Kolloquium

Konstitutionalisierung der Staatengemeinschaft

Skript 4

- Resolution 56/83 der Generalversammlung der Vereinten Nationen vom 28.2.2002 (A/RES/56/83) – Responsibility of States fort internationally wrongful acts

- Oppenheim, International Law, Vol. I, 1rst ed. (1905), §§ 148 - 167

- International Court of Justice: Reports of Judgments, Advisory Opinions and Orders, Case concerning application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007 (Auszug)

- International Court of Justice: Reports of Judgments, Advisory Opinions and Orders, Case concerning United States Diplomate and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 may 1980 (Auszug)

- International Court of Justice: Reports of Judgments, Advisory Opinions and Orders, Case concerning legality of use of force (Yugoslavia v. United States of America), request for the indication of provisional measures, Order of 2 June 1999 (Auszüge),

General Assembly

Distr.: General
28 January 2002

Fifty-sixth session
Agenda item 162

Resolution adopted by the General Assembly

[*on the report of the Sixth Committee (A/56/589 and Corr.1)*]

56/83. Responsibility of States for internationally wrongful acts

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,[1] which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,[2]

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (*a*), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1).
[2] Ibid., paras. 72 and 73.

3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts".

85th plenary meeting
12 December 2001

Annex

Responsibility of States for internationally wrongful acts

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I
General principles

Article 1
Responsibility of a State for its internationally wrongful acts

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

Article 2
Elements of an internationally wrongful act of a State

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

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

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

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

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

Chapter II
Attribution of conduct to a State

Article 4
Conduct of organs of a State

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

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

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

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

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

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

Article 7
Excess of authority or contravention of instructions

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

Article 8
Conduct directed or controlled by a State

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

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

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

Article 10
Conduct of an insurrectional or other movement

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

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

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

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

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

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

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

Article 13
International obligation in force for a State

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

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

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

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

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

Article 15
Breach consisting of a composite act

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

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

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

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

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

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

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

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

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

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

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

Article 18
Coercion of another State

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

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

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

Article 19
Effect of this chapter

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

Chapter V
Circumstances precluding wrongfulness

Article 20
Consent

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

Article 21
Self-defence

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

Article 22
Countermeasures in respect of an internationally wrongful act

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

Article 23
Force majeure

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

2. Paragraph 1 does not apply if:

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

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

Article 24
Distress

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

2. Paragraph 1 does not apply if:

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

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

Article 25
Necessity

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

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

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

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

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

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

Article 26
Compliance with peremptory norms

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

Article 27
Consequences of invoking a circumstance precluding wrongfulness

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

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

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

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

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

Article 29
Continued duty of performance

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

Article 30
Cessation and non-repetition

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

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

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

Article 31
Reparation

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

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

Article 32
Irrelevance of internal law

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

Article 33
Scope of international obligations set out in this part

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

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

Chapter II
Reparation for injury

Article 34
Forms of reparation

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

Article 35
Restitution

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

(*a*) Is not materially impossible;

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

Article 36
Compensation

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

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

Article 37
Satisfaction

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

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

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

Article 38
Interest

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

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

Article 39
Contribution to the injury

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

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

Article 40
Application of this chapter

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

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

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

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

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

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

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I
Invocation of the responsibility of a State

Article 42
Invocation of responsibility by an injured State

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

(*a*) That State individually; or

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

(i) Specially affects that State; or

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

Article 43
Notice of claim by an injured State

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

2. The injured State may specify in particular:

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

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

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:

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

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

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

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

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

Article 46
Plurality of injured States

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

Article 47
Plurality of responsible States

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

2. Paragraph 1:

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

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

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

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

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

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

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

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

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

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

Chapter II
Countermeasures

Article 49
Object and limits of countermeasures

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

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

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

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

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

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

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

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

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

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

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

Article 51
Proportionality

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

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

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

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

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

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

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

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

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

Article 53
Termination of countermeasures

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

Article 54
Measures taken by States other than an injured State

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

PART FOUR
GENERAL PROVISIONS

Article 55
Lex specialis

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

Article 56
Questions of State responsibility not regulated by these articles

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

Article 57
Responsibility of an international organization

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

Article 58
Individual responsibility

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

Article 59
Charter of the United Nations

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

Oppenheim, International Law, Vol. I, 1st edn. (1905)

p. 198.

