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Responsibility of States for internationally wrongful acts

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Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts ("State responsibility articles") at its fifty-third session, in 2001. In its resolution 56/83 of 12 December 2001, the General Assembly took note of the State responsibility articles adopted by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action.

2. In its resolutions 59/35 of 2 December 2004, 62/61 of 6 December 2007, 65/19 of 6 December 2010 and 68/104 of 16 December 2013, the General Assembly requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles. Following its consideration of the written comments received from Governments,[1] as well as the compilations of decisions prepared by the Secretary-General,[2] the Assembly, in its resolution 71/133 of 13 December 2016, continued to acknowledge the importance and usefulness of the State responsibility articles, and once again commended the articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly reiterated its request that the Secretary-General invite Governments to submit their written comments on any future action regarding the articles and also requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles. In addition, the Assembly decided to further examine, at its seventy-fourth session, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of

* A/74/50.

[1] See A/62/63, A/62/63/Add.1, A/65/96, A/65/96/Add.1, A/68/69, A/68/69/Add.1 and A/71/79.

[2] See A/62/62, A/62/62/Corr.1, A/62/62/Add.1, A/65/76, A/68/72, A/71/80 and A/71/80/Add.1.

States for internationally wrongful acts or other appropriate action on the basis of the articles.

3. By notes verbales dated 16 January 2017 and 8 January 2018, the Secretary-General invited Governments to submit, no later than 1 February 2019, their written comments on any further action regarding the State responsibility articles. In those notes, he also invited Governments to submit information regarding decisions of international courts, tribunals and other bodies referring to the articles.

4. As at 21 June 2019, the Secretary-General had received written comments from Austria (dated 1 February 2019), El Salvador (dated 28 January 2019), Portugal (dated 14 March 2019), Qatar (dated 27 July 2018), the Sudan (dated 20 October 2017), and the United Kingdom of Great Britain and Northern Ireland (dated 4 February 2019).

II. Comments on any future action regarding the articles on responsibility of States for internationally wrongful acts

Austria

[Original: English]
[1 February 2019]

In Austria's view, the compilation of information regarding decisions of international courts, tribunals and other bodies referring to the articles on responsibility of States for internationally wrongful acts is a very useful tool and it should be continued in the future. The information on State practice in this regard also provides an indication of whether States accept the articles, which in turn is of help in assessing the prospects regarding the ratification and acceptance of a possible future convention.

Austria would, in principle, be in favour of the adoption of a convention and is prepared to engage in respective discussions with interested States. However, any future work on a convention would need to ensure that the current structure and balance of the draft articles is maintained and a renewed discussion of their substantial provisions avoided. The project of a convention should only be pursued if there are realistic prospects for a wide ratification and acceptance of such a convention.

El Salvador

[Original: Spanish]
[28 January 2019]

This written comment is being submitted pursuant to General Assembly resolution 71/133 on the responsibility of States for internationally wrongful acts, in which the Assembly invites Governments to submit comments on any future action regarding the draft articles on the subject under consideration and information on their practice in this regard.

The Republic of El Salvador reiterates its position, namely that it acknowledges the importance of the articles on the responsibility of States for internationally wrongful acts, which are the result of the arduous and methodical work of codification and progressive development undertaken by the International Law Commission, with the participation of important jurists and experts.

We believe that the content of these articles reflects the crystallization of the responsibility of States as a principle of international law and that the adoption of a

binding instrument in this area will make it possible to better guarantee the various means of implementation of the international responsibility of a State; that is why, once the principle has been codified in a convention, it will become a source of law and have a stronger level of legal constraint and a greater impact on the domestic legal systems of States in contemporary international society.

In the case of El Salvador, the Constitutional Chamber of the Supreme Court of Justice has recognized in its jurisprudence that international treaties become laws of the Republic upon entry into force (article 144 of the Constitution); as a result, treaties remain the quintessential source of international law in the Salvadoran legal system. However, once they enter the legal system, treaties become secondary laws, and even within that category, international treaties enjoy a higher rank than domestic laws (ruling No. 10-2000 of 11 November 2003 on unconstitutionality proceedings).

Thus, taking into account the impact of international legal instruments on the domestic legal system, our State recognizes the effects of the conventions, protocols and treaties that are ratified by our country at both the international and domestic levels.

