### **Firstly: The concerned party to monitor the implementation of the Agreement:**

##### **Foreign Ministers of the GCC Countries:**

Foreign ministers of the GCC Countries shall hold private meeting on the margins of annual periodic meetings of the ministerial council wherein violations and complaints reported by any member country of the Council against any member country of the Council shall be reviewed by the foreign ministers to consider, and raise them to leaders. With the emphasis that the first task the Council shall conduct, according to the mentioned mechanism, is to make sure of the implementation of all content, mentioned above, within Riyadh Agreement, consider its content a basis to the security and stability of the GCC Countries and its unity, either with regard to those issues of internal affairs, external political aspects or internal security; and ensuring that no country neglects or omits the group orientation of the GCC, and shall coordinate with all members of the GCC; and emphasizing that no support is being made to any currents that pose threats to any member country of the Council.

##### **Secondly: Decision-making body:**

##### **Leaders of the GCC Countries:**

The leaders shall take the appropriate action towards what the Ministers of Foreign Affairs raise to them regarding any country that has not complied with the signed agreement by the GCC Countries.

##### **Thirdly: Compliance procedures:**

This Agreement shall be implemented by the following procedures:

**1. With Regard to GCC Countries Internal Affairs:**

- Commit that any media channels owned or supported by any GCC country should not discuss any disrespectful subjects to any GCC Country, directly or indirectly. The GCC Countries shall set a list by these media channels, and the list shall be periodically updated.
- All member countries shall commit that they will not grant citizens of other GCC Countries a citizenship who have been proven to practice opposition activity against their governments. Every country shall inform the other countries on the names of the opposition figures residing in such country in order to prevent their violative activities and take the appropriate actions against them.
- Take the necessary actions that would guarantee no interference in any GCC Country internal affairs, including, but not limited to:
  - a. Governmental organizations, community organizations, individuals and activists shall not support opposition figures with money or via media.
  - b. Not to shelter, accept, support, encourage or make its country an incubator to the activities of GCC citizens or other figures who are proven oppositionists to any country of GCC.
  - c. Ban the existence of any external organizations, groups or parties, who target GCC Countries and their peoples; nor provide foothold for their hostile activities against the GCC Countries.
  - d. Not to fund or support external organizations, groups or parties, that have hostile positions and incitements against the GCC Countries.

**2. With regard to the foreign policy:**

Commit to the group orientation of the GCC Countries, coordinate with other GCC countries and shall not support any entities or currents that pose threats to the GCC Countries, including:

- a. Not to support Muslim Brotherhood with money or via media in the GCC Countries or outside.
- b. Approve the exit of Muslim Brotherhood figures, who are not citizens, within a time limit to be agreed upon. The GCC Countries shall coordinate with each other on the lists of those figures.
- c. Not to support external gatherings or groups in Yemen, Syria or any destabilized area, which pose a threat to the security and stability of GCC Countries.

- d. Not to support or shelter whoever perform opposition activities against any GCC country, being current officials, former officials or others; and shall not give them any foothold inside their countries or allow them to act against any of the GCC Countries.
- e. Close any academies, establishments or centres that train and qualify individuals from GCC citizens to work against their governments.

**3. With regard to the internal security of the GCC Countries:**

In the event of any pending security files that need further clarification and are directly connected to the security matters of the competent security agencies in any GCC country, immediate meetings shall be held among security specialists with their counterparts to discuss the details of these subjects and find out their objectives.

**If any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take ant appropriate action to protect their security and stability.**

**Allah is the grantor of success,,**

[signature]

His Highness Sheikh Abdullah bin Zayed Al Nahyan, Foreign Minister of United Arab Emirates

[signature]

His Royal Highness Prince Saud Al Faisal, Foreign Minister of Kingdom of Saudi Arabia

[signature]

His Excellency Dr. Khalid bin Mohammad Al Attiyah, Foreign Minister of State of Qatar

[signature]

His Excellency Sheikh Khalid bin Ahmed Al Khalifa, Foreign Minister of Kingdom of Bahrain

[signature]

His Excellency Yusuf bin Alawi bin Abdullah, Minister Responsible for Foreign Affairs of Sultanate of Oman

[signature]

His Excellency Sheikh Sabah Al-Khalid Al-Hamad Al-Sabah, Deputy Prime Minister and Minister of Foreign Affairs of State of Kuwait

