

Rules on State Responsibility

Quick Reference Rules of Law

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Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

State (P) v. State (D)

2007 I.C.J. 191.

NATURE OF CASE: Action brought in the International Court of Justice to determine whether a state committed a criminal violation of international law.

FACT SUMMARY: In 1993, Bosnia and Herzegovina (P) brought suit against the Federal Republic of Yugoslavia (Serbia and Montenegro) (D) in the International Court of Justice, claiming violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

RULE OF LAW

The conduct of any state organ is to be considered an act of the state under international law, therefore giving rise to the responsibility of the state if the conduct constitutes a breach of an international obligation of the state.

FACTS: The Socialist Federal Republic of Yugoslavia began to break up in the early 1990s, and the republics of Bosnia and Herzegovina (P), Croatia, Macedonia, and Slovenia declared independence. Serbia and Montenegro (D) eventually declared themselves the Federal Republic of Yugoslavia (FRY) (D). During armed conflicts that arose in 1992-1995 within Bosnia and Herzegovina (P), a massacre was perpetrated by Serbian forces on 8000 Bosnian Muslim men of fighting age in a small village called Srebrenica in July 1995. In 1993, Bosnia and Herzegovina (P) brought suit against the FRY (Serbia and Montenegro) (D) in the International Court of Justice, claiming violations of the Convention on the Prevention and Punishment of the Crime of Genocide, on the theory that FRY (D) was responsible for the actions of the Serbian forces.

ISSUE: Is the conduct of any state organ to be considered an act of the state under international law, therefore giving rise to the responsibility of the state if the conduct constitutes a breach of an international obligation of the state?

HOLDING AND DECISION: [Judge not identified in casebook excerpt.] Yes. The conduct of any state organ is to be considered an act of the state under international law, therefore giving rise to the responsibility of the state if the conduct constitutes a breach of an international obligation of the state. This is a rule of customary international law that was codified in Article 4 of the ILC Articles on State Responsibility.

There is no evidence that the Serbian forces were de jure organs of FRY (D). It has not been shown in this case that the army of the FRY (D) took part in the massacres, or that

the political leaders of the state had any part in it. There is no doubt that the FRY (D) was providing substantial financial support, in addition to other support, to the Serbian forces that carried out the genocide, but that does not automatically make them organs of the FRY (D).

It is possible to attribute to a state the conduct of persons or groups who, while they do not have the legal status of state organs, are de facto organs of the state, on the theory that they act under strict control by the state. This is so in cases where the persons or groups act in "complete dependence" on the state. In this case, in July 1995, however, the Serbians could not be regarded as mere instruments through which the FRY (D) was acting, or as lacking any real autonomy. The acts of genocide at Srebrenica cannot therefore be attributed to FRY (D) under the "complete dependence" theory.

The conduct of a person or group of persons can also be considered a de facto act of state under international law if in carrying out the offending conduct, the person or group is in fact acting on the instructions of, or under the direction or control of, the state. To determine whether a person or entity may be equated with a state organ even if not having that status under law, it is not necessary to show that the persons who performed the acts were in a relationship of "complete dependence" on the state, but it has to be proved either that they acted in accordance with that state's instructions, or under its "effective control," or that they were under the "overall control" of the state. The "effective control" test is drawn from *Nicaragua v. United States of America*, and requires a showing that the state controlled all aspects of the operation in question. The "overall control" test, unlike the "effective control" test, does not require a showing that every operation by the group was under supervision of the state, but that the state was in general control. The appeals chamber used this test to determine that the acts committed by Serbs rose to international responsibility of the FRY (D).

But the "overall control" test has the major drawback of broadening the scope of state responsibility beyond the fundamental international law principle that a state is responsible only for its own conduct, and for this reason, the test is unsuitable. And there is no evidence that the Serbs were under the effective control of FRY (D) while conducting the massacre at Srebrenica. Thus, the persons or entities that conducted the massacres at Srebrenica were not organs of the FRY (D), and FRY (D) is not responsible under international law for the massacres.

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ANALYSIS

See also the brief for the first part of this case, interpreting the requirements of the Genocide Convention, which is excerpted on page 166 of the casebook. In deciding whether to hold FRY (D) liable for the alleged genocide at Srebrenica by certain Bosnian Serbs, the I.C.J. referred to a standard set by *Nicaragua v. United States*, in which the United States was found not to be legally responsible for the actions of the Contra guerrillas, despite their common goal and public support.