With regard to the subject under consideration, we reaffirm our support for the convening of an international conference for the purpose of drafting a convention on the responsibility of States for internationally wrongful acts. A convention will have more lasting and beneficial effects than a non-binding instrument could have.

Portugal

[Original: English]
[14 March 2019]

The item “Responsibility of States for internationally wrongful acts” has been on the agenda of the Sixth Committee since its fifty-sixth session, in 2001. Back then, the General Assembly took note of the articles on responsibility of States for internationally wrongful acts and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. Since the fifty-sixth session, the item has been on the Sixth Committee agenda every three years, and has been debated both in plenary and in a working group since the sixty-fifth session. At the request of the Assembly, the Secretary-General prepared and has been updating a compilation of decisions of international courts, tribunals and other entities referring to the articles, allowing States to assess and analyse the acceptance and use of the articles – individually and as a whole – within the legal community.

Eighteen years after the introduction of this item on the agenda, we must acknowledge that the debate has stalled and become stuck between two opposite positions, each represented by a group of States: one that considers that this is the moment to start moving towards a convention and another that believes that the negotiation of a convention would somehow damage the results of the International Law Commission on the item and that the articles should remain in their current form. It must be noted that there is a sizeable group of States that has not been vocal in the debate. Thus, unless some new elements are added to the debate, there is little or no chance that the next session of the General Assembly will bring any advance to this topic.

The position of Portugal on this matter is widely known: the articles have gone through a long period of discussion and maturation, and there is a relevant body of practice and case law regarding the articles, so the time has come to reach consensus to proceed towards the negotiation of a convention. A convention would provide the international system with clear rules about State responsibility for internationally

wrongful acts, including the threat and use of force in violation of the Charter of the United Nations, human rights violations and illegal exploitation of natural resources. Every other procedural option, such as having the articles included as an annex to a resolution, falls short of the International Law Commission's work on this subject. We must recall that this is not a new agenda item: State responsibility was one of the first topics to appear in the programme of work of the International Law Commission in 1948, 71 years ago.

We also believe that the impasse and the continuing postponement of a decision may send a message that the Sixth Committee is paralysed and becoming unable to debate seriously and creatively the results of the International Law Commission products. Inaction can also have a negative effect on the articles. By simply not doing anything, the community of States is signalling that it is uninterested in the topic or finds it irrelevant, which may affect the so-called "organic development" of the articles as well. The seventy-fifth anniversary of the United Nations would provide an excellent opportunity to send a positive signal on this topic.

That is why we believe that the debate in the upcoming session must be focused on analysing and confronting openly the points of disagreement between the two groups of States and finding solutions to overcome them, instead of restating well-known principled positions once again. A number of issues have been stated and signalled over the years, but there was never a proper moment to debate them in depth: is the risk of a low number of ratifications real? Are differences between civil and common law systems relevant when approaching this topic and, if so, to what extent? Would a convention give more authority to the articles? Are the reputational risks for the Sixth Committee that strong?

We acknowledge and understand the concerns expressed by some States about the potential uncertainty of conveying a diplomatic conference and about the possible negative impact that a negotiation process might have on the text of the articles as they stand and that it could somehow damage or undo the work of the International Law Commission, especially on those points that were contentious in the first reading. However, we must bear in mind that the International Law Commission is not a legislative body; States are. So, remarkable as they may be, the articles are not untouchable and States can negotiate some of them, if they want to.

Still, we believe that those dangers can be minimized by defining very clearly the scope of the conference – negotiating only those articles that are not qualified as customary international law and that are not consensual – and by conducting a comprehensive and participated preparatory work. A negotiating process is the best way to address outstanding substantive issues and close potential gaps, and give all States a sense of ownership of the final outcome of the process.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[4 February 2019]

The United Kingdom considers the articles on responsibility of States for internationally wrongful acts to be one of the most significant projects that the International Law Commission has produced. Aspects of the articles continue to be highly influential, as evidenced by the judgments of international and national courts and tribunals that make reference to them and the recourse that Governments have to them in formulating their legal views. However, following careful reflection on the articles, the United Kingdom remains of the view that their very breadth, both in terms of their scope and formulation, means that it is still premature to say that they reflect

in their entirety customary international law or a settled consensus of views among States. There remains a varied spectrum of State views concerning a number of issues.

