



Impact of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts in US, UK and Canadian Courts

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2 June 2011

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Introduction

- The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the "Draft Articles") have become an important source of authority for international tribunals despite being 'soft law'.
- However, the Draft Articles have not yet had a significant impact on municipal courts (at least insofar as the jurisdictions discussed in this presentation are concerned):
 - International law typically only becomes relevant to municipal court proceedings to the extent that it has been incorporated into domestic law.
 - Most of the internationally wrongful acts for which a state would be responsible as a matter of public international law involve governmental, *iure imperii*, activities (for which the state would typically have a sovereign immunity to suit).
 - Accordingly, it is only before international tribunals that questions of state responsibility for internationally wrongful acts commonly arise.
 - The Articles include only secondary rules which tend to be of less relevance to domestic courts which generally provide their own secondary rules for dealing with the consequences of breaches of international norms (where such norms are relevant in domestic proceedings).
- Most of the references to the Draft Articles in the following cases are made in passing, or are not discussed in the judgment of the case despite being raised in the pleadings.

Cases in the English Courts: *R v. Lyons & Ors* [2003] 1 AC 976

- The Guinness case - defendants accused of illegally inflating share price to assist bid for another company.
- During the investigation, the Department of Trade & Industry inspectors compelled answers from the defendants under the Companies Act 1985:
 - s. 436 – refusal to answer is punishable as if a contempt of court (prison).
 - s.434(5) – the answers given may be used in evidence.
- In the criminal case, the judge refused to exercise his discretion to exclude these answers.
 - On application by one of the defendants, the European Court of Human Rights decided that this constituted a breach of ECHR Article 6(1) (right to a fair trial) (*Saunders v. UK* (1996) 23 EHRR 313).
 - The Attorney General subsequently issued guidance to prosecutors that they should not normally use such evidence. The Companies Act 1985 was also later amended to exclude such evidence being used in criminal trials.
- Before the House of Lords, the appellants argued that the court's refusal to disallow such evidence would constitute a breach of the UK's international obligations.
 - Draft Articles - state must make restitution for internationally wrongful acts by restoring the status quo ante (i.e., in this case, by overturning the conviction).
- House of Lords held that the ECHR is an international treaty and so does not confer rights directly enforceable in domestic law.
 - Although the courts should interpret legislation in accordance with international obligations, this cannot override an express statutory provision.
 - This may be in breach of a treaty provision but the courts are bound to apply the law of Parliament.

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Cases in the English Courts: *A & Ors v. Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221

- Secretary of State had issued certificates to detain suspected terrorists.
 - Based on emergency legislation following 9/11 (threat to the life of the nation constituting a permitted derogation to the Convention for the Protection of Human Rights and Fundamental Freedoms).
- Claimants appealed their detention to the Special Immigration Appeals Commission.
 - Special Immigration Appeals Commission (Procedure) Rules 2003 – SIAC can receive evidence not admissible in court.
 - SIAC dismissed the appeals based partly on evidence of a third party allegedly obtained through torture in a foreign state.
 - CA upheld the SIAC's decision.
- The House of Lords upheld the appeals and remitted the cases to the SIAC for reconsideration.
 - The HL held that evidence obtained by torture was inherently unreliable, unfair and offensive to humanity and decency and incompatible with the principles on which courts should administer justice. Accordingly, such evidence is inadmissible irrespective of where such torture took place.
 - The HL held that whilst the Secretary of State could rely on such material to certify, arrest and detain a person suspected of terrorism, the SIAC had to exercise a judicial function and was bound by the above.
- Lord Bingham:
 - "Article 41 of the [Draft Articles] requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law."

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Cases in the English Courts: *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270

- Claimants brought action for psychological damages as a result of torture suffered during imprisonment in Saudi Arabia.
 - Both the Kingdom of Saudi Arabia and the individual torturers were named as defendants.
- The Kingdom of Saudi Arabia claimed state immunity for the impugned actions both for itself and for the individual defendants.
 - The Court of Appeal upheld the immunity from suit for the Kingdom of Saudi Arabia, but decided that the individual defendants could not benefit from this protection:
 - The CA decided that since torture is a crime under international law, it could not be treated as an official act so as to attract immunity *ratione materiae* in respect of criminal or civil proceedings.
 - The CA also held that a blanket immunity would constitute a breach of claimants' right of access to court under ECHR Article 6.
 - Claimants appealed the immunity of the Kingdom of Saudi Arabia, defendants appealed the lack of immunity for the state officials.
- House of Lords determined that state immunity does apply to state officials for acts of torture as it had not been shown that the prohibition of torture took precedence over other rules of international law.
 - Lord Bingham cited the Draft Articles in analysing the distinction between 'unauthorised but still official' conduct and 'private' conduct (question of apparent authority):
 - Article 4 – '[t]he conduct of any state organ shall be considered an act of that state under international law' ... '[a]n organ includes any person which has that status in accordance with the internal law of the state'.
 - Article 7 – '[it] shall be considered an act of state under international law if the organ, person or entity acts [in exercise of governmental authority] even if it exceeds its authority or contravenes instructions.'