CHAPTER III

RESPONSIBILITY OF STATES

I

On State Responsibility in General

Grotius, II. c. 21, § 2—Pufendorf, VIII. c. 6, § 12—Vattel, II. §§ 63-78—Hall, § 65—Halleck, I. pp. 440-444—Wharton, I. § 21—Wheaton, § 32—Bluntschli, § 74—Heffter, §§ 101-104—Holtzendorff in Holtzendorff, II. pp. 70-74—Liszt, § 24—Ullmann, § 74—Bonfils, Nos. 324-332—Piedelièvre, I. pp. 317-322—Pradier-Fodéré, I. Nos. 196-210—Rivier, I. pp. 40-44—Calvo, III. §§ 1261-1298—Fiore, I. Nos. 659-679—Martens, I. § 118—Clunet, "Offenses et actes hostiles commis par particuliers contre un état étranger" (1887).—Triepel, "Völkerrecht und Landesrecht" (1899), pp. 324-381—Anzillotti, "Teoria generale della responsabilità dello stato nel diritto internazionale" (1902)—Bougier, "Les guerres civiles et le droit des gens" (1903), pp. 448-474.

Nature of State Responsibility.

§ 148. It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects. Since a State can abolish parts of its Municipal Law and can make new Municipal Law, it can always avoid legal, although not moral, responsibility by a change of Municipal Law. Different from this internal autocracy is the external responsibility of a State to fulfil its international legal duties. Responsibility for such duties is, as will be remembered,[1] a quality of every State as an International Person, without which the Family of Nations could not peaceably exist. Although there is no International Court

[1] See above, § 118.

of Justice which could establish such responsibility and pronounce a fine or other punishment against a State for neglect of its international duties, State responsibility concerning international duties is nevertheless a *legal* responsibility. For a State cannot abolish or create new International Law in the same way as it can abolish or create new Municipal Law. A State, therefore, cannot renounce its international duties unilaterally[1] at discretion, but is and remains legally bound by them. And although there is not and never will be a central authority above the single States to enforce the fulfilment of these duties, there is the legalised self-help of the single States against one another. For every neglect of an international legal duty constitutes an international delinquency,[2] and the violated State can through reprisals or even war compel the delinquent State to comply with its international duties.

Original and vicarious State Responsibility.

§ 149. Now if we examine the various international duties out of which responsibility of a State may rise, we find that there is a necessity for two different kinds of State responsibility to be distinguished. They may be named "original" in contradistinction to "vicarious" responsibility. I name as "original" the responsibility borne by a State for its own—that is, its Government's actions, and for such actions of the lower organs or private individuals as are performed at the Government's command or with its authorisation. But States have to bear another responsibility besides that just mentioned. For States are, according to the Law of Nations, in a sense

[1] See Annex to Protocol I. of Conference of London, 1871, where the Signatory Powers proclaim that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement."

[2] See below, § 151.

responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their organs, of their subjects, and even of such foreigners as are for the time living within their territory. This responsibility of States for acts other than their own I name "vicarious" responsibility. Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects[1] of International Law, and the latter is unable to confer directly rights and duties upon individuals. And for this reason the Law of Nations must make every State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such foreigners as are temporarily resident on its territory.

Essential Difference between Original and Vicarious Responsibility.

§ 150. It is, however, obvious that original and vicarious State responsibility are essentially different. Whereas the one is responsibility of a State for a neglect of its own duty, the other is not. A neglect of international legal duties of a State constitutes an international delinquency. The responsibility which a State bears for such delinquency is especially grave, and requires, apart from other especial consequences, a formal expiatory act, such as an apology at least, by the delinquent State to repair the wrong done. On the other hand, the vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, of the wrong-doers. In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case

See below, § 290.

a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility.

II

State Responsibility for International Delinquencies

See the literature quoted above at the commencement of § 148.

Conception of International Delinquencies.

§ 151. International delinquency is every injury to another State committed by the head and the Government of a State through neglect of an international legal duty. Equivalent to acts of the head and Government are acts of officials or other individuals commanded or authorised by the head or Government.

An international delinquency is not a crime, because the delinquent State, as a Sovereign, cannot be punished, although compulsion may be exercised to procure a reparation of the wrong done.