The United Kingdom has, on previous occasions before the Sixth Committee, highlighted the risks in pressing ahead towards a convention codifying the articles. Such a course has the potential to disturb the balance that was so carefully struck when the articles were drafted, and risks provoking further divergences and differences of views in such a way as to jeopardize the very coherence that the articles are seeking to instil – an outcome that the United Kingdom would seek to avoid. The United Kingdom remains very mindful of these risks, but is open to engaging in a Sixth Committee discussion and consideration of options for progressing the articles, including the possibility, at an appropriate time, of negotiations towards a convention.

III. Comments on the articles on responsibility of States for internationally wrongful acts

Qatar

[Original: Arabic]
[27 July 2018]

The draft does not clarify the principles which govern the responsibility of States for internationally wrongful acts, or maintain a distinction between those principles and the rules that place obligations on States, the violation of which may generate international responsibility.

The draft does not specify when and for what period of time there is or has been a breach of an international obligation by a State.

The draft does not determine in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter.

The draft does not state which procedural preconditions should exist in order for a State to invoke the responsibility of another State, or the circumstances in which the right to invoke responsibility may be lost.

The draft does not explain whether or under what conditions a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State.

The articles deal only with the responsibility of States for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). These requirements of compensation or restoration would involve primary obligations; if States failed to meet those obligations, they would incur international responsibility for illegal conduct. However, the draft fails to address that question.

The draft articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations; yet the latter are persons under general international law and are subject to its provisions.

The Sudan

[Original: Arabic]
[20 October 2017]

As a member of the international community, the Sudan is committed to General Assembly resolution 56/83 concerning responsibility of States for internationally wrongful acts. It wishes, however, to draw attention to some articles that could raise concerns if invoked by international courts:

1. The first item under article 2 stands in need of clear criteria regarding actions or omissions that entail the responsibility of a State under international law.

2. With regard to article 5, entitled "Conduct of persons or entities exercising elements of governmental authority", the conduct of persons or entities that do not belong to State organs is a matter of internal law. To attribute such conduct to the State and hold the latter responsible for it would undermine the principle that international law and the national law of the State are complementary.

3. In several places, the articles refer without distinction to persons or groups of persons. This could cause complications for international courts in view of the conflict between national and international jurisdictions. Even if natural persons perform conduct attributed to States, the most reliable basis for their prosecution is the national judicial system, not the international one.

4. Article 10 provides that the conduct of an insurrectional or other movement shall be considered an act of State. That idea should be reconsidered. International law recognizes such insurrectional movements only when they have a recognized leadership and a distinctive uniform and have entered into a negotiation process with the State. The Iran-United States Claims Tribunal made that point in the case *Rankin v. Islamic Republic of Iran* in 1987. Considering whether it had jurisdiction to examine the case, it decided that its jurisdiction did not extend to damages resulting from the actions of popular demonstrations that took place during the Islamic revolution in Iran, and that those demonstrations did not constitute an act of the Government of Iran that would entail international responsibility. That finding established the condition under customary international law that a State may be deemed responsible only for wrongful acts that can be attributed to it. It has thus not been determined that the Government of the Sudan bears any responsibility for the conduct of insurrectional movements, whatever they may be, on its territory.

5. Article 32 states as follows: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part." That provision should also be reconsidered. International law complements internal law, and numerous conventions encourage States to take national measures. Internal law is thus the appropriate frame of reference as regards the conduct of movements mounting an insurrection against their States. Accordingly, the Sudan prosecuted the actions of the armed movement that raided Khartoum on 28 May 2008 under Sudanese criminal law.

6. Article 38 states as follows:

> 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

We have a reservation regarding that provision inasmuch as it is inconsistent with article 100 of the 1983 Civil Procedures Act of the Sudan, which provides that

the court in question shall not under any circumstances award interest payments. It is also inconsistent with the opinions rendered by the Islamic Fiqh Academy on the topic of interest.

IV. Information on State practice regarding the articles on responsibility of States for internationally wrongful acts

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[4 February 2019]

The following are extracts from recent[3] cases before the courts of the United Kingdom in which the articles were referenced. The Attorney General of the United Kingdom of Great Britain and Northern Ireland referenced the International Law Commission's work on countermeasures in a speech given in May 2018, entitled "Cyber and international law in the twenty-first century".