## Mechanism Implementing the Riyadh Agreement



سري للغاية



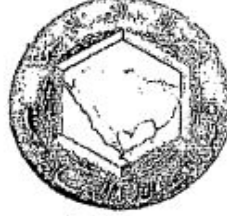
### آلية تنفيذ اتفاق الرياض



بعد اطلاع وزراء خارجية دول مجلس التعاون على الاتفاق الذي تم التوقيع عليه في الرياض بتاريخ ١٤٣٥/١/١٩ هـ الموافق ٢٠١٣/١١/٢٣ م من قبل خادم الحرمين الشريفين الملك عبدالله بن عبدالعزيز ملك المملكة العربية السعودية ، وأخيه صاحب السمو الشيخ صباح الأحمد الجابر الصباح أمير دولة الكويت ، وأخيه صاحب السمو الشيخ تميم بن حمد بن خليفة آل ثاني أمير دولة قطر . وأطلع ووقع عليه كل من صاحب الجلالة الملك حمد بن عيسى آل خليفة ملك مملكة البحرين ، وصاحب الجلالة السلطان قابوس بن سعيد سلطان عمان وسمو الشيخ محمد بن زايد بن سلطان آل نهيان ولي عهد أبوظبي نائب القائد الأعلى للقوات المسلحة بدولة الامارات العربية المتحدة .

ونظراً لأهمية هذا الاتفاق الذي تم التوقيع عليه والذي لم يسبق وأن تم التوقيع على اتفاق مشابه له استشعاراً من القادة بأهمية مضمونه .

شهر



سري للغاية

ثانياً - الجهة المناط بها اتخاذ القرار :

قادة دول مجلس التعاون :

يتخذ القادة ما يرونه مناسباً من إجراء حيال ما يتم رفعه لأنظارهم من وزراء الخارجية ضد الدولة التي لم تفي بما التزمت بما يتم الاتفاق عليه بين دول المجلس .

ثالثاً : الإجراءات المطلوب الالتزام بها :

يتم الالتزام بوضع هذا الاتفاق موضع التنفيذ وذلك من خلال الآتي :

١ - فيما يتعلق بالشؤون الداخلية لدول المجلس :

- الالتزام بعدم تناول شبكات القنوات الإعلامية المملوكة أو المدعومة بشكل مباشر أو غير مباشر من قبل أي دولة عضو لمواضيع تسيء إلى أي دولة من دول مجلس التعاون، ويتم الاتفاق بين دول المجلس على تحديد قائمة بهذه الوسائل الإعلامية ويتم تحديثها دورياً.

- تلتزم كل دولة عضو بعدم منح مواطني دولة من دول المجلس جنسيتها لمن يثبت قيامهم بنشاط معارض لحكومة بلادهم، على أن تقوم كل دولة

*[Handwritten signature]*

*[Handwritten signature]*



سرى للغاية

ولما كان الأمر يستدعي اتخاذ الإجراءات التنفيذية اللازمة لإنفاذ مقتضاه، فقد تم الاتفاق على ضرورة وضع آلية تضمن ذلك وفقاً للتالي :-

أولاً - الجهة المناط بها مراقبة تنفيذ الاتفاق :

وزراء خارجية دول مجلس التعاون :

يعقد وزراء الخارجية على هامش الاجتماعات الدورية السنوية للمجلس الوزاري اجتماعاً خاصاً يتم خلاله استعراض التجاوزات والشكاوي التي تردهم من أي من الدول الأعضاء ضد دولة أخرى عضو في مجلس التعاون . للنظر فيها ومن ثم رفعها للقادة . مع التأكيد على أن أول مهمة يقوم بها المجلس وفق الآلية المشار إليها هو التأكد من تنفيذ جميع ما تضمنه اتفاق الرياض المشار إليه أعلاه واعتبار محتواه أساساً لأمن واستقرار دول مجلس التعاون وتماسك دوله ، سواء المتعلقة بالشئون الداخلية ، أو الجوانب السياسية الخارجية أو الأمن الداخلي وعدم تجاوز التوجه الجماعي لدول المجلس والتنسيق مع الدول الأعضاء فيه ، وعدم دعم أي تيارات تمثل خطورة على دوله .



### سرى للغاية

بإبلاغ أسماء مواطنيها الذين يقومون بنشاط معارض لحكومتهم إلى الدولة الأخرى التي يتواجدون بها وذلك لمنع أنشطتهم المخالفة واتخاذ الإجراءات المناسبة بحقهم.

- اتخاذ الإجراءات اللازمة التي تضمن عدم التدخل في الشؤون الداخلية لأي دولة من دول المجلس وفي أي موضوع يمس الشأن الداخلي لتلك الدول، وعلى سبيل المثال لا الحصر ما يلي :

أ- عدم دعم الفئات المعارضة مادياً وإعلامياً من قبل مؤسسات رسمية أو مجتمعية أو أفراد ونشطاء.