International delinquencies in the technical sense of the term must not be confounded either with so-called "Crimes against the Law of Nations" or with so-called "International Crimes." "Crimes against the Law of Nations" in the wording of many Criminal Codes of the single States are such acts of individuals against foreign States as are rendered criminal by these Codes. Of these acts, the gravest are those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. "International Crimes," on the other hand, refer to crimes like piracy on the high

seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent.

An international delinquency must, further, not be confounded with discourteous and unfriendly acts. Although such acts may be met by retorsion, they are not illegal and therefore not delinquent acts.

Subjects of International Delinquencies.

§ 152. An international delinquency may be committed by every member of the Family of Nations, be such member a full-Sovereign, half-Sovereign, or part-Sovereign State. Yet, half- and part-Sovereign States can commit international delinquencies in so far only as they have a footing within the Family of Nations, and therefore international duties of their own. And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an international duty directly to the wronged State, or whether it is the full-Sovereign State (suzerain, federal, or protectorate-exercising State) to which the delinquent State is attached that must bear a vicarious responsibility for the delinquency. On the other hand, so-called Colonial States without any footing whatever within the Family of Nations and, further, the member-States of the American Federal States, which likewise lack any footing whatever within the Family of Nations because all their possible international relations are absorbed by the respective Federal States, cannot commit an international delinquency. Thus an injurious act against France committed by the Government of the Commonwealth of Australia or by the Government of the State of California in the United States of America, would not be an international delinquency in the technical sense of the term, but

merely an internationally injurious act for which Great Britain or the United States of America must bear a vicarious responsibility.

State Organs able to commit International Delinquencies.

§ 153. Since States are juristic persons, the question arises, Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? It is obvious that acts of this kind are, first, all such acts as are performed by the heads of States or by the members of Government acting in that capacity, so that their acts appear as State acts. Acts of such kind are, secondly, all acts of officials or other individuals which are either commanded or authorised by Governments. On the other hand, unauthorised acts of corporations, such as Municipalities, or of officials, such as magistrates or even ambassadors, or of private individuals, never constitute an international delinquency. And, further, all acts committed by heads of States and members of Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies either.[1] The States concerned must certainly bear a vicarious responsibility for all such acts, but for that very reason these acts comprise not international delinquencies.

No International Delinquency without Malice or culpable Negligence.

§ 154. An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence. Therefore, an act of a State committed by right or prompted by self-preservation in necessary self-defence does not contain an international delinquency, however injurious it may actually be to another State. And the same is valid in regard to acts of officials or other individuals

[1] See below, §§ 157–158.

committed by command or with the authorisation of a Government.

Objects of International Delinquencies.

§ 155. International delinquencies may be committed against so many different objects that it is impossible to enumerate them. It suffices to give some striking examples. Thus a State may be injured—in regard to its independence through an unjustified intervention; in regard to its territorial supremacy through a violation of its frontier; in regard to its dignity through disrespectful treatment of its head or its diplomatic envoys; in regard to its personal supremacy through forcible naturalisation of its citizens abroad; in regard to its treaty rights through an act violating a treaty. A State may also suffer various injuries in time of war by illegitimate acts of warfare, or by a violation of neutrality on the part of a neutral State in favour of the other belligerent. And a neutral may in time of war be injured in various ways through a belligerent violating neutrality by acts of warfare within the neutral State's territory; for instance, through a belligerent man-of-war attacking an enemy vessel in a neutral port or in neutral territorial waters, or through a belligerent violating neutrality by acts of warfare committed on the Open Sea against neutral vessels.

Legal consequences of International Delinquencies.

§ 156. The nature of the Law of Nations as a law between, not above, Sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime. The only legal consequences of an international delinquency that are possible under existing circumstances are such as create a reparation of the moral and material wrong done. The merits and the conditions of the special cases are, however, so

different that it is impossible for the Law of Nations to prescribe once for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done. What kind of acts these are, depends upon the special case and the discretion of the wronged State. At least a formal apology on the part of the delinquent State will be necessary, and it is obvious that there must be a pecuniary reparation for a material damage. The apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the mission of a special embassy bearing apologies, and the like. A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, on the one hand, and on the other, for such as arise merely from culpable negligence.