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Quicknotes

BREACH The violation of an obligation imposed pursuant to contract or law, by acting or failing to act.

GENOCIDE The systematic killing of a particular group.

INTERNATIONAL LAW The body of law applicable to dealings between nations.

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Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)

Shareholders (P) v. Corporation (D)

I.C.J., 1970 I.C.J. 3.

NATURE OF CASE: Proceeding before the International Court of Justice.

FACT SUMMARY: Belgium (P) claimed that Spain (D) should be held responsible for injury to a Canadian corporation operating in Spain.

RULE OF LAW

When a state admits into its territory foreign investments or foreign nationals, it assumes an obligation concerning their treatment based on general international law.

FACTS: Belgium (P) sued Spain (D) on behalf of Belgian nationals (P) who had invested in a Canadian corporation. Belgium (P) alleged that Spain (D) was responsible for acts in violation of international law that had caused injury to the Canadian corporation and its Belgian shareholders (P).

ISSUE: When a state admits into its territory foreign investments or foreign nationals, does it assume an obligation concerning their treatment based on general international law?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. When a state admits into its territory foreign investments or foreign nationals, it assumes an obligation concerning their treatment based on general international law. An essential distinction should be drawn between those obligations of a state toward the international community as a whole and those arising from the field of diplomatic protection. If a breach of an obligation that is the subject of diplomatic protection occurs, only the party to whom an international obligation is due can bring a claim.

ANALYSIS

The Court mentioned the basic rights of all human persons to be protected against slavery and racial discrimination as deriving from basic general international law. Such rights may derive from international instruments of a universal or quasi-universal character. Such obligations are obligations *erga omnes*, that is, all states have a legal interest in their protection.

Quicknotes

DIPLOMATIC PROTECTION The act by which a State, on behalf of one of its citizens who is an injured party, intervenes when a rule of international law has been violated.



Rainbow Warrior (New Zealand v. France)

[Parties not identified.]

France-New Zealand Arbitration Tribunal, 82 I.L.R. 500 (1990).

NATURE OF CASE: Arbitration regarding removal of prisoners.

FACT SUMMARY: France removed two agents convicted of destroying a ship docked in New Zealand on the basis that they required emergency medical treatment.

RULE OF LAW

The wrongfulness of an act of a state not in conformity with an international obligation is precluded by the "distress" of the author state if there exists a situation of extreme peril in which the organ of the state has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner inconsistent with the requirements of the obligation at issue.

FACTS: A team of French agents destroyed a civilian vessel docked in New Zealand. Agents Mafart and Prieur were extradited and New Zealand sought reparations from the incident. Following the transfer of the two agents to a French military facility, they were later transported to Paris on the basis that they each needed medical treatment. The dispute was submitted to an arbitral tribunal. New Zealand demanded a declaration that France had breached its obligations and ordered that it return the agents to the facility for the remainder of their sentences.

ISSUE: Is the wrongfulness of an act of a state not in conformity with an international obligation precluded by the "distress" of the author state if there exists a situation of extreme peril in which the organ of the state has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner inconsistent with the requirements of the obligation at issue?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. The wrongfulness of an act of a state not in conformity with an international obligation is precluded by the "distress" of the author state if there exists a situation of extreme peril in which the organ of the state has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner inconsistent with the requirements of the obligation at issue. Three conditions here would be required to justify France's conduct: (1) very exceptional circumstances of extreme urgency involving medical or other considerations, provided prompt recognition of such circumstances is provided by New Zealand; (2) the reestablishment of the original situation of compliance;

and (3) a good faith effort to try to obtain the consent of New Zealand. The unilateral removal of Mafart without obtaining New Zealand's consent was justified; however, the removal of Prieur was a material breach of France's obligations.

ANALYSIS

The court rejects France's contention that the circumstances here constituted a force majeure. "Force majeure" is usually invoked to justify unintentional acts, and refers to "unforeseen external events" that render it "materially impossible" to act in conformity with the obligation.



Quicknotes

FORCE MAJEURE CLAUSE Included in contracts to protect against nonperformance due to causes outside control of the parties; unforeseen external event that results in impossibility.

MATERIAL BREACH Breach of a contract's terms by one party that is so substantial as to relieve the other party from its obligations pursuant thereto.

UNILATERAL One-sided; involving only one person.



Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

[Parties not identified.]

I.C.J., 1997 I.C.J. 7.

