Leiden Journal of International Law (2013), 26, pp. 615–642
 doi:10.1017/S0922156513000277

Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility

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Abstract

The rules of customary international law governing when a state or international organization will be held to have committed an internationally wrongful act, thereby engaging its international responsibility, are relatively well settled in international practice and jurisprudence. A key point of reference in this regard is the work of the International Law Commission on State Responsibility and Responsibility of International Organizations. The present paper examines relevant practice of domestic courts from a variety of jurisdictions which have relied upon the ILC's work, and discusses the extent to which domestic courts may make a contribution to the further development of the rules relating to engagement of responsibility. It concludes that, due to the operation of rules of, inter alia, immunity and non-justiciability, the principal instance in which domestic courts may actually apply the rules of international law is where it is the responsibility of the forum state which is in issue.

Key words

state responsibility; domestic courts; customary international law; ILC Articles on the Responsibility of States for Internationally Wrongful Acts; ILC Articles on the Responsibility of International Organizations for Internationally Wrongful Acts

1. Introduction

The present article aims to assess the contribution of domestic courts to the formation and development of the customary international law of responsibility relating to the engagement of international responsibility (i.e. when an internationally wrongful act is to be taken to have occurred).[1] In doing so, it focuses in particular on the

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1 The extent to which domestic courts have considered and may contribute to the development of other aspects of the customary law of responsibility, in particular the content and implementation of responsibility

relevant rules under the law of state responsibility, although reference is also made as appropriate to a number of domestic decisions that have considered questions of the international responsibility of international organizations.

For these purposes, the rules as to engagement of international responsibility may be understood as referring essentially to the rules codified in, and constituting Part One of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted on second reading by the International Law Commission in 2001 ('the ILC's Articles on State Responsibility' 'the Articles' or 'ARSIWA'),[2] as well as the corresponding provisions contained in Part Two of the ILC's Articles on Responsibility of International Organizations for Internationally Wrongful Acts ('the ILC's Articles on Responsibility of International Organizations', or 'ARIO'), adopted by the Commission upon second reading in 2011.[3]

Concentrating for these purposes on the Articles on State Responsibility, in addition to the familiar basic, foundational principles of the customary law of state responsibility contained in Chapter I,[4] the remaining provisions contained in Part One of the Articles include detailed rules governing:

(including the principal obligation to make full reparation), is examined in the article by Stefan Wittich elsewhere in the same issue of the *Leiden Journal of International Law*.

2 Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 August 2001; for the text of the articles and the ILC's accompanying Commentary, see Report of the International Law Commission on the Work of Its Fifty-Third Session (2001), UN Doc. A/56/10, Ch. IV. The text of the Articles, and the Commentary, together with an introduction and various other useful materials relating to the drafting history of the Articles, are reproduced in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002). In 2001, the General Assembly took note of the Articles, commended them to the attention of governments, and annexed them to its resolution, whilst deferring until 2004 any decision on whether the Articles should be adopted in the form of a multilateral convention (GA Res. 56/83, 10 December 2001; UN Doc. A/RES/56/83). In doing so, it dropped the qualifier 'draft', so that the Articles are properly referred to as 'Articles', rather than 'draft Articles'. Upon the General Assembly taking up the question again in 2004, the question of what was to be done with the Articles was again deferred until 2007 (GA Res. 59/35, 2 December 2004; UN Doc. A/RES/59/35). That pattern was thereafter repeated in 2007, with the taking of a decision being further deferred until 2010, albeit that it was resolved to examine at that point, 'within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of states for internationally wrongful acts or other appropriate action on the basis of the articles' (GA Res. 62/61, 6 December 2007; UN Doc. A/RES/62/61). In 2010, following consideration by the Working Group, the General Assembly once more deferred any decision on what action was to be taken in relation to the Articles until its 68th Session in 2013, and resolved that, on that occasion, it would 'examine, within the context of a working group of the Sixth Committee, *with a view to adopting a decision*, the question of a convention on responsibility of states for internationally wrongful acts or any other appropriate action on the basis of the articles' (emphasis added) (GA Res. 65/19, 6 December 2010; UN Doc. A/RES/65/19). For an account of the positions taken by states in the debate in the Sixth Committee in 2004, see J. Crawford and S. Olleson, 'The Continuing Debate on a UN Convention on State Responsibility', (2005) 54 ICLQ 959.

3 Arts. 3–27 ARIO. For the text of the Articles on the Responsibility of International Organizations and the ILC's accompanying Commentary, see Report of the International Law Commission on the Work of its Sixty-Third Session (2011), UN Doc. A/66/10, Chapter V. As with the Articles on State Responsibility, in 2011, the General Assembly took note of the Articles on the Responsibility of International Organizations, commended them to the attention of governments, and annexed them to its resolution, in the process dropping the qualifier 'draft'; the question of 'the form which might be given' to the Articles on the Responsibility of International Organizations was deferred for further consideration at the General Assembly's 69th session in 2014 (GA Res. 66/100, 9 December 2011; UN Doc. A/RES/66/100).

4 I.e. the principles that 'every internationally wrongful act of a State entails the international responsibility of that State' (Art. 1 ARSIWA); that an internationally wrongful act occurs when conduct, consisting of an action or omission, is both attributable to a State and constitutes a breach of its international obligations (Art. 2 ARSIWA); and that characterization of an act as internationally wrongful is governed by international law (Art. 3 ARSIWA). See also Arts. 3–5 ARIO.

- the situations in which conduct may be attributed to a state or international organization for the purposes of its international responsibility (Chapter II);
- issues as to when particular conduct is to be held to be not in conformity with what is required of the state in question (i.e. in breach of an international obligation) and questions as to the extension in time of a breach of an international obligation and the special category of 'continuing' wrongful acts (Chapter III); and
- the specific circumstances in which a state may, exceptionally, be held responsible in connection with the internationally wrongful act of another state (so-called 'derivative' or 'ancillary' responsibility) on the basis of aid and assistance in relation to, direction and control over, or coercion of, the internationally wrongful act of another state (Chapter IV).

Finally, Part One of the Articles includes an attempt to codify the limited catalogue of excuses and justifications upon which a state may attempt to rely in order to avoid the responsibility it would otherwise incur for an act which is not in conformity with its international obligations (the so-called 'circumstances precluding wrongfulness') (Chapter V).

By contrast to the remainder of the provisions contained in Part One of the Articles, the rules contained in Chapter V do not pertain to the engagement of responsibility, as such, but rather to the circumstances in which a state can exculpate itself for conduct which, other things being equal, would be characterized as internationally wrongful, and thereby avoid the legal consequences (in particular the secondary obligations to make full reparation and to cease any continuing wrongful act)[5] which would otherwise normally be entailed.[6] Despite this qualitative difference, the present study also examines the extent to which domestic courts have considered the international-law rules on circumstances precluding wrongfulness, in particular the state of necessity, as codified by the ILC in Article 25, ARSIWA.

2. The dual role of domestic courts in the law of international responsibility: subject and adjudicator

In examining the extent to which domestic courts can and do contribute to the development of the law of international responsibility, it is possible to distinguish two distinct roles, or functions.

The first and most obvious way in which domestic courts may contribute to the development and clarification of the law of international responsibility is when

5 See, Arts. 30 and 31 ARSIWA, and Arts. 30 and 31 ARIO.

6 See Introductory Commentary to Part One, Chapter V, paras. 2–4 and 7 of ARSIWA; see also Crawford, *supra* note 2, at 160–2. In the *CMS* annulment, the Ad Hoc Committee discussed whether the effect of the successful invocation of a state of necessity 'goes to the issue of wrongfulness or that of responsibility', and implicitly endorsed the approach of the ILC that circumstances precluding wrongfulness are secondary rules which affect the responsibility which is otherwise entailed by a breach of an international obligation, rather than whether there has been a breach of international obligation: *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007, paras. 132–134. For discussion of the distinction, see V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', (1999) 10 EJIL 405.

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

they are called upon to consider and, if appropriate, apply the international-law rules of state responsibility (or responsibility of international organizations) in performing their normal task of adjudicating upon the cases which come before them. When fulfilling this role, depending upon the arguments put forward by parties, domestic courts may undoubtedly be called upon to express their view as to what the applicable rules of international law in fact are. That role is by far the most interesting from the point of view of the development of the law of responsibility, and is the principal focus of what follows.

However, there is a second role in which domestic courts can be said to contribute to the law of state responsibility, which can be dealt with far more briefly at the outset. This is the situation in which the decisions and conduct of domestic courts, considered for these purposes in their character as organs of the state within the meaning of Article 4 ARSIWA, in itself results in a breach of the international obligations of the state of which they form a part, and thus gives rise to the state's international responsibility.

There is a fundamental distinction between these two roles: in the first scenario, the domestic courts are active participants in a wider, ongoing discourse – involving both domestic and international courts and tribunals, states, the ILC and academic writers – as to the true content of the international rules of state responsibility. In the second scenario, the courts are regarded in the same way as any other organ of the state, the acts of which, if they breach the state's international obligations, will entail its international responsibility.