When the delinquent State refuses reparation of the wrong done, the wronged State can exercise such means as are necessary to enforce an adequate reparation. In case of international delinquencies committed in time of peace, such means are reprisals[1] (including embargo and pacific blockade) and war as the case may require. On the other hand, in case of international delinquencies committed in time of war through illegitimate acts of warfare on the part of a belligerent, such means are reprisals and the taking of hostages.[2]

[1] See below, vol. II. § 34. [2] See below, vol. II. §§ 248 and 259.

III

State Responsibility for Acts of State Organs

See the literature quoted above at the commencement of § 148.

Responsibility varies with Organs concerned.

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs. As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs varies with the organs concerned. It is therefore necessary to distinguish between internationally injurious acts of heads of States, members of Government, diplomatic envoys, parliaments, judicial functionaries, administrative officials, and military and naval forces.

Internationally injurious Acts of Heads of States.

§ 158. Such international injurious acts as are committed by heads of States in the exercise of their official functions are here not our concern, because they constitute international delinquencies which have been discussed above (§§ 151–156). But a monarch can, just as any other individual, in his private life commit many internationally injurious acts, and the question is, whether and in what degree a State must bear responsibility for such acts of its head. The position of a head of a State, who is within and without his State neither under the jurisdiction of a Court of Justice nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to claim a certain vicarious responsibility from States for internationally injurious acts committed by their heads in private life. Thus, for instance, when a monarch during his stay abroad commits an act injurious to the property of a foreign subject and refuses adequate reparation, his State may be requested to pay damages on his behalf.

Internationally injurious Acts of Members of Government.

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity and other acts. Acts of the first kind constitute international delinquencies, as stated above (§ 153). But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts. Now, as members of a Government have not the exceptional position of heads of States and are therefore, under the jurisdiction of the ordinary Courts of Justice, there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

Internationally injurious Acts of Diplomatic Envoys.

§ 160. The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of exterritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State, and, on the other hand, excludes the jurisdiction of the receiving State over such acts. The Law of Nations makes therefore the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects in whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State. Thus, for instance, a crime committed by the envoy on the territory of the receiving State must be punished by his home State, and according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologise

or express its regret for his behaviour, or to pay damages. It must, however, be remembered that such injurious acts as an envoy performs at the command or with the authorisation of the home State, constitute international delinquencies for which the home State bears original responsibility and for which the envoy cannot personally be blamed.

Internationally injurious Attitudes of Parliaments.

§ 161. As regards internationally injurious attitudes of parliaments, it must be kept in mind that, most important as may be the part parliaments play in the political life of a nation, they do not belong to the organs which represent the States in their international relations with other States. Therefore, however injurious to a foreign State an attitude of a parliament may be, it can never constitute an international delinquency. That, on the other hand, all States must bear vicarious responsibility for such attitudes of their parliaments, there can be no doubt. But, although the position of a Government is difficult in such cases, especially in States that have a representative Government, this does not concern the wronged State, which has a right to demand satisfaction and reparation for the wrong done.

Internationally injurious Acts of Judicial Functionaries.

162. Internationally injurious acts committed by judicial functionaries in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such acts, and the question is how far a State's vicarious responsibility for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are to a great extent independent of their Government.[1] Undoubtedly,

[1] Wharton, II. §§ 230, comprises abundant and instructive material on this question.

in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion against such Courts. And the same is valid with regard to an obvious and malicious act of misapplication of the law by the Courts which is injurious to another State. But if a Court observes its own proper forms of justice and nevertheless pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, and eventually war may break out between the respective States.

Internationally injurious Acts of administrative Officials and Military and Naval Forces.

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies because they are not State acts. But a State bears a wide, unlimited, and unrestricted vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts of the respective State. Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or even apologising to the Government of the injured State; secondly, damages must be paid where required; and, lastly, the offenders must be punished according to the merits of the special case.

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts of these

subjects are internationally injurious as would constitute international delinquencies when committed by the State itself or with its authorisation. A very instructive case may be quoted as an illustrative example. On September 26, 1887, a German soldier on sentry duty at the frontier near Vexaincourt shot from the German side and killed an individual who was on French territory. As this act of the sentry violated French territorial supremacy, Germany disowned and apologised for it and paid a sum of 50,000 francs to the widow of the deceased as damages. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood.[1]

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home State has no right to request that they should be otherwise treated than as the law of the land authorises a State to treat its own subjects. Therefore, since the Law of Nations does not prevent a State from expelling foreigners, the home State of an expelled foreigner cannot request the expelling State to pay damages for the losses sustained by the expelled through his having to leave the country. Therefore, further, a State need not make any reparation for losses sustained by a foreigner through legitimate measures taken by administrative officials and military forces in time of war, insurrection,[2] riot, or public calamity

[1] A recent example occurred in 1904, when the Russian Baltic Fleet, on its way to the Far East during the Russo-Japanese war, fired upon the Hull Fishing Fleet off the Dogger Bank. (See below, vol. II. § 5.)