NATURE OF CASE: Review of countries' obligations pursuant to a treaty.

FACT SUMMARY: Hungary claimed it was no longer bound to a treaty entered into with Czechoslovakia on the basis that it was justified in abandoning and suspending works due to a "state of necessity."



RULE OF LAW

A state of necessity can only be invoked if it is occasioned by an essential interest of the state authoring the act conflicting with its international obligations, that interest was threatened by a grave and imminent peril, the act being challenged is the only means of safeguarding that interest, the act challenged must not have seriously impaired an essential interest of the state toward which the obligation existed, and the state that authored the act must not have contributed to the state of necessity.

FACTS: Hungary and Czechoslovakia entered into a treaty for the construction and operation of a system of locks on the Danube River, which was started but not completed. The two countries underwent major transformations in government, with Czechoslovakia dividing into two separate states. Hungary gave notice of the termination of the treaty. Hungary and Slovakia later petitioned to the I.C.J. to decide whether Hungary was entitled to suspend and abandon its operations on the basis of changed circumstances and impossibility. Slovakia contended that it was entitled to implement a significant variation from the original plan in response to Hungary's repudiation of the treaty.

ISSUE: Can a state of necessity only be invoked if it is occasioned by an essential interest of the state authoring the act conflicting with its international obligations, that interest was threatened by a grave and imminent peril, the act being challenged is the only means of safeguarding that interest, the act challenged must not have seriously impaired an essential interest of the state toward which the obligation existed, and the state that authored the act must not have contributed to the state of necessity?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. A state of necessity can only be invoked if it is occasioned by an essential interest of the state authoring the act conflicting with its international obligations, that interest was threatened by a grave and imminent peril, the act being challenged is the only means of safeguarding that interest, the act challenged

must not have seriously impaired an essential interest of the state toward which the obligation existed, and the state that authored the act must not have contributed to the state of necessity. The perils invoked by Hungary were neither sufficiently established nor imminent; Hungary had available alternative means of responding to the perceived dangers other than suspension and abandonment of the works.

ANALYSIS

Hungary failed in its argument here on the imminency of the perceived peril. While guarding the "ecological balance" had been interpreted to constitute an "essential interest," "imminency" of the peril was interpreted as necessarily being "a threat to the interest at the actual time," even if the peril were to take place at some time in the future. The dangers here remained "at some far-off time" and were too "uncertain" to invoke the justification.

Quicknotes

REPUDIATION The actions or statements of a party to a contract that evidence his intent not to perform, or to continue performance, of his duties or obligations thereunder.

TREATY An agreement between two or more nations for the benefit of the general public.

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

Treaty partner (P) v. New nation (D)

1997 I.C.J. 7, reprinted in 37 I.L.M. 162 (1998).

NATURE OF CASE: Proceeding before the International Court of Justice.

FACT SUMMARY: Hungary (P) claimed that when Czechoslovakia (D) appropriated waters of the Danube River to construct a dam, it violated provisions of a treaty.



RULE OF LAW

Watercourse states shall participate in the use, development, and protection of an international watercourse in an equitable and reasonable manner.

FACTS: Hungary (P) and Czechoslovakia (D) had signed a treaty in 1977 for the construction of dams and other projects along the Danube River that bordered both nations. After Hungary (P) stopped working on the project and negotiations failed to resolve the matter, Czechoslovakia (D) began work on damming the river in its territory and Hungary (P) terminated the treaty. Hungary (P) claimed the damming of the river had been agreed to only in the context of a joint operation and sharing of its benefits, and that Czechoslovakia (D) had unlawfully unilaterally assumed control of a shared resource.

ISSUE: Shall watercourse states participate in the use, development, and protection of an international watercourse in an equitable and reasonable manner?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. Watercourse states shall participate in the use, development, and protection of an international watercourse in an equitable and reasonable manner. Czechoslovakia (D) deprived Hungary (P) of its right to an equitable and reasonable share of the natural resources of the Danube and failed to respect the proportionality that is required by international law. The parties must reestablish cooperative administration of what remains of the project.

ANALYSIS

The Court held that the joint regime must be restored. Common utilization of shared water resources was necessary for the achievement of several of the Treaty's objectives. Czechoslovakia (D) was not authorized to proceed without Hungary's (P) consent.

Quicknotes

TREATY An agreement between two or more nations for the benefit of the general public.

UNILATERAL One-sided; involving only one person.