ب- عدم إيواء أو استقبال أو تشجيع أو دعم أو جعل الدولة منطلقاً لأنشطة مواطني دول المجلس أو غيرهم الذين يثبت معارضتهم لأي من دول المجلس.

ج- منع المنظمات والتنظيمات والأحزاب الخارجية التي تستهدف دول مجلس التعاون وشعوبها من إيجاد موطئ قدم لها في الدولة وجعلها منطلقاً لأنشطتها المعادية لدول المجلس.

  
عنه







سرى للغاية



د- عدم تقديم التمويل المادي والدعم المعنوي للمنظمات والتنظيمات والأحزاب والمؤسسات الخارجية والتي تصدر عنها مواقف معادية ومعرضة ضد دول مجلس التعاون.

٢ - فيما يتعلق بالمسألة الخارجية :

الالتزام بالتوجه الجماعي لدول مجلس التعاون والتنسيق مع دول المجلس وعدم دعم جهات وتيارات تمثل خطورة على دول المجلس ومن ذلك :-

أ- عدم دعم الاخوان المسلمين مادياً وإعلامياً سواء في دول مجلس التعاون أو خارجه.

ب- الموافقة على خروج مجموعة الاخوان المسلمين من غير المواطنين وخلال مدة متفق عليها على أن يتم التنسيق مع دول مجلس التعاون حول قوائم هؤلاء الأشخاص.

ج- عدم دعم المجموعات والجماعات الخارجية التي تمثل تهديداً لأمن واستقرار دول مجلس التعاون سواء في اليمن أو سوريا أو غيرها من

مواقع الفتن.

عمر

7



سري للغاية

د- عدم دعم أو إيواء من يقومون بأعمال مناهضة لأي من دول مجلس التعاون سواء كانوا من المسؤولين الحاليين أو السابقين أو من غيرهم، وعدم تمكين هؤلاء الأشخاص من إيجاد موطنٍ قدم داخل الدولة أو المساس بأي دولة أخرى من دول المجلس.

هـ- إغلاق أي أكاديميات أو مؤسسات أو مراكز تسعى إلى تدريب وتأهيل الأفراد من دول مجلس التعاون للعمل ضد حكوماتهم.

٣ - فيما يتعلق بالأمن الداخلي لدول المجلس :

إن وجود ملفات أمنية معلقة تحتاج إلى إيضاح وذات ارتباط مباشر بالشأن الأمني لدى الأجهزة الأمنية المختصة في أي دولة من دول المجلس، يتطلب الدخول في تفاصيل تلك المواضيع وسبر أغوارها من خلال اجتماعات مباشرة فورية بين المختصين الأمنيين بشكل ثنائي مع نظرائهم.



سري للغاية

وفي حال عدم الالتزام بهذه الآلية فلبقية دول المجلس اتخاذ ما تراه  
مناسباً لحماية أمنها واستقرارها.  
والله العوفيق.

معالي الشيخ / خالد بن احمد بن محمد آل خليفة  
وزير الخارجية في مملكة البحرين

سمو الشيخ / عبدالله بن زايد آل نهيان  
وزير الخارجية بالإمارات العربية المتحدة

معالي / يوسف بن طوي بن عبدالله  
الوزير المسئول عن الشؤون الخارجية في  
سلطنة عمان

صاحب السمو الملكي الأمير / سعود الفيصل  
وزير الخارجية في المملكة العربية السعودية

معالي الشيخ صباح خالد الحمد الصباح  
نائب رئيس مجلس الوزراء ووزير الخارجية  
بدولة الكويت

معالي الدكتور / خالد بن محمد المطيرة  
وزير الخارجية في دولة قطر



## **Annex 21**

Supplementary Riyadh Agreement, 16 November 2014

\_ United Nations, *Treaty Series* \_ (no. I-55378)

