

Impact of the ILC Draft Articles on Responsibility of States for Internationally Wrong Acts in Continental European States

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The limited number of cases

Even though domestic cases in continental European states where courts adjudicate claims based on a breach of an international obligation easily numbers in the 100s a year, the ASR play a role in only an extreme minority of such cases.

The limited number of cases: reasons

- National law will often be sufficient / ASR have nothing to add
 - The Netherlands, Supreme Court, *CDS v The State of the Netherlands*, 30 March 1990, [1991] NYIL 249
- ASR are not applicable to the large majority of claims in national courts (made by individuals)
 - Germany, *Argentine Bondholder Case, K and ors v Argentina*, Decision of the Federal Constitutional Court, (ILDC 952 (DE 2007))
- Many conflicts between international law and national law are not seen as being of the type that they lead to state responsibility
- Special regimes
 - Germany, *East German Expropriation Case* ILDC 66 (DE 2004) *art 3 1907 Convention)
 - Italy, Court of Cassation, *Dorigo*, ILDC 1096 (IT 2007) (ECHR)

Responsibility decisions that not refer to the ASR

- Belgium, *Mukeshimana-Ngulinzira and others v Belgium and others*, ILDC 1604 (BE 2010) (art. 4, 6)
- France, *Gardedieu v France* ILDC 738 (FR 2007) (art. 1. 2)
- Germany, *Görgülü* ILDC 65 (DE 2004) (art. 1, 2)
- Latvia, Constitutional Court, *Linija v Latvia*, ILDC 189 (LV 2004);
- Slovenia, *Case concerning the Constitutionality of the Europe Agreement Establishing an Association between Slovenia and the European Communities*, ILDC 532 (SI 1997)

Situations in which the ASR have been relevant

- Confirmation of international legal consequences of breach of an obligation
 - France, *Gardedieu v France* ILDC 738 (FR 2007)
 - Greece, *Germany v Margellos*, ILDC 87 (GR 2002)
- Attribution of acts between states or between states and states and international organizations
 - The Netherlands, *HN v Netherlands* ILDC 1092 (NL 2008) (art. 6)
 - Germany, *East German Expropriation Case* ILDC 66 (DE 2004) (art. 18 (of 17?))
- Aid and assistance
 - Germany, *Yemeni citizens extradition case* ILDC 10 (DE 2003) (art 16)
 - Germany, *Attorney of the Federal Armed Forces v Anonymous* (DE 2005)
- Circumstances precluding wrongfulness (?)
 - Germany, *Argentine Bondholder Case* ILDC 952 (DE 2007)
- Legal consequences of breach of ius cogens
 - Germany, *East German Expropriation Case* ILDC 66 (DE 2004)

Situations in which the ASR have been relevant (continued)

Reparation cases, but without reference to ASR:

- Bulgaria, Supreme Administrative Court, *Al-Nashif v National Police Directorate at the Ministry of the Interior*, Administrative Case No 11004/2002; ILDC 608 (BG 2003)
- Belgium, Court of Cassation, *ING België v B I*, Case No C.05.0154.N; ILDC 1025 (BE 2007)
- Czech Republic, *Labour Code – Proposal to Repeal Several of Its Provisions*, PI ÚS 83/06; ILDC 1404 (CZ 2008)

Customary status of the ASR

- Blind acceptance
 - *HN v Netherlands* ILDC 1092 (NL 2008) (art. 6)
 - *East German Expropriation Case* ILDC 66 (DE 2004) (art 1, 18)
 - *Attorney of the Federal Armed Forces v Anonymous* (DE 2005) (art. 16)

- 'Critical' review
 - *Argentine Bondholder Case* (DE 2007)
 - *East German Expropriation Case* ILDC 66 (DE 2004) (art. 40/41))

- Rejection
 - *Constance Regional Court* (DE 2007) (art. 6)

The ASR as 'legislative text'

- *East German Expropriation Case* ILDC 66 (DE 2004) (art. 40/41))

Conservative effect

- Germany, *Italian Military Internees Case* ILDC 438 (DE 2004)
- Italy, *Presidency of the Council of Ministers v Markovic and ors*, ILDC 293 (IT 2002)
- Germany, *Argentine Bondholder Case* ILDC 952 (DE 2007)

Beyond the ASR

- Germany, *Yemeni citizens extradition case* ILDC 10 (DE 2003)
- Poland, *Bug River Claims, Czesław S v State Treasury and Minister of the State Treasury*, ILDC 268 (PL 2005)