As a consequence, in the first role, domestic courts may necessarily be forced consciously to engage with the content of the international legal rules, to evaluate the arguments and material placed before them by the parties as to what the relevant rules of international law are and their content, and to consider to what extent any particular rule constitutes customary international law. Further, to the extent that they are not precluded from ruling on such questions by doctrines under domestic law which restrict the jurisdiction of the court, or require abstention or restraint as to exercise of the jurisdiction which the courts otherwise possess, as will be seen, domestic courts may actually have to apply the international law of responsibility to the facts of the case before them in order to resolve the dispute between the parties.

By contrast, in the second role, the domestic court may not even be aware that its conduct risks engaging the responsibility of the state. To give but a few examples, it is far from clear that the Malaysian courts were cognizant of the possibility that their actions in failing to recognize the immunity from jurisdiction of a Special Rapporteur of the Commission on Human Rights as a bar *in limine* to defamation proceedings brought against him by private individuals and corporations in relation to statements made during the performance of his functions, would eventually contribute to a situation in which an advisory opinion was sought from the International Court of Justice in order to clarify Malaysia's obligations under the Convention on the Privileges and Immunities of the United Nations.[7] Similarly, it seems likely that,

7 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, p. 62 (the *Cumaraswamy* Advisory Opinion).

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

when issuing an arrest warrant for the then sitting foreign minister of the Democratic Republic of the Congo, the *juge d'instruction* of the Court of First Instance in Brussels would not have foreseen that his actions would eventually end up in a finding by the International Court of Justice that Belgium had breached the customary international-law relating to sovereign immunity.[8]

By contrast, it seems probable that the Italian courts, including the Corte di cassazione in rendering its decision in *Ferrini*,[9] were well aware of the potential ramifications for Italy of their decisions by which they held that Germany was not entitled to immunity from jurisdiction in respect of claims brought by victims of Nazi atrocities during the Second World War, and by which they held it liable.[10] Similarly, the courts of Senegal must undoubtedly have been aware that they risked contributing to a finding that Senegal had breached its obligations under the United Nations Convention against Torture, by first holding that they had no jurisdiction to prosecute the ex-president of Chad, Hissène Habré, for alleged atrocities, including torture, committed under his rule, and then subsequently refusing his extradition to Belgium on the ground that he was entitled to immunity.[11]

This second, essentially passive, role of the domestic courts is of very much lesser importance in terms of the *development* of the customary international law of responsibility. The principal issue of state responsibility which arises in such cases of course relates to the rules governing attribution of the conduct of its organs to a state. However, that rule, including the specification that the courts of a state, at whatever level, form a part of the core group of organs, and that their conduct is therefore attributable, is probably among the most settled and least controversial in the modern law of state responsibility.

Given the settled rules relating to the attribution to a state of the conduct of its organs, including the judiciary, the International Court in the *Cumaraswamy* Advisory Opinion had little hesitation in affirming the 'well-established rule of international law', which it noted was of a customary character, that 'the conduct of any organ of a State must be regarded as an act of that State'.[12] Similarly, it later

8 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, p. 3.

9 *Ferrini v. Federal Republic of Germany*, Corte di Cassazione, Decision No. 5044/2004, 11 March 2004; ILR Vol. 128, p. 658; ILDC 19 (IT 2004).

10 For a summary of the various legal proceedings, see ibid., at paras. 27–29. For the Courts' finding that the actions of the Italian courts had resulted in Italy's responsibility, see paras. 52–58, and the *dispositif*, para. 139(1). In addition, the Italian courts had recognized as enforceable in Italy judgments against Germany rendered by the Greek courts in favour of Greek claimants – see paras. 30–34. The Court likewise held that the conduct of the Italian courts in that regard violated Italy's obligation to respect the immunity from jurisdiction of Germany – paras. 121–133, and the *dispositif*, para. 139(3).

11 *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal)*, Judgment of 20 July 2012 (not yet published). For the Court's summary of the relevant facts, including the decisions of the Senegalese courts, see paras. 17–22.

12 See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human, Rights supra* note 7, at 87 (para. 62). In support the Court referred to Art. 6 of the ILC's draft Articles on State Responsibility, as adopted on first reading in 1996, which subsequently became, with changes in the drafting, Art. 4 of ARSIWA.

affirmed that 'the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State'.[13]

The rule is so well-established that in *Arrest Warrant*, the Court did not even discuss the question of the attribution to Belgium of the acts of the *juge d'instruction*, but dived straight into the question whether the issue of the warrant was compatible with the immunity of Mr Yerodia as foreign minister under customary international law. Similarly, in *LaGrand*[14] and *Avena*,[15] as there was no serious dispute between the parties that the actions of the state and federal courts in the United States which had failed to give effect to the rights under the Vienna Convention on Consular Relations of foreign nationals accused of serious crimes were attributable, and the Court did not feel the need subsequently to mention the issue.[16]

In the subsequent cases of *Certain Criminal Proceedings in France*,[17] *Certain Questions of Mutual Assistance in Criminal Matters*,[18] *Jurisdictional Immunities of the State*,[19] and *Questions Relating to the Obligation to Extradite or Prosecute*,[20] which also concerned allegedly wrongful conduct of the domestic courts of the respondent state, the issue of attribution was again apparently not in dispute between the parties and the Court likewise did not discuss it.

Of course, on each occasion in which the conduct of a domestic court ultimately results in a finding of the international responsibility of the state of which it forms part – for instance, every time that the actions of a domestic court are held to have resulted in a breach of Article 6 of the European Convention on Human Rights – the default rule as to attribution of acts of judicial organs specifically, and the acts of organs of the state more generally, is reinforced. But that can hardly be referred to as 'development' of the customary law of responsibility in any meaningful sense.

Nevertheless, disputes arising from the attributable actions of judicial organs may constitute a catalyst or at least provide the opportunity for developments in other areas of the law of international responsibility.[21] Taking again the *Cumaraswamy* Advisory Opinion, at the end of its decision, the Court affirmed, in something of a

13 See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *supra* note 7, at 88 (para 63).

14 *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p. 9; Judgment, ICJ Reports 2001, p. 466.

15 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, p. 77; and Judgment, ICJ Reports 2004, p. 12.

16 In the final paragraph of the reasoning of its Order on Provisional Measures in *LaGrand*, the Court recalled that 'the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be'; *LaGrand*, Provisional Measures, *supra* note 14, at p. 16 (para. 28). However, that observation appears to have been directed prospectively to compliance with the Order, rather than to the issue of attribution of the conduct of the domestic courts that had given rise to the dispute.

17 *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 102.

18 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Reports 2008, p. 177.

19 See generally *Jurisdictional Immunities of the State*, *supra* note 10.

20 See generally *Questions Relating to the Obligation to Extradite or Prosecute*, *supra* note 11.

21 Further, as the facts underlying the *Arrest Warrant* and *Jurisdictional Immunities* decisions clearly illustrate, the conduct of domestic courts may act as the catalyst for the development, or clarification and consolidation, of existing rules in other areas of international law, most notably state immunity and jurisdictional immunities of states. This is so both insofar as the decisions of domestic courts in themselves may be relied upon as state practice of the existence of the rules of customary international law they purport to identify and then apply, and insofar as the decisions of domestic courts may result in proceedings in which an international court

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

sting in the tail for the UN, that the immunity from jurisdiction enjoyed by the Special Rapporteur was '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' and that the 'the United Nations may be required to bear responsibility for the damage arising from such acts'.[22] Although not strictly responsive to the request for an Advisory Opinion framed by the Economic and Social Council,[23] the recognition by the Court that an international organization may bear international responsibility, and that such a responsibility of the organization may be the corollary of the immunity of its functionaries from the jurisdiction of the domestic courts of states, were both important developments for the wider law of international responsibility.[24]

Having dealt with the limited role which domestic courts play as subjects of the law of international responsibility, it is possible to turn to the more fruitful hunting grounds of decisions of the domestic courts which seek to identify and apply the relevant rules of the customary international law of responsibility.

3. Decisions of domestic courts as to the content of international responsibility

As a matter of first impression, one might think that the scope for domestic courts to contribute to the development of the law of state responsibility is somewhat limited. This is so for a variety of reasons.

First, as a purely empirical matter, in the vast majority of cases, the domestic courts of states are required to rule on questions of domestic law, rather than on the responsibility of a state on the international plane. As will be seen, in many of the cases in which domestic courts have had cause to discuss the international law relating to the engagement of responsibility, the issues of international law are, to a greater or lesser extent, ancillary to issues arising purely under domestic law.

However, the ingenuity of counsel often results in arguments based on the international law of responsibility in relation to what are essentially questions of domestic law, or in support of arguments on issues of international law which do not as such implicate the responsibility of a state or international organization on the international plane. In such circumstances, the courts are likely to give short shrift to arguments based on the international law of state responsibility.