## The Supplementary Riyadh Agreement

### Top Secret

In the Name of Allah, the Most Beneficent, the Most Merciful

1. Based on a generous invitation by the Custodian of the Two Holy Mosques King Abdullah Bin Abdel-Aziz Al-Saud, the king of Saudi Arabia, the following have met in Riyadh today, Sunday, 23/1/1436 (Hijri Calendar), 16/11/2014 (Gregorian Calendar): His Highness Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabbah, the Prince of Kuwait, His Majesty King Hamad Bin Eissa Al-Khalifa, King of Bahrain; His Highness Sheikh Tamim Bin Hamd Bin Khalifa Al-Thani , Prince of Qatar; His Highness Sheikh Mohamed Bin Rashed Al-Maktom, the Vice President and Prime Minister of the United Arab Emirates and the Governor of Dubai; and His Highness Sheikh Mohamed Bin Zayed Al-Nahyan, the Crown Prince of Abu Dhabi, and the deputy Commander of the Armed Forces of the United Arab Emirates. This was to cement the spirit of sincere cooperation and to emphasize the joint fate and the aspirations of the Citizens of the Gulf Cooperation Council for a strong bond and solid rapprochement.
2. After discussing the commitments stemming from the Riyadh Agreement signed 19/1/1435 (Hijri) – 23/11/2013 and its executive mechanism ; reviewing the reports of the committee following the execution mechanism and the results of the joint follow-up [operation] room; and reviewing the conclusions of the report of the follow-up room signed on 10/1/1436 (Hijri) – 3/11/2014 (Gregorian) by the intelligence chiefs of the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain and the state of Qatar.
3. The following has been reached:
  - a) Stressing that non-committing to any of the articles of the Riyadh Agreement and its executive mechanism amounts to a violation of the entirety of them.
  - b) What the intelligence chiefs have reached in the aforementioned report is considered a step forward to implement Riyadh agreement and its executive mechanism, with the necessity of the full commitment to implementing everything stated in them within the period of one month from the date of the agreement.
  - c) Not to give refuge, employ, or support whether directly or indirectly, whether domestically or abroad, to any person or a media apparatus that harbors inclinations harmful to any Gulf Cooperation Council state. Every state is committed to taking all the regulatory, legal and judicial measures against anyone who [commits] any encroachment against Gulf Cooperation Council states, including putting him on trial and announcing it in the media.
  - d) All countries are committed to the Gulf Cooperation Council discourse to support the Arab Republic of Egypt, and contributing to its security, stability and its financial support; and ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al-jazeera, Al-Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media.

4. Accordingly, it has been decided that the Riyadh Agreement, and its executive mechanism, and the components of this supplementary agreement, requires the full commitment to its implementation. The leaders have tasked the intelligence chiefs to follow up on the implementation of the results of this supplementary agreement and to report regularly to the leaders, in order to take the measures they deem necessary to protect the security and stability of their countries.
5. It has been agreed that implementing the aforementioned commitments contributes towards the unity of the Council states and their interests and the future of their peoples, and signals a new page that will be a strong base to advance the path of joint work and moving towards a strong Gulf entity.

[Signatures]

Note that the UAE has 2 signatures on this page one for His Highness Sheikh Mohamed Bin Rashed Al-Maktom, the Vice president and Prime Minister of the UAE and the Ruler of Dubai; and another one by His Highness Mohamed Bin Zayed Al-Nahyan, the Crown Prince of Abu Dhabi, and the deputy Commander of the Armed Forces of the UAE.

بسم الله الرحمن الرحيم

"سري للعلية"

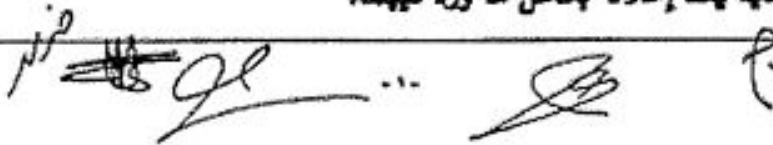
"اتفاق الرياض التكميلي"

بناءً على دعوة كريمة من خادم الحرمين الشريفين الملك عبدالله بن عبدالعزيز آل سعود ملك المملكة العربية السعودية فقد اجتمع هذا اليوم الأحد ١٤٣٦/١/٢٣هـ الموافق ٢٠١٤/١١/١٦م في مدينة الرياض لدى خادم الحرمين الشريفين - حفظه الله - صاحب السمو الشيخ صباح الأحمد الجابر الصباح أمير دولة الكويت، وصاحب الجلالة الملك حمد بن عيسى آل خليفة ملك مملكة البحرين، وصاحب السمو الشيخ تميم بن حمد بن خليفة آل ثاني أمير دولة قطر، وصاحب السمو الشيخ محمد بن راشد آل مكتوم نائب رئيس دولة الإمارات العربية المتحدة ورئيس مجلس الوزراء حاكم دبي، وصاحب السمو الشيخ محمد بن زايد آل نهيان ولي عهد أبوظبي نائب القائد الأعلى للقوات المسلحة بدولة الإمارات العربية المتحدة، وذلك لترسيخ روح التعاون الصادق والتأكيد على المصير المشترك وما يتطلع إليه أبناء دول مجلس التعاون لدول الخليج العربية من وحدة متينة وتقارب وثيق.