[2] See below, § 167.

such as a fire, an epidemic outbreak of dangerous disease, and the like.

IV

State Responsibility for Acts of Private Persons

See the literature quoted above at the commencement of § 148.

Vicarious in contradistinction to original State Responsibility for Acts of Private Persons.

§ 164. As regards State responsibility for acts of private persons, it is first of all necessary not to confound the original with the vicarious responsibility of States for internationally injurious acts of private persons. International Law imposes the duty upon every State to prevent as far as possible its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility. But it is practically impossible for a State to prevent all injurious acts which a private person might commit against a foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility for such injurious acts of private individuals as are incapable of prevention.

Vicarious responsibility for Acts of Private Persons relative only.

§ 165. Now, whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative. For their sole duty is to procure satisfaction and reparation for the wronged State as far as possible by punishing the offenders and compelling them to pay damages

where required. Beyond this limit a State is not responsible for acts of private persons; there is in especial no duty of a State itself to pay damages for such acts if the offenders are not able to do it.

Municipal Law for Offences against Foreign States.

§ 166. It is a consequence of the vicarious responsibility of States for acts of private persons that by the Criminal Law of every civilised State punishment is severe for certain offences of private persons against foreign States, such as violation of ambassadors' privileges, libel on heads of foreign States and on foreign envoys, and other injurious acts.[1] In every case that arises the offender must be prosecuted and the law enforced by the Courts of Justice And it is further a consequence of the vicarious responsibility of States for acts of private persons that criminal offences of private persons against foreign subjects—such offences are indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad —must be punished according to the ordinary law of the land, and that the Civil Courts of Justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such land.

Responsibility for Acts of Insurgents and Rioters.

§ 167. The vicarious responsibility of States for acts of insurgents and rioters is the same as for acts of other private individuals. As soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States must be punished according to the law of the land. The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign

[1] As regards the Criminal Law of England concerning such acts, see Stephen's Digest, articles 96–103.

States against the local State for damages for losses sustained by their subjects through acts of the insurgents or rioters respectively, and that some writers[1] assert that such claims are justified by the Law of Nations. The majority of writers maintain, correctly, I think, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters. Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots just as the risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals, and claim damages from the latter before the Courts of Justice. The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its Courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal. And in States which, as France for instance, have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local authorities for losses of such kind. But the State itself never has by International Law a duty to pay such damages.

The practice of the States agrees with this rule laid down by the majority of writers. Although in some cases several States have paid damages for losses of such kind, they have done it, not through compulsion of law, but for political reasons. In

[1] See, for instance, Rivier, II. p. 43.

most cases in which the damages have been claimed for such losses, the respective States have refused to comply with the request.[1] As such claims have during the second half of the nineteenth century frequently been tendered against American States which have repeatedly been the scene of insurrections, several of these States have in commercial and similar treaties which they concluded with other States expressly stipulated[2] that they are not responsible for losses sustained by foreign subjects on their territory through acts of insurgents and rioters.[3]

[1] See the cases in Calvo, III. §§ 1283–1290.

[2] See Martens, N.R.G. IX. p. 474 (Germany and Mexico); XV. p. 840 (France and Mexico); XIX. p. 831 (Germany and Colombia); XXII. p. 308 (Italy and Colombia), and p. 507 (Italy and Paraguay).

[3] The Institute of International Law at its meeting at Neuchatel in 1900 adopted five rules regarding the responsibility of States with regard to this matter. See Annuaire, XVIII. p. 254.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

JUDGMENT OF 26 FEBRUARY 2007

2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

ARRÊT DU 26 FÉVRIER 2007

be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

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

* *

(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who,

though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"*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."