A good example in this regard is the 2008 decision of the Court of Appeal of England and Wales in *City of London* v. *Sancheti*.[25] Mr Sancheti, a national of India, had instituted an international investment treaty arbitration against the

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ruling upon an inter-state dispute is given the opportunity to pronounce upon and clarify the content of the relevant rules of customary international law.

22 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *supra* note 7, at 88–9 (para. 63).

23 For the request for an opinion as formulated by ECOSOC, see ibid., *supra* note 7, at 63–4 (para. 1).

24 See, e.g., the reliance by the ILC on the observations of the International Court of Justice in the Commentary to ARIO: Commentary to Art. 3, para. (3); Commentary to Art. 6, para. (3); Commentary to Art. 36, para. (3).

25 *City of London v. Sancheti*, [2008] EWCA Civ 1283; [2009] 1 Lloyd's Rep 117 (21 November 2008).

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

United Kingdom for what he alleged were breaches of the UK–India bilateral investment treaty (BIT) in relation to his investment in the UK. In particular, it appears that he complained, inter alia, of the discriminatory manner in which a rent revision procedure applicable to the lease of a property rented from the City of London Corporation, resulting in a substantial increase in the rent payable, had been conducted.

Subsequently, the Corporation brought proceedings before the English courts, seeking to recover the difference between the revised rent and the original rent under the lease, some £20,000. In response, Mr Sancheti sought to have the proceedings stayed on the basis that he had invoked arbitration under the UK–India BIT and that this extended to the dispute as to his liability to pay the arrears of rent resulting from the revision. His argument in that regard was relatively straightforward: relying on Article 4 of the Articles, he argued that the City of London was an organ of the UK and its acts were therefore attributable to the state, and as such, the Corporation was bound by the arbitration agreement under the BIT such that its claim should be resolved in the arbitral proceedings under the BIT, rather than before the domestic courts.

The Court of Appeal dealt with the point succinctly; Lawrence Collins LJ (as he then was) observed:

> In the present case the Corporation of London is not a party to the arbitration agreement. The relevant party is the United Kingdom Government. The fact that in certain circumstances a State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of its local authorities, does not make that local authority a party to the arbitration agreement.[26]

That decision is clearly right: whether or not the actions of the City of London are attributable to the UK for the purposes of international responsibility, including in terms of breach of any applicable BIT, the law of attribution for internationally wrongful acts is irrelevant to the question whether a constituent entity of a state is bound by an arbitration clause such that, under domestic law, it may be enjoined from bringing proceedings before the courts. This is so whether the relevant arbitration agreement arises under a contract, or under an international treaty to which the state is party.

Further, as a consequence of the fact that in many cases the principal issues are pure questions of domestic law, quite apart from cases where the reference to the international law of responsibility by one of the parties is simply rejected as misguided by domestic courts, the court may reach its decision on other grounds, and therefore not reach and deal with the question of international law. This may occur even where arguments based on responsibility are more or less directly on point.

In *Horgan* v. *An Taoiseach et al.*,[27] a decision of the Irish High court, the applicant sought to challenge the legality of the policy of the Irish government of permitting

26 Ibid., at 35.

27 *Horgan v. An Taoiseach et al., the Minister for Foreign Affairs, the Minister for Transport, the Government of Ireland, Ireland and the Attorney General*, [2003] IEHC 64; [2003] 2 IR 468; ILDC 486 (IE 2003).

overflight of Irish airspace by military aircraft of the United States en route to carry out attacks against Iraq, and the use of Shannon Airport as a stopover and refuelling point. He sought declaratory relief in that regard.

Although not directly calling into question the legality of the use of force by the United States against Iraq, it was argued that, as a matter of domestic constitutional law, the Irish government should have conducted an enquiry into the legality of the use of force before providing any assistance; further arguments were based upon Ireland's obligations under the international law of neutrality.[28] However, of particular interest for present purposes, a further strand of the argument of the applicant was that 'the aid and assistance rendered by Ireland to the military forces of the United States constitute[d] "participation" in a war' and was therefore unconstitutional as in breach of Article 28(3)(1) of the Irish Constitution, which provides 'War shall not be declared and the State shall not participate in any war', except with the asset of the leglislature (*Dáil Éireann*).

In that regard, the applicant's argument, as summarized by the High Court, was that:

> the concept of participation [in Article 28(3)(1)] could best be understood by considering relevant principles of international law. If Ireland could incur international responsibility for the use of armed force against another state, it could hardly be suggested that such a significant consequence would not be regarded as a 'participation'.
>
> Under article 16 of the International Law Commission Articles on State Responsibility . . . which are generally regarded as reflecting customary law, Ireland, by virtue of the aid and assistance it has and continues to offer, could be liable if found to be aiding or assisting the wrongful acts of another state.[29]

Having set out Article 16, the High Court quoted extensively from the Commentary to Article 16, as well as from academic commentary discussing the question of accessory responsibility of states in connection with the internationally wrongful act of another state.[30] The argument on behalf of the applicant was that:

> Having regard to the threshold thus established by the International Law Commission, counsel argued that Ireland would not be able to defend itself at international law level by claiming that the aid and assistance it had furnished did not in its view amount to a 'participation' when it clearly constituted a sufficient involvement to make it liable for the commission of a tort in international law.[31]

Article 16 was thus invoked principally in support of the interpretation of a provision of the Irish Constitution, although it also clearly implicated the responsibility of Ireland under international law on the basis of the provision of aid and assistance in relation to the use of force against Iraq.

However, the elaborately constructed argument on this point came to nothing. The court dismissed the application on the basis of considerations of domestic constitutional law relating to the justiciability of decisions taken by the executive

28 [2003] 2 IR 468, at 491–492.

29 Ibid., at 492.

30 Ibid, at 493, citing Commentary to Art. 16, para. (10). Crawford, *supra*, note 2, p. 151; and V. Lowe, 'Responsibility for the Conduct of Other States', (2002) *Japanese Journal of International Law* 1.

31 See *Horgan*, *supra* note 27, [2003] 2 IR 468, at 493.

in the field of foreign relations and the extent to which customary international law was imported into Irish law.[32] It made no comment as such in relation to the extent to which Article 16 of the Articles reflects customary international law, nor on the substance of the argument that Ireland might incur responsibility through the aid and assistance provided to other states.

A second obstacle to domestic courts being able to play an active role in the development of customary international law relating to the engagement of international responsibility results from the fact that such disputes by definition normally implicate the actions of states, which enjoy a privileged position before the domestic courts of other states. Even where issues of state responsibility may arise incidentally in domestic proceedings in the context of a claim or issue which is predominantly governed by domestic law, a timely invocation of state immunity or other cognate concepts will often preclude examination by the domestic courts of the question whether a state has complied with its international obligations.

Most obviously, where the claim is against the state itself, a successful invocation of immunity will bar a domestic court from proceeding to an examination on the merits of whether the particular conduct complained of is attributable to the state and whether that state in question has in fact breached its international obligations. However, even where the claim is not brought against the state itself (or against its instrumentalities or agents who may be able to benefit from the immunity of the state), other doctrines may preclude examination. For instance, doctrines of non-justiciability, act of state, 'political question', *fait du prince*, etc. may cause domestic courts to refrain from ruling on the legality of the actions of foreign states on the international plane.[33] Further, as the decision in *Horgan* shows, rules of domestic law relating to the role of customary international law in the domestic system may also preclude examination of the merits of questions of international responsibility, and the same may be the effect of rules in those systems which deny any effect to unincorporated treaties.[34]

As a result, one may postulate that it will be an exceptionally rare case in which a true question of the engagement of the international responsibility of a *foreign* state will come before the domestic courts, and the domestic courts of the forum are in a position to adjudicate upon it on the merits.

It is, of course, possible to identify cases in which domestic courts have expressed, in more or less strong terms, indications of their views as to whether there has been a violation of its international obligations by either the forum state or another state: for instance, the decisions of the House of Lords in *Kuwait Airways* and the *Roma*

32 Ibid.

33 As to the doctrine of non-justiciability as a matter of English law, see e.g. *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] AC 888; *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos. 4 and 5)*. [2002] 2 AC 883 (House of Lords). For the US, as to the 'act-of-state' doctrine, see *Underhill v. Hernandez*, (1897) 168 US 250; *Banco Nacional de Cuba v. Sabbatino*, (1964) 376 US 398; 35 ILR 1; and *W. S. Kirkpatrick v. Environmental Tectonics*, (1990) 493 US 400; as to the 'political question' doctrine, see *Baker v. Carr*, (1962) 369 US 186.

34 See, e.g., as a matter of English law, *J. H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, [1990] 2 AC 418; 81 ILR 670.

Rights case,[35] and the remarks of the English Court of Appeal in *Abbasi*.[36] However, in none of these cases was there any live issue of state responsibility or any dispute as to the proper application of the relevant international rules, and in none of them was there any substantive discussion in that regard.

Nevertheless, the domestic courts do have some role to play in contributing to the development of the customary international law of responsibility.