وبعد مناقشة الالتزامات المنبثقة عن اتفاق الرياض الموقع بتاريخ ١٤٣٥/١/١٩هـ الموافق ٢٠١٣/١١/٢٣م، وآلية التنفيذ، والاطلاع على تقارير لجنة متابعة تنفيذ الآلية ونتائج غرفة المتابعة المشتركة، واستعراض ما خرج به محضر نتائج غرفة المتابعة الموقع بتاريخ ١٤٣٦/١/١٠هـ الموافق ٢٠١٤/١١/٣م من قبل رؤساء الأجهزة الاستخباراتية في كل من (المملكة العربية السعودية، ودولة الإمارات العربية المتحدة، ومملكة البحرين، ودولة قطر).

لقد تم التوصل إلى الآتي:

أولاً: التأكيد على أن عدم الالتزام بأي بند من بنود اتفاق الرياض وآلية التنفيذ يعد إخلالاً بكامل ما ورد فيهما.





ثانياً، أن ما توصل إليه رؤساء الأجهزة الاستخباراتية في محضرهم المشار إليه أعلاه يعدّ تقدماً لإنفاذ اتفاق الرياض وآلياته التنفيذية، مع ضرورة الالتزام الكامل بتنفيذ جميع ما ورد فيهما في مدة لا تتجاوز شهر من تاريخ هذا الاتفاق.

ثالثاً، عدم إهواء أو توظيف أو دعم - بشكل مباشر أو غير مباشر - في الداخل أو الخارج أي شخص أو أي وسيلة إعلامية ممن له توجهات تسيء إلى أي دولة من دول مجلس التعاون، وتلتزم كل دولة باتخاذ كافة الإجراءات النظامية والقانونية والتضامنية بحق من يصدر عن هؤلاء أي تجاوز ضد أي دولة أخرى من دول مجلس التعاون لدول الخليج العربية، بما في ذلك محاكمته، وأن يتم الإعلان عن ذلك في وسائل الإعلام.

رابعاً، التزم كافة الدول بنهج سياسة مجلس التعاون لدول الخليج العربية لدعم جمهورية مصر العربية والإسهام في أمنها واستقرارها والمساهمة في دعمها اقتصادياً، وإيقاف كافة النشاطات الإعلامية الموجهة ضد جمهورية مصر العربية في جميع وسائل الإعلام بصفة مباشرة أو غير مباشرة بما في ذلك ما يبث من إساءات على قنوات الجزيرة وقناة مصر مباشر، والسعي لإيقاف ما ينشر من إساءات في الإعلام المصري.

وبناء على ما سبق، فقد تقرر أن مقتضى اتفاق الرياض، وآلياته التنفيذية، وما ورد في هذا الاتفاق التكميلي، يتطلب الالتزام الكامل بتنفيذها. وقد كلف القادة رؤساء الأجهزة الاستخباراتية بمتابعة إنفاذ ما تم التوصل إليه في هذا الاتفاق التكميلي، وأن يتم الرفع عن ذلك بشكل دوري للقادة لاتخاذ ما يرونه من التدابير والإجراءات المناسبة لحمالية أمن دولهم واستقرارها.

كما تم الاتفاق على أن تنفيذ ما ذكر أعلاه من التزامات يعصب في وحدة دول المجلس ومصالحها ومستقبل شعوبها، ويعدّ إيذاناً بفتح صفحة جديدة ستكون بإذن الله مركزاً قوياً لدفع مسيرة العمل المشترك والانطلاق بها نحو كيان خليجي قوي ومتماسك.

والله ولي التوفيق.

صاحب السمو الشيخ محمد بن راشد آل مكتوم

صاحب السمو الشيخ محمد بن زايد آل نهيان

نائب رئيس دولة الإمارات العربية المتحدة  
ورئيس مجلس الوزراء حاكم دبي

ولي عهد أبوظبي نائب القائد الأعلى للقوات المسلحة  
بمملكة الإمارات العربية المتحدة

صاحب الجلالة الملك حمد بن عيسى آل خليفة

ملك مملكة البحرين

صاحب السمو الشيخ تميم بن حمد بن خليفة آل ثاني

أمير دولة قطر

صاحب السمو الشيخ صباح الاحمد الجابر الصباح

أمير دولة الكويت

خادم الحرمين الشريفين  
الملك عبدالله بن عبدالعزيز آل سعود

ملك المملكة العربية السعودية