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

JUDGMENT OF 24 MAY 1980

1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PERSONNEL DIPLOMATIQUE ET CONSULAIRE DES ÉTATS-UNIS À TÉHÉRAN

(ÉTATS-UNIS D'AMÉRIQUE c. IRAN)

ARRÊT DU 24 MAI 1980

to be looked at by the Court from two points of view. First, 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. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of the attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf on the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayatollah Khomeini, had made several public declarations inveighing against the United States as responsible for all his country's problems. In so doing, it would appear, the Ayatollah Khomeini was giving utterance to the general resentment felt by supporters of the revolution at the admission of the former Shah to the United States. The information before the Court also indicates that a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up

dissension between the main streams of Islamic thought). In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy. Again, congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.

60. The first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks ; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2 :

> *"The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any* intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, Article 29 provides :

> "The receiving State shall treat him with due respect and *shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*" (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the

archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be". Under Article 25 it is required to "accord full facilities for the performance of the functions of the mission", under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory", and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes". Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 31, para. 3, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In

February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz ; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermanshah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure "the most constant protection and security" to each other's nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities :

(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRETS,
AVIS CONSULTATIFS ET ORDONNANCES
AFFAIRE RELATIVE À LA LICÉITÉ
DE L'EMPLOI DE LA FORCE

(YOUGOSLAVIE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

ORDONNANCE DU 2 JUIN 1999

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
LEGALITY OF USE OF FORCE

(YUGOSLAVIA v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 2 JUNE 1999

***

…

15. Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia;
16. Whereas the Court is profoundly concerned with the use of force in Yugoslavia; whereas under the present circumstances such use raises very serious issues of international law;
17. Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court;
18. Whereas the Court deems it necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law;

***

19. Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted; whereas the Court has repeatedly

stated "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction" *(East Timor (Portugal* v. *Australia), Judgement,* I.C.J. *Reports 1995,* p. 101, para. 26); and whereas the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;

20. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless; the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established;

***

21. Whereas in its Application Yugoslavia claims, in the first place, to found the jurisdiction~ of the Court upon Article IX of the Genocide Convention, which provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts. enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute";

whereas it is not disputed that both Yugoslavia and the United States are parties to the Genocide Convention; but whereas, when the United States ratified the Convention on 25 November 1988, it made the following reservation :

> "That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this Article, the specific consent of the United States is required in each case";

....

22. Whereas the United States contends that "[its] reservation [to Article IX] is clear and unambiguous"; that "[t]he United States has not given the specific consent [that reservation] requires [and] ... will not do so"; and that Article IX of the Convention cannot in consequence found the jurisdiction of the Court in this case, even prima facie; whereas the United States also observed that reservations to the Genocide Convention are generally permitted; that its reservation to Article IX is not contrary to the Convention's object and purpose; and that, "[s]ince ... Yugoslavia did not object to the ... reservation, [it] is bound by it"; and whereas the United States further contends that there is no "legally sufficient ... connection between the charges against the United States contained in the Application and [the] supposed jurisdictional basis under the Genocide Convention"; and whereas the United States further asserts that Yugoslavia has failed to make any credible allegation of violation of the Genocide Convention, by failing to demonstrate the existence of the specific

intent required by the Convention to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", which intent could not be inferred from the conduct of conventional military operations against another State.
23. Whereas Yugoslavia disputed the United States interpretation of the Genocide Convention, but submitted no argument concerning the United States reservation to Article IX of the Convention;
24. Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to the United States reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties;
25. Whereas in consequence Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and the United States alleged to fall within its provisions; and whereas that Article manifestly does not constitute a basis of jurisdiction in the present case, even prima facie;
26. Whereas in its Application Yugoslavia claims, in the second place, to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court, which reads as follows:

> "5. When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case";

***

27. Whereas the United States observes that it "has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so";
28. Whereas it is quite clear that, in the absence of consent by the United States, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case, even prima facie;

***

29. Whereas it follows from what has been said above that the Court manifestly lacks jurisdiction to entertain Yugoslavia's Application; whereas it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein; and whereas, within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice;
30. Whereas there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties;

31. Whereas, whether or not States accept the jurisdiction of the Court, they remain in. any event responsible for acts attributable to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties;
32. Whereas in this context the parties should take care not to aggravate or extend the dispute;
33. Whereas, when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter;

* * *

34. For these reasons,

THE COURT,
(1) By twelve votes to three,
Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;