In that regard, it is of course the case that, where an international human rights convention is applicable as a matter of domestic law, every time a domestic court rules that a particular domestic body has acted inconsistently with the state's obligations, that decision is implicitly based on the underlying rules of international law relating to attribution and breach. However, those rules are so well settled that the issues in this regard are not normally made explicit.[37]

However, there are other cases in which domestic courts have engaged far more explicitly with the rules of international responsibility. In this regard, it is possible to identify two broad types or categories of cases in which domestic courts have grappled with the content of international law as to the engagement of responsibility.

First, given that state immunity only precludes the impleading of a foreign state, a particularly fertile ground in which to search for relevant practice is represented by those cases in which the claim is that the forum state itself has incurred (or would incur) its international responsibility by engaging in particular conduct. Unsurprisingly, such questions arise most frequently in public-law cases, in which arguments under international law are invoked in support of other grounds under domestic law.

The second category of cases concerns those disputes in which the international law of responsibility is relied upon not in order to determine whether a state has breached its international obligations, but as part of the general body of international law, in order to inform the approach to be taken in another area, whether under international law or domestic law.

These two broad groupings of cases, which to a certain extent parallel the categorization elaborated by André Nollkaemper in examining the role of the law of

35 *R (ex p. European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55; [2005] AC 1.

36 *R (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598; [2003] UKHRR 76; see also *Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence*, [2012] UKSC 48.

37 Although the domestic rules determining the extent to which the implementing legislation applies to particular bodies may not necessarily track precisely the contours of the law relating to state responsibility as a matter of public international law. For instance, Section 6(3), (5), and (6) of the Human Rights Act 1998, which defines the notion of 'public authority' and therefore the scope of domestic applicability of the obligations under the European Convention within the UK legal system, would appear not exactly to capture the categories of bodies the conduct of which is attributable to the UK for the purposes of its obligations under the European Convention as a matter of the general international law of responsibility. This is most obviously the case insofar as Section 6(6)(b) expressly excludes the application of the 1998 Act in relation to a failure by Parliament to make any primary legislation or remedial order; it is also far from clear that the test of whether a 'hybrid' entity which has certain 'functions of a public nature' within the meaning of Section 6(3)(b), such that the Human Rights Act 1998 applies to it in performing those functions (as to which, see, in particular, *YL v. Birmingham City Council & Ors*, [2007] UKHL 27; [2008] 1 AC 95), parallels the test under the general law of responsibility in Art. 5 ARSIWA, pursuant to which the conduct of non-organs 'exercising elements of governmental authority' is attributable to the state only to the extent to which they are in fact acting in that capacity in carrying out the conduct in question.

international responsibility in domestic courts,[38] are not intended to be either exhaustive or mutually exclusive; indeed there are a number of a cases which cannot be neatly sorted into either group. Rather, the categories are put forward solely in order to facilitate and structure the discussion of the relevant practice.

The following sections briefly examine some examples drawn from the relevant practice of domestic courts in these two areas, before discussing those few, rare, one might even say anomalous, cases in which domestic courts have in fact made findings as to the international responsibility of a state other than the forum state.

3.1. The law of international responsibility and the responsibility of the forum state

As to the first broad category of cases, those in which the claim before the court involves issues implicating the responsibility of the forum state itself, such cases have involved both questions of the 'direct' responsibility of the forum state for its own internationally wrongful acts, and questions of the responsibility of the forum state in relation to what is alleged to be the internationally wrongful act of another state under the ancillary responsibility provisions contained in Chapter III of Part One of the Articles, and in particular Article 16 relating to aid and assistance.

A striking example of reliance of the law of international responsibility by a domestic court is a decision of the Constance Regional Court, affirming the liability of the German state to indemnify a Russian airline as a result of a mid-air collision in German airspace. The collision had resulted in part from the fault of Swiss air traffic controllers who had been responsible for air traffic control in the relevant sector of German airspace at the time of the collision. The court's decision as to liability was reached on the basis that the Swiss air traffic controllers were acting as organs of the German state, on the basis that air traffic control was inherently a state function.

However, Article 6 of the Articles was invoked in support of the (somewhat convoluted) argument put forward by way of defence that Germany had, in turn, placed the air traffic controllers at the disposal of Switzerland, such that it was Switzerland which was liable. The Regional Court did not in the end actually decide that point; it held, first, that the Articles apply only in cases of inter-state responsibility, and not in relation to liability of states vis-à-vis entities other than states, and, second, somewhat formalistically, that, in any case, Germany had on the evidence not in fact placed the air traffic controllers at the disposal of Switzerland within the meaning of Article 6, such that it could not apply. In that latter regard, it observed:

> The requirements for a (factual) loan of an organ under international law, by which means the respondent [Germany] wishes to transfer responsibility to the Swiss state, are not fulfilled, for the simple reason that the respondent had not outsourced air traffic control organs that were part of its governmental structures to an agency outside its sovereign territory and made them available to the Swiss air traffic control services.

38 Cf. A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', (2007) 101 AJIL 760.

> There can thus be no question of a 'loan' as defined for the purposes of this international law doctrine.[39]

However, the case is of interest insofar as it is a relatively rare example of a case in which domestic courts referring to the Articles have actually sought to assess the extent to which particular provisions do indeed constitute a codification of existing customary international law, rather than an exercise in its progressive development. In that regard, the Court expressed the view that it was

> doubtful whether this legal concept [sc. that of lending organs] has already evolved into customary law, although it is difficult to judge since there has not been sufficient practice on the issue . . .] . It is also uncertain whether, in the absence of recognition as customary law, the rules on lending organs constitute a general principle of international law along the lines of article 38(1)(c) of the International Court of Justice Statute and article 6 of the International Law Commission [Articles].[40]

It is interesting to contrast the hesitancy of the Constance court as to the customary nature of the rule reflected in Article 6 with the decision of the District Court for the Hague in *HN* v. *Netherlands (Ministry of Defence and Ministry of Foreign Affairs)* in 2008.[41]

The claimant in *HN* had been a translator assisting the Dutchbat force stationed in Srebrenica prior to the massacre of Muslim men and boys following the overrunning of the Dutch positions by Bosnian Serb forces. He brought claims alleging violation of international law (including the Genocide Convention, the ECHR, and the ICCPR) against the Dutch government and the commanders of Dutchbat for failure to prevent the death of his brother and parents at the hands of the Bosnian Serb forces.

In defence of the claims relating to the allegedly wrongful acts of Dutchbat, the Netherlands argued that the actions and omissions of Dutchbat had to be attributed to the UN, and not the Netherlands itself, on the basis that the Dutchbat troops were present in accordance with a Security Council resolution adopted under Chapter VII of the Charter, and were under UN command and control.

The District Court concluded that the question of attribution of the actions of the Dutchbat troops, whether to the Netherlands or to the UN, fell to be decided on the basis of international law.[42] In relation to the question of the effects of provision of troops to an international organization, the District Court, paraphrasing Article 6 of the Articles, stated:

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39 Constance Regional Court, Case No. 4 O 234/05 H, judgment of 27 July 2006; partial English translation in Responsibility of States for Internationally Wrongful Acts; Comments and Information Received from Governments, Report of the Secretary General, 9 March 2007, UN Doc. A/62/63, at 11–12.

40 Ibid.

41 District Court for the Hague, *HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, LJN: BF0181/265615; ILDC 1092 (NL 2008). It may not be irrelevant in this regard that, in the interim, the International Court of Justice in *Bosnian Genocide*, in effect, implicitly endorsed Art. 6 ARSIWA as representing customary international law: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, 43, at 204 (para. 389); although cf. the more careful position taken by the Court, ibid., at 215 (para. 414).

42 *HN v. Netherlands*, *supra* note 41, para. 4.6.

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> If a public body of state A or (another) person or entity with public status (according to the law of state A) is made available to state B in order to implement aspects of the authoritative power of state B, then the actions of that body, person or entity are considered as actions of state B. This rule, considered international common law, is part of the articles accepted by the International Law Commission (ILC) under the auspices of the United Nations concerning the liability of states. According to this rule the attribution should concern acting with the consent, on the authority and 'under direction and control' of the other state and for its purposes.
>
> This rule of attribution also applies to the armed forces deployed by a state in order to assist another state, provided that they are placed under the 'command and control' of that other state.[43]

Article 6 concerns the lending of organs of one state to another state; however, the District Court, referring to the ILC's then-ongoing work on the Responsibility of International Organizations,[44] as well as prevailing international practice, saw no obstacle to applying the rule by analogy to the situation of troops placed at the disposal of an international organization.[45] The District Court went on to conclude that, given the exclusive responsibility of the UN Security Council for maintaining international peace and security, 'participation in a UN peacekeeping operation on the basis of chapter VII of the Charter implies that the "operational command and control" over the troops made available is transferred to the UN'.[46]

On the evidence, the District Court concluded that the relevant actions of the Dutchbat troops were to be assessed 'as actions of a contingent of troops made available to the United Nations for the benefit of the UNPROFOR mission',[47] and that, on that basis, 'these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations'.[48] The court further rejected the claimant's argument that, in the case of gross acts of negligence or serious failure of supervision, concurrent liability of the state coexisted with that of the UN, at whose disposal the troops had been placed, holding that even such circumstances did not affect the principal of exclusive attribution of the conduct of lent troops to the UN.[49] Having also rejected the claimant's argument that the Dutch commanders had cut across the UN command and control, such that the actions and omissions of the Dutch troops were therefore attributable to the Netherlands,[50] the court concluded that the actions of Dutchbat had to be attributed exclusively to the United Nations. As a result, the Netherlands' defence succeeded, with the consequence that the Netherlands could not be held responsible 'for any . . . wrongful act committed by Dutchbat'[51] and the claimant's claim was dismissed.