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Cases in the English Courts: other cases citing the Draft Articles

- *City of London v Sancheti* [2008] EWCA Civ 1283 – case concerning the decision of a UK county court to refuse to stay an action involving a BIT arbitration.
 - Claimant cited Article 4 of the Draft Articles (that a state is responsible for the acts of organs of the state) to assert that the Corporation of London is a state organ.
 - The Draft Articles were not referred to in the *ratio* of the case.
- *Continental Transfert Technique Ltd v Government of Nigeria & Others* [2009] EWHC 2898 (Comm) – case concerning enforcement of arbitral award in the UK against a state entity (the Nigerian National Petroleum Corporation) that had not been party to the arbitration.
 - The judgment of the High Court cited Article 8 of the Draft Articles (conduct directed or controlled by a State) in rejecting the NNPC's claims that the Interim Charging Orders should be discharged immediately (the judge decided to let the matter take its usual course).
 - This did not decide the point of whether the NNPC actually constituted a department of the Nigerian State.
- *R (on the application of Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office* [2008] EWHC 714 (Admin) (Div Ct) – case concerning the Serious Fraud Office's investigation into bribery in Saudi Arabia. Following threats to the relationship between the Kingdom of Saudi Arabia and the UK, political pressure led to the discontinuance of the investigation. The claimants judicially reviewed this decision by the Director of the SFO.
 - The claimants, *inter alia*, offered the solution that the potential effect on relations with other states should only be taken into account in the case of 'necessity' under customary international law.
 - The source for this submission was Article 25 of the Draft Articles (dealing with necessity as a ground for precluding the wrongfulness of an action of a state not in conformity with an international obligation).

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Cases in the English Courts: other cases citing the Draft Articles *cont...*

- *R (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2006] EWHC 972 (Admin) (Div Ct) – case concerning detention of British residents in Guantanamo Bay.
 - The claimant tried to use Article 40 of the Draft Articles (on serious breaches of obligations under peremptory norms of general international law) to impose an obligation of the UK to prevent torture outside of its own territory.
- *R (on the application of Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) (Div Ct) – action in respect of actions of Israel in Gaza post December 2008.
 - Claimant was a Palestinian NGO seeking an order that the UK should use its best endeavours to intervene in accordance with its international obligations (e.g., public denunciations, suspension of aid and trade, applications to the EU etc).
 - Claimant relied on the Draft Articles (no detail was given in the judgment) but this was rejected by court.
- *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin) – Binayam Mohamed case (British resident held in Guantanamo). Claimant sought disclosure in confidence to his lawyers of potentially exculpatory documents that were being withheld by the UK on national security grounds.
 - The judgment referred to Article 41 requiring states to cooperate to bring to an end through lawful means any serious breach of a peremptory norm of customary international law.

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Cases in the US Courts

- *Compagnie Noga v. Russian Federation*, 361 F.3d 676 (2d Cir. 2004) – action for enforcement of an arbitration award in New York.
 - US District Court for the Southern District of New York had denied the contractor's motion to enforce the awards on the ground that the state was not itself the party subject to the underlying agreements and arbitration (which were entered into by an organ of the state instead of the state itself).
 - Article 4(1) of the Draft Articles was used as authority for proposition that there is no distinction in international law between a State and its organ.
 - The order denying the contractor's motion to enforce the awards and judgments was vacated and the case was remanded for further proceedings.
- *McKesson HBOC v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001) – Iran appealed decision by the United States District Court of the District of Columbia granting summary judgment for the American company appellee which held Iran liable for expropriating the company's equity in a dairy farm located in Iran.
 - In relation to the issue of compound interest, the court referred to the Third Report on State Responsibility submitted to the International Law Commission of the UN which states that compound interest is not generally awarded under international law, although special circumstances may arise which justify some element of compounding as an aspect of full reparation.

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Cases in the Canadian Courts

- The Draft Articles have not yet been cited in a case before a Canadian court.

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