Similar issues to those faced by the Hague District Court, involving the possible attribution of the acts of troops acting abroad to entities other than their national

43 Ibid., para. 4.8.
44 See now ARIO, Art. 7.
45 *HN v. Netherlands*, *supra* note 41, para. 4.8.
46 Ibid., para. 4.9
47 Ibid., para. 4.10.
48 Ibid., para. 4.11.
49 Ibid., para. 4.13.
50 Ibid., para. 4.14.
51 Ibid., para. 4.15.

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

state, have been faced by other courts. In its admissibility decision in *Behrami and Behrami* v. *France*; *Saramati* v. *France, Germany and Norway*,[52] the Grand Chamber of the European Court of Human Rights concluded that the actions of troops of various nationalities in Bosnia as part of UNMIK and KFOR were not attributable to the contributing states, but rather to the UN on the basis that it had retained 'ultimate authority and control'.[53] As a result, the Court concluded that it had no jurisdiction to examine complaints alleging violations of the Convention.

That decision formed the basis for the part of the decision of the District Court for the Hague in *HN* relating specifically to the European Convention,[54] as well as clearly influencing its reasoning more generally in relation to the wider question of attribution. Similarly, the House of Lords in *Al-Jedda* adopted a broadly similar approach in relation to the question of the attribution of acts of British troops in Iraq, although on the facts it distinguished *Behrami*, concluding in particular that, given the different basis for the presence of the coalition forces in Iraq and the fact that they were not under UN command and control, the actions of British troops in detaining the applicant were not attributable to the UN, but to the United Kingdom.[55]

Pursuant to an appeal by the claimant in *HN*, the Court of Appeal of the Hague (Gerechtshof 's-Gravenhage) in 2011 reversed the decision of the District Court and concluded that the conduct of Dutchbat was in fact attributable to the Netherlands. In that regard, having referred to (then) draft Article 6 of the Articles on Responsibility of International Organizations, it effectively declined to follow *Behrami*, noting that,

> the generally accepted opinion is that if a state places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed, depends on the question which of both parties has 'effective control' over the relevant conduct.[56]

On the facts, it concluded that it was the Dutch government which had had 'effective control' over the relevant actions of Dutchbat.[57]

Issues involving the alleged responsibility of the forum state have also been raised in other contexts. The decision of the Irish High Court in *Horgan*, in which Article 16 was raised, although the Court did not in the event rule on the question, has already been mentioned above.[58] The German Bundesverfassungsgericht (Federal

52 *Behrami and Behrami v. France; Saramati v. France, Germany and Norway* (Apps. Nos. 71412/01 and 78166/01), Decision on Admissibility of 2 May 2007; see also *Berić v. Bosnia and Herzegovina* (Apps. Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05, and 25496/05), Decision on admissibility of 16 October 2007; *Blagojević v. Netherlands* (App. No. 49032/07), Decision of 9 June 2009; *Galić v. Netherlands* (App. No. 22617/07), Decision of 9 June 2009.

53 *Behrami and Behrami v. France; Saramati v. France, Germany and Norway*, *supra* note 52, para. 133.

54 *HN v. Netherlands*, *supra* note 41.

55 *R (Al-Jedda) v. Secretary of State for Defence (JUSTICE and Another Intervening)*, [2007] UKHL 58; [2008] 1 AC 332. See also the subsequent decision of the European Court of Human Rights in *Al-Jedda v. United Kingdom* (App. No. 27021/08), Judgment of 7 July 2011 [GC], and its careful treatment (at paras. 74–86) of the decision in *Behrami*.

56 *Nuhanovic v. Netherlands*, English translation available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388, at para. 5.8

57 Ibid., at paras. 5.10–5.20.

58 *Horgan*, *supra* note 27.

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

Constitutional Court) was likewise faced with arguments based on Article 16 of the Articles alleging the ancillary responsibility of Germany on the basis of aid and assistance in a pair of parallel cases concerning extradition requests made by the United States for two Yemeni nationals on terrorism-related charges.[59]

The two applicants alleged that they had been lured out of Yemen to Germany by agents of the United States in order to circumvent a ban on extradition of nationals under Yemeni law, and that the actions of the United States in that regard were contrary to customary international law. Building on that foundation, the applicants relied on Article 16 ARSIWA in support of an argument that extradition should be refused, since, were Germany to grant the request for extradition to the US, it would thereby be lending its support to the allegedly internationally wrongful actions of the United States, and would, as a consequence, incur international responsibility to Yemen.

In this regard, the court observed that, in principle, international responsibility might arise on that basis, noting:

> Wrongful action on the part of the United States would establish their responsibility under international law vis-à-vis Yemen. In such a case, there would be the risk that by extraditing the complainant, Germany would support a United States' action that is possibly contrary to international law, which would make Germany itself responsible under international law vis-à-vis Yemen. That such state responsibility can, under specific preconditions, be established by the support of third parties' action that is contrary to international law is shown by Article 16 of the International Law Commission's Draft Convention [*sic*] on State Responsibility, which codifies customary international law in this field . . . .[60]

However, the court in the event ruled that, in any case, there existed no rule of customary international law which the United States had breached by luring the individuals out of Yemen and which precluded extradition in such circumstances.[61]

It should be emphasized that the Constitutional Court was concerned with alleged aid or assistance occurring *after* the alleged breach of customary international law. The situation was thus one in which it was alleged that the actions of Germany would have given effect to and 'supported' the results of an internationally wrongful act which was not continuing in character. The granting of extradition would not have aided or assisted the 'commission' of an internationally wrongful act, but rather would have constituted 'support' after the fact. It is at the least arguable that such conduct is not in any case caught by Article 16 of the Articles.[62]

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59 Bundesverfassungsgericht, Case No. 2 BvR 1243/03, Decision of 5 November 2003; Bundesverfassungsgericht, Case No. 2 BvR 1506/03, Decision of 5 November 2003; English translation of the latter decision available at http://www.bverfg.de/en/decisions/rs20031105_2bvr150603en.html.

60 Ibid., Case No. 2 BvR 1243/03, at para. 47. In support of its conclusion that Art. 16 reflected customary international law, the Court referred to the ILC's Commentary.

61 See Bundesverfassungsgericht, Case No. 2 BvR 1243/03, at paras 51–60, and Case No. 2 BvR 1506/03, at paras 53–62.

62 See ARSIWA, Commentary to Art. 16, para. (3) ('Article 16 limits the scope of responsibility for aid or assistance in three ways . . . secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so') and para. (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

In any case, given its finding that there had in fact been no breach of any customary international law rule by the US, the court's decision might be regarded as strictly *obiter* on the question of aid or assistance, which it was not required to decide. However, the court's opinion that Article 16 'codifies customary international law' in this field nevertheless does provide some support for the customary nature of the rule relating to aid and assistance contained in the Articles.

3.2. The international law of responsibility as an ancillary aid for resolution of other issues

The second group of cases involves disputes in which what is at issue is not as such a question of international responsibility of a state, whether of the forum state or another state. Rather, in such cases, the international rules of responsibility may be invoked in order to assist in resolution of other issues, whether under domestic law or, on occasion, under international law. However, the rules invoked in this way are generally those which are most established (in particular, the rules on attribution), are assumed to represent customary international law and accordingly are not subject to any scrutiny. As such, decisions of this type contribute little to the development of the law of international responsibility.

Illustrative in this regard is the decision of the House of Lords in *Jones* v. *Saudi Arabia*.[63] The decision disposed of appeals in two separate claims, brought by individuals who alleged that they had been detained and tortured by members of the Saudi Arabian police in Saudi Arabia. In the first claim, the claimant sought damages (including aggravated and exemplary damages) under English law for assault and battery, trespass to the person, torture and unlawful imprisonment. The claim was directed against the Ministry of the Interior of Saudi Arabia, and the individual official alleged to have in fact carried out the torture. The second claim, alleging assault and negligence, was brought against the two police officers who had allegedly carried out the torture of the three claimants, the deputy governor of the prison where the torture had allegedly taken place, and the minister of the interior of Saudi Arabia in his personal capacity.

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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'). Crawford, *supra*, note 2, at p. 149. See also the Introductory Commentary to Part One, Chapter IV, para. (9) (Crawford, *supra*, note 2, at pp. 147–8), which refers to 'the exclusion of certain situations of "derived responsibility" from chapter IV', including 'the issue which is described in some systems of internal law as being an "accessory after the fact"... In that regard, the Commentary continues: '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'.

63 *Jones v. Ministry of Interior; Mitchell and Others v. Al-Dali and Others and Ministry of Interior*, [2006] UKHL 26; [2007] 1 AC 270; ILDC 521 (UK 2006).

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Saudi Arabia unsurprisingly invoked immunity both in respect of itself (in the first claim), and in respect of the individual defendants. In the first claim, service of the proceedings out of the jurisdiction against the state was set aside on the basis of the State Immunity Act 1978; the individual defendant was not held to have been validly served, and permission was also refused to effect service by alternative means, again on the basis of immunity. In the second claim, the Master also held that the individual defendants benefited from state immunity and on that basis refused leave to serve proceedings out of the jurisdiction. The claimants' respective appeals against those decisions were joined. The Court of Appeal dismissed the appeal in the first claim against the decision in respect of the immunity of the state, but allowed service by an alternative method as against the individual defendant. As regards the second claim, the Court of Appeal allowed the claimants' appeals against the refusal to allow service out of respect of the individual defendants. The basis of the Court of Appeal's decision in allowing the claims against the individual defendants to proceed was, essentially, that torture, even if committed by a state official, could not be regarded as constituting an official act, and therefore the individual claimants could not benefit from the immunity invoked by Saudi Arabia on their behalf.[64] The first claimant then appealed to the House of Lords against the claim in respect of immunity of the state, whilst Saudi Arabia appealed against the decision permitting service against the individual defendants in both claims, the central issue in that regard being whether the individual state officials benefited from immunity under the State Immunity Act.

Both Lord Bingham and Lord Hoffman, who gave the only two substantive speeches, with both of which the other three members of the House agreed, had little hesitation in holding that Saudi Arabia itself was immune on the basis of the terms of the State Immunity Act 1978,[65] and, on the basis of the decision of the ECtHR in *Al-Adsani*,[66] that this was not incompatible with Article 6 of the ECHR. [67]

As regards the individual defendants, the question was whether the immunity of Saudi Arabia could be validly invoked on their behalf. Under the scheme of the State Immunity Act 1978, a state is immune unless falling within precise enumerated exceptions, none of which were relied upon by the claimants.[68] However, as Lord Bingham stated:

> [w]hile the 1978 Act explains what is comprised within the expression 'State', and both it and the 1972 European Convention govern the immunity of separate entities exercising sovereign powers, neither expressly provides for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state ('servants or agents') in respect of acts done by them as such in the foreign state.[69]

64 *Jones v. Ministry of the Interior, Saudi Arabia; Mitchell and Others v. Al Dali*, [2004] EWCA Civ 1394; [2005] QB 699; ILDC 109 (UK 2004).
65 *Jones v. Saudi Arabia*, *supra* note 63, [13]; [2007] 1 AC 270 at 283.
66 *Al-Adsani v. The United Kingdom* (App. No. 35763/97); Judgment of 21 November 2001; Reports 2001-XI [GC].
67 *Jones v. Saudi Arabia*, *supra* note 63, [28]; [2007] 1 AC 270 at 290.
68 Ibid., [9]; [2007] 1 AC 270, at 280.
69 Ibid., [10], [2007] 1 AC 270, at 280–1.

However, he concluded that the acts of servants and agents of a state undoubtedly did benefit from immunity. He continued:

> There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents.

Having observed that '[i]n some borderline cases there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct', Lord Bingham noted that the cases before the court were not borderline, in that the individual defendants were public officials, and there was 'no suggestion that the defendants' conduct was not in discharge or purported discharge of their public duties'.[70]

It was at this point that the law of state responsibility entered the picture. Lord Bingham stated:

> [i]nternational law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.[71]

In support of that proposition, Lord Bingham referred to Article 4 of the Articles in relation to attribution of the acts of organs of a state and Article 7 as regards the attribution of conduct carried out in excess of authority or contravention of instructions, as well as making reference to the ILC's Commentary to those provisions,[72] and noted that the approach embodied in those Articles had been endorsed by the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*.[73] His conclusion in this regard was that:

> [p]ausing at this point in the analysis, I think that certain conclusions (taking the pleadings at face value) are inescapable: (1) that all the individual defendants were at the material times acting or purporting to act as servants or agents of the Kingdom; (2) that their acts were accordingly attributable to the Kingdom; (3) that no distinction is to be made between the claim against the Kingdom and the claim against the personal defendants . . .[74]

He went on to dismiss the arguments of the claimants that there existed an exception to immunity from civil jurisdiction in the case of violations of *jus cogens* norms such as the prohibition of torture.[75]

Lord Hoffman also made reference to the law of state responsibility, albeit from a slightly different perspective, in the context of his discussion of the reasoning of

70 Ibid., [11]; [2007] 1 AC 270, at 281.
71 Ibid., [12]; [2007] 1 AC 270, at 281.
72 Ibid., [2007] 1 AC 270, at 281–2, referring to Commentary to Art. 4, para. 13. See Crawford, *supra* note 2, 99; and Commentary to Art. 7, para. (8). See Crawford, *supra*, note 2, 108.
73 *Jones v. Saudi Arabia*, *supra* note 63, at [12]; [2007] 1 AC 270, at 282; the reference is to *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2005, 168, at 242 (paras. 213–214).
74 *Jones v. Saudi Arabia*, *supra* note 63, at [13]; [2007] 1 AC 270, at 283.
75 Ibid., [24]–[27]; [2007] 1 AC 270, at 288–89.

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the Court of Appeal that the individual defendants were not entitled to immunity because acts of torture were so illegal that they could not be considered governmental acts or exercises of state authority entitled to the protection of state immunity *ratione materiae*. He observed:

> [i]t has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal. The cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law.[76]

Having referred to the decision of the Mexico–United States General Claims Commission in *Mallén*,[77] Lord Hoffmann also referred to Article 4 of the Articles, passages from the accompanying Commentary, and Article 7 in support of that conclusion.[78] He then observed:

> [i]t seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.[79]

Accordingly, in *Jones*, the rules of attribution were relied upon in the House of Lords not in order to establish the responsibility of Saudi Arabia (although it is clear that the facts alleged, if proved, would have constituted a clear violation of the Torture Convention), but rather in order to uphold Saudi Arabia's plea of state immunity under domestic law. This link between responsibility and immunity was clearly drawn by Lord Bingham, in particular, in his observation that it is 'clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state [for the purposes of the law of state immunity] since their acts are attributable to it'.[80]

The Privy Council, in its decision in *Gécamines*,[81] deployed similar reasoning in relation to the circumstances in which a state-owned corporation having separate legal personality is to be assimilated to the state. Although formally a decision on

76 Ibid., at [74]; [2007] 1 AC 270, at 300.

77 Ibid., at [75]; [2007] 1 AC 270, at 300–1, quoting *Francisco Mallén (United Mexican States) v. United States of America*, (1927) IV *RIAA* 173, Vol. IV, p. 173.

78 See *Jones v. Saudi Arabia*, *supra* note 63, at [76]–[77]; [2007] 1 AC 270, at 301, quoting Commentary to Art. 4, para (13. See Crawford *supra*, note 2, p. 99.

79 *Jones v. Saudi Arabia*, *supra*, note 63, at [78]; [2007] 1 AC 270, at 301.

80 Ibid., at [31]; [2007] 1 AC 270, at 290. A similar link was drawn by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters supra*, note 18, at p. 244 (para. 196), when it observed that 'the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs'.

81 *La Générale des Carrières et des Mines v. F. G. Hemisphere Associates LLC*, [2012] UKPC 27; [2013] 1 All ER 409 ('*Gécamines*').

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the law of Jersey on an appeal from the Royal Court, the decision constitutes very strong authority as to the position under English law.

In *Gécamines*, the purchaser of the assignment of two arbitral awards against the Democratic Republic of the Congo sought to enforce those awards against the assets of Gécamines, the state-owned mining company, which had separate legal personality as a matter of Congolese law.

As a matter of English law, a corporation, even if owned or controlled by a foreign state, will normally be recognized as a separate entity, and not assimilated to the state, unless there exist circumstances (for instance that its separate personality is merely a sham) which would justify piercing the corporate veil.[82]

The Privy Council proceeded on the basis that there was a 'need for full and appropriate recognition of the existence of separate juridical entities established by states, particularly for trading purposes',[83] and in that regard expressed the view that similar considerations ought to apply both for the purposes of immunity and in relation to the extent to which enforcement could be sought against separate entities for debts owed by the state. In that context, in discussing the limited immunity which separate entities enjoy under the State Immunity Act 1978 and the European Convention on State Immunity (which it is intended to implement), the Privy Council made reference to Articles 4 and 5 of the Articles[84] as well as to the accompanying Commentary[85] as confirming the 'general international legal recognition' accorded to the distinction between a state and a separate entity.[86]

The domestic decisions discussed have principally concentrated on the rules relating to attribution or ancillary responsibility. However, a number of domestic courts have had occasion to consider the proper scope and operation of the rules relating to circumstances precluding wrongfulness in the context of domestic decisions.

One such example is the decision of a Divisional Court of the Queen's Bench Division of the High Court of England and Wales in *R. (on the application of Corner House Research and Campaign against Arms Trade)* v. *Director of the Serious Fraud Office*.[87] The case was an application for judicial review of the decision of the Serious Fraud Office to discontinue an investigation into alleged corruption and bribery in the context of a deal for the supply of arms between a British company and the government of a foreign state (Saudi Arabia). The decision to discontinue the investigation was taken on the basis that the investigation risked damage to the public interest, given the threat of withdrawal of intelligence co-operation by the government of the foreign state concerned if the investigation were to continue. The applicants challenged the legality of the decision on a variety of grounds,

82 See *C. Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex*, [1979] AC 351; *I Congreso del Partido*, [1983] 1 AC 244, at 258. For an example of a case in which it was held to be appropriate to pierce the corporate veil, and assimilate a corporation to the state, see *Walker International v. Republique populaire du Congo*, [2005] EWHC 2813 (Comm).

83 *Gécamines*, *supra* note 81, at [28].

84 Ibid., at [15].

85 Ibid., at [18], quoting ARSIWA, Commentary to Art. 4, para. 6 See Crawford, *supra* note 2, p. 100.

86 *Gécamines*, see *supra* note 81, at [15].

87 *R (on the Application of Corner House Research and Campaign against Arms Trade) v. Director of the Serious Fraud Office*, [2008] EWHC 714 (Admin) ('*Corner House*').

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

including its incompatibility with the rule of law, as well as challenging whether the threat by the Saudi authorities was a matter which could properly be taken into account in exercising the discretion whether to discontinue the proceedings.

The applicants also relied upon Article 5 of the 1997 OECD Anti-Bribery Convention, to which the UK is party, and which the relevant decision-makers had expressly stated they had taken into account and with which they stated they had attempted to comply. Article 5 of the OECD Convention provides:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[88]

The applicants argued that the decision to discontinue the investigation was taken in violation of that provision, on the basis that it was essentially taken due to 'the potential effect upon relations with another State'.[89]

In interpreting Article 5 of the OECD Convention, the Divisional Court was concerned to identify some distinction between the prohibited consideration of the effect of a decision of relations with another state, and the taking into account of issues of national security, which were not prohibited, as well as to identify a workable standard that would ensure uniformity in that regard among all states parties to the OECD Convention.[90]

In this connection, the court accepted the argument of the claimants that the appropriate approach in this context was by having regard to the rules of customary international law relating to the state of necessity, as reflected in Article 25 of the Articles. The Divisional Court observed:

> The solution offered by the claimants is more likely to achieve uniformity and the objective of the Convention by closely defining the circumstances in which considerations of the potential effect on relations with another state may be taken into account, notwithstanding Article 5, because of the potential impact on an investigating state's national security. It does so by invoking the doctrine of necessity in customary international law which is recognised as excusing a state from a breach of its international obligation or, as it is put in the *argot* of international law, as precluding the wrongfulness of an act not in conformity with an international obligation.[91]

Having set out Article 25 of the Articles in full,[92] the Court observed, referring to the ILC's Commentary to that provision:

> It is important to appreciate that this doctrine of necessity only arises where a state has not acted in conformity with an international obligation. The doctrine does not provide that there has been no breach, but that the state is not responsible for that

88 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, 37 ILM 1.
89 *Corner House*, *supra* note 87 at 105.
90 Ibid., at [130].
91 Ibid., at [143].
92 Ibid., at [144].

> breach. Thus the conditions under which a state may escape the consequences of its breach of an international obligation are narrowly defined. [93]

It then continued:

> In [*Gabčíkovo-Nagymaros Project*] the International Court of Justice confirmed that those strict conditions reflect customary international law.
>
> The doctrine of necessity provides a clear basis for distinguishing between those decisions which are influenced by the potential effect upon relations with a foreign state and those decisions which, while they are influenced by those considerations, are nevertheless justified by national security. A prosecutor would only be able to discontinue an investigation or prosecution in circumstances where that was the only means of protecting the security of its citizens. Moreover, such an approach would achieve uniformity since each of the contracting states would be required to bring itself within the strict conditions identified in Article 25 before it could justify its action. That uniformity would be enhanced by the principle identified by the ICJ in *Gabčíkovo-Nagymoros* that the state in question cannot be the sole judge of whether the conditions of necessity had been met. . . .
>
> The only way, as we see it, of achieving the purpose of Article 5 is to permit consideration of national security only in circumstances which on an international plane would be regarded as justifying the defence of state necessity. We can see no other way of distinguishing national security and relations with another state.[94]

Although the House of Lords subsequently allowed an appeal, and upheld the validity of the decision to discontinue the investigation, it did so on grounds that meant that it did not reach the question of the relevance of circumstances precluding wrongfulness under international law to the interpretation of the OECD Convention.[95]

3.3. Problematic cases

The two categories of cases discussed above encompass many of the instances in which domestic courts have examined the rules relating to international responsibility in recent years. However, there are a number of instances of practice which do not fit easily into either category.

It was mentioned above that it would appear to be a rare case in which a domestic court in fact rules directly upon the responsibility of a state other than the forum state. One such case, at least on first impression, is a decision of the German Bundesverfassungsgericht (Federal Constitutional Court) relating to claims for compensation as the result of expropriation of property in the Soviet zone of occupation of Eastern Germany during the period from 1945 to 1949. Some of the relevant expropriatory decisions had been adopted by the authorities set up by the Soviet Union in the Soviet Zone. The question for the Constitutional Court was whether Germany bore responsibility for those decisions.

The Court held that, as a matter of domestic law, '[i]t is not significant whether the expropriations were formally based on legal acts of the occupying power or of

93 Ibid., at [145], referring to Commentary to Art. 25, para. 1 see Crawford, *supra* note 2, p. 178; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, 7.

94 *Corner House*, *supra* note 87, at [146]–[148].

95 *R (Corner House Research and Another) v. Director of the Serious Fraud Office (JUSTICE Intervening)*, [2008] UKHL 60; [2009] 1 AC 756.

the German authorities established by that power' and that the acts of expropriation were in any case to be attributed to the Soviet Union if it was the Soviet Union which was in fact exercising 'the highest sovereignty at the time of the expropriation'.[96]

In support of that conclusion, the Court also analysed the situation from the perspective of public international law, in that regard referring to Article 18 of the Articles. The Court observed:

> This conclusion is also unobjectionable from the point of view of public international law. In the law of state responsibility, it is recognised that acts of the bodies of a state give rise to the responsibility of another state if they can be attributed to the latter (see Article 18 of the ILC Articles on state responsibility . . .). Accordingly there are no objections to attributing the expropriations under public international law to the Soviet Union, in view of its overall responsibility as occupying power and its formative influence on the events.[97]

One may doubt whether the Court in fact intended to refer to Article 18, which deals with ancillary responsibility as a result of coercion, rather than to Article 17, which deals with direction and control of another state, and on its face would appear to be more relevant to the situation of occupation at issue.[98]

However this may be, it appears that the Constitutional Court took the remarkable step of holding that the Soviet Union was responsible for the violations of international law constituted by the expropriations. However, the Soviet Union was of course not a party to the proceedings and accordingly the question of its responsibility for the acts in question was not as such before the court. Indeed, the Soviet Union had ceased to exist by that stage. It is not clear whether the Russian Federation, as successor to the Soviet Union, ever protested against the decision. In any case, the decision is perhaps best regarded as anomalous.

A further cluster of problematic cases are a number of decisions of German courts arising out of the Argentine financial crisis, in relation to claims brought by holders of Argentine bearer bonds. As a result of the economic crisis, Argentina failed to make payments due in accordance with the terms of those bonds, and, upon being sued by the holders before the German courts, attempted to justify its non-payment inter alia on the existence of a state of necessity under international law.

In one of those cases, the Frankfurt am Main Regional Court (Oberlandesgericht), in a decision dated 27 June 2006,[99] ruled simply that

> [Argentina] can no longer invoke a state of emergency based on insolvency as a defence to the plaintiff's claims . . . because the facts underlying the dishonouring of the debts no longer apply and because the respondent has not submitted that repaying all its debts would result in a state of emergency.[100]

96 Bundesverfassungsgericht, decision of 26 October 2004 (Cases Nos. 2 BvR 955/00, and 2 BvR 1038/01), at paras. 136–137 (available in English at http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html).
97 Ibid., para. 138.
98 See e.g. Commentary to Art. 17, para. (5); Crawford, *supra* note 2, 153.
99 Oberlandesgericht, Frankfurt am Main, Decision of 27 June 2006 (Case No. 2/21 O 122/03); partial English translation in Responsibility of States for Internationally Wrongful Acts, *supra* note 39 at para. 31.
100 Ibid.

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

In amplifying on its holding, the court recorded that it was undisputed that, as a matter of international law:

> a state of emergency can only suspend the debtor State's obligations to pay. The obligations revive when the prerequisites for the state of emergency are no longer given. This is now the case, since the reasons that the respondent originally cited to justify the state of emergency and the debt moratorium no longer exist.

In that regard, the court made reference to the customary international law of necessity, which it took as being codified in Article 25 of the ILC's Articles, and referred to the requirement in Article 25(1)(a) that necessity may not be invoked unless the particular action was 'the only way for the state to safeguard an essential interest against a grave and imminent peril'. In that regard, it emphasized that 'since article 25 of the International Law Commission draft contains an exception to the obligation to comply with international law, the general threshold for necessity was set very high'.[101]

The Court considered the scope of the term 'essential interest' by reference to the work of the Committee on International Monetary Law of the International Law Association in the context of financial crises of debtor states, which had expressed the position that

> in the event of insolvency of a debtor nation, a temporary suspension of payments for the purpose of debt restructuring was permissible if the State would otherwise no longer be able to guarantee the provision of vital services, internal peace, the survival of part of the population and ultimately the environmentally sound preservation of its national territory.[102]

The Court noted that this view was

> in line with the submissions made by the respondent and with the international literature it has referred to. These sources do not consider a national emergency to exist simply when it is economically impossible for the State to pay the debts. Additional special circumstances must also be present, which make it evident that meeting the financial obligations would be self-destructive, e.g. because servicing the debt would mean that basic State functions (health care, the administration of justice, basic education) could no longer be fulfilled.[103]

Given that the facts on which the state of necessity might have been held to have existed were in any case no longer present, the Court concluded that Argentina was not able to rely on the state of necessity under international law in order to resist payment to the bondholders.

A further group of cases involving similar facts reached the Bundesverfassungsgericht and were decided on 8 May 2007.[104] The Constitutional Court was called upon to decide, in response to a number of similar requests for a preliminary ruling

101 Ibid.
102 Ibid.
103 Ibid.
104 Bundesverfassungsgericht, Cases 2 BvM 1/03–5/03 and 2 BvM 1/06 and 2/06, Decision of 8 May 2007; translation available at http://www.bundesverfassungsgericht.de/entscheidungen/ms20070508_2bvm000103en.html.

by the Frankfurt am Main Amtsgericht, whether there existed any rule of customary international law permitting a state to disregard its contractual obligations owed to private individuals on the basis of the existence of a state of necessity.

The Court discussed the state of necessity as a matter of general international law, and referred to Article 25 of the Articles and the accompanying Commentary, as well as relevant international jurisprudence.[105] On that basis, the Court recognized that the state of necessity, as reflected in Article 25 of the Articles, was accepted as a rule of customary international law and was capable of precluding wrongfulness in the context of inter-state obligations.[106] However, it went on to find that there was an insufficient basis on which it could be concluded that there existed any such rule which could be invoked against private individuals, rather than against states, so as to permit a state to escape contractual liability of payment under a private-law relationship.[107] The Court stated:

> The relevant case-law of international and national courts together with the views expressed in scholarly literature on international law do not permit the positive ascertainment of a general rule of international law, according to which, over and above the area of application of Article 25 of the ILC Articles on State Responsibility, restricted as it is to international-law relations, a state would also be entitled to temporarily refuse to meet payment claims due in private-law relationships towards private creditors after declaring state necessity because of inability to pay. There is no uniform state practice recognising such a justification by force of international law.[108]

Again, these decisions are perhaps best regarded as anomalous and arising due to the particular nature of the claims and the defence invoked by Argentina. So far as it is possible to ascertain from the translations of the available decisions, the question of invocation of necessity as a circumstance precluding wrongfulness under international law did not arise in the context of an issue as to whether Argentina's refusal to make payments under the bonds was as such internationally wrongful, at least as regards the bondholders, but rather in the consideration of a free-standing defence to their claims for payment under the bonds which was said to arise under German law (albeit imported from and deriving from international law).

The difference in approach appears to have been dictated by the different procedural context. The Oberlandesgericht was able to dispose of the defence on the basis that, even if the international-law defence of necessity could be invoked against private individuals, given the effect of the doctrine in temporarily excusing performance of obligations, rather than extinguishing them, in the circumstances, and in particular the disappearance of the facts alleged to give rise to the state of necessity, it could not continue to justify Argentina's failure to perform its obligations under the bonds. By contrast, the Constitutional Court was squarely faced with the question whether necessity could be relied upon as against individuals, rather than states, under international law, and was thus required to express a view.

105 Ibid., at paras. 35–47.
106 Ibid., at paras. 45–47.
107 Ibid., at para. 64, although cf. the strongly dissenting opinion of Judge Lübbe-Wolff on this point.
108 Ibid., para. 51.

4. Conclusions

What conclusions can be drawn from the foregoing survey of domestic decisions involving questions of the engagement of international responsibility?

The first obvious conclusion is that the extent to which domestic courts in fact make any meaningful contribution to the development of customary international law governing the engagement of responsibility is comparatively limited. That conclusion would appear to be justified both on the basis that domestic courts only infrequently have the opportunity to adjudicate on questions of international responsibility and due to the fact that, on the rare occasions when such questions do come before them, they generally will not be decisive of the merits of the case. Although incidental reference to the rules on international responsibility provides some further opportunity for domestic courts to engage with and consider the law, the rules which are most conducive to that effect are the basic, uncontroversial rules as to attribution.

Second, it seems clear that the finalization by the ILC of its work on state responsibility has had a salutary effect in making the content of the law, and the underlying state practice, clearer and more easily accessible, both for counsel and for judges.

However, that leads to a third point: taking the decisions surveyed above as a whole, with the notable exception of the decision of the Constance court,[109] there is a certain general tendency for domestic courts to simply apply the ILC's Articles (and the Articles on Responsibility of International Organizations) as if they were a legislative text, with little independent analysis of the extent to which the individual provisions which they are called upon to apply in fact represent customary international law. David Caron predicted precisely this problem, which results from the quasi-legislative format of the Articles, shortly after their adoption, and warned against the risks that too much authority might be attributed to them.[110]

Of course, domestic courts are not particularly well placed to assess whether or not any particular provision of the Articles or the Articles on International Organizations reflect customary international law. The uncritical approach to the Articles as representing a simple codification of customary international law (rather than, as the Commentary makes clear,[111] a mix of codification and progressive development), is relatively unproblematic in relation to the most well-settled rules relating to attribution. However, in relation to other, more controversial provisions, such as those relating to ancillary responsibility for aid and assistance, the precise contours of the rules, particularly at the outer fringes, are far from clear or settled.

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109 Although admittedly some domestic courts have displayed somewhat greater scepticism in relation to the customary nature of other Articles outside Part I. See in particular, the decision of the Divisional Court in *R (on the Application of Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs*, [2009] EWHC 1910 (Admin), DC, at 57 (in relation to Arts. 40 and 41 ARSIWA). Cf., however, the observations of Lord Bingham in *A and Others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, at 34; [2006] 2 AC 221, at 262–3 (as regards the obligations of states deriving from the prohibition of torture).

110 D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, (2002) 96 AJIL 856.

111 ARSIWA Introductory Commentary, para 1. See Crawford, *supra* note 2, 74.

https://doi.org/10.1017/S0922156513000277 Published online by Cambridge University Press

Finally, although the impact of the domestic courts themselves upon the development of the law of international responsibility is relatively minimal, the phenomenon of the invocation of and reliance upon the international law of responsibility before domestic courts may have broader consequences. When faced with a claim relying on the rules of international law as to engagement of responsibility, a government, in contradistinction to other litigants, is not free simply to adopt the argument or position that best suits its position or is seen as most likely to win the particular case. The position and arguments taken by the state in litigation before domestic courts no less represent state practice and *opinio juris* than statements made in other fora.[112] As a consequence, the arguments which may be run and the stance which may be adopted are necessarily also a question of policy, implicating the position of the state more generally as to the content of the particular rules of international law in issue. To the extent that those positions are recorded in judgments, or (in the common-law world), in the reports of judgments,[113] they have implications which extend beyond the single piece of litigation.

112 As do the decisions of the domestic courts. The question how to decide what constitutes state practice when a government takes a particular position as to the law before its domestic courts, and the domestic court in its judgment rejects that position and expresses a different view as to the content of the law, at odds with that of the government, is beyond the scope of this paper. Cf. A. Roberts, 'Comparative International Law: The Role of National Courts in Creating and Enforcing International Law', (2011) 60 ICLQ 57, at 62.

113 See, e.g., the summary of the position taken by the UK government as to the conditions for invocation of necessity under customary international law before the House of Lords in the report of *R (Corner House Research and another) v. Director of the Serious Fraud Office (JUSTICE intervening)*; [2008] UKHL 60; [2009] 1 AC 756, at 812.