Law Debenture Trust Corp Plc v Ukraine [2017] EWHC 655 (Comm)

"357. Countermeasures are unlawful actions taken by one state against another in response to that other state having committed an internationally wrongful act in order to induce that other state to comply with its international obligations.

358. A summary is in Article 49 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts:

Object and limits of countermeasures

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

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

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

359. The underlying principles behind countermeasures are, Ukraine submits, familiar to the English Court. The requirement of 'clean hands' in equity, or of excusing contractual breaches that arise from a counterparty's breaches, or set-off, bear similarities with the countermeasures defence.

360. Ukraine relies on the following elements of the defence of countermeasures:

i. *Russia has committed an internationally wrongful act*. The use of force is plainly such an act. Ukraine's case is that it is justiciable.

i) *The non-payment of the Eurobonds is action 'directed against a State'*. Russia is the sole Noteholder, the Trustee is acting at the direction, on behalf and for the sole benefit of Russia, and any payment would be to Russia.

ii) *The non-payment of the Eurobonds is the non-performance of an international obligation of Ukraine*. Russia has sought to

[3] These are cases that have referenced the State responsibility articles in the period between March 2016 and January 2019.

characterise the obligation as being a duty owed to it, the IMF has recognised that position as the economic reality, the money would be paid to Russia and the Eurobond structure can be analysed in this way given that Russia has direct rights of enforcement in certain circumstances. It would also be a prima facie breach of the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and Russia.

iii) *The non-payment of the Eurobonds is to induce Russia to cease its internationally wrongful act*. This litigation is part of a wider strategy by Russia to pressure Ukraine, which includes the unlawful occupation of Crimea, the military interference in the east and other measures; the corollary is that if there is any obligation to pay, the non-payment is directed towards responding to that pressure and the massive damage inflicted by Russia on Ukraine by its actions.

iv) *The non-payment of the Eurobonds is proportionate*. Ukraine's non-performance of the alleged obligation to repay US$ 3 billion in response to Russia's acts cannot be disproportionate."

R v TRA [2018] EWCA Crim 2843

[This was an appeal against a finding that the words "public official or persona acting in an official capacity" in section 134 of the Criminal Justice Act 1988 (which was enacted to give effect to article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) include an individual who is not a de facto State official but who, following an insurrectional movement, became president.]

"11. In supporting the Judge's conclusion, the Prosecution argue that section 134 covers the conduct of non-state actors who seek to depose a government and who exercise *de facto* authority over individuals in the territory which they control. They submit that the interpretation accepted by the Judge was supported by the terms of the Torture Convention; by its object and purpose; by its drafting history; by the State Responsibility principles reflected in article 10 of the UN General Assembly Resolution 56/83 of 12 December 2001; by the decision of Treacy J in *Zardad*; by the jurisprudence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ('ICTY'); and taking into account international humanitarian law as the *lex specialis* in armed conflicts.

…

67. Mr Rogers also sought to place some reliance on principles concerning the responsibility of insurrectional movements which become state governments. UN General Assembly Resolution 56/83 of 12 December 2001 set out annexed principles for Responsibility of States for Internationally Wrongful Acts. Article 10 provides that the conduct of an insurrectional movement which becomes the new government of a state, or the government of a new state, is to be considered to be an act of that state under international law. The commentary of the International Law Commission in the Yearbook of the International Law Commission 2001 Vol II pt 2 at p. 50 explains the rationale as lying in the continuity between the movement and the government. The predecessor state cannot be responsible for acts seeking to overthrow it, over which it has no control, whereas the new government should be required to assume responsibility for conduct committed with a view to its own establishment: see paragraphs (5) to (6). The Prosecution submits that it would be anomalous if torture committed by a public official of an insurrectional movement exercising

governmental functions over territory in which it exercises *de facto* control should be treated as outside the scope of the Torture Convention, so as to attract no individual responsibility, because the acts were not those of a *de jure* state, in circumstances where the very same acts would constitute acts of the state for which the state would assume responsibility, if the insurrectional movement was successful and became the de jure state (as the NPFL ultimately did in Liberia).

68. However, article 58 makes clear that the principle is without prejudice to the responsibility of an individual under international law, and that the question of state responsibility for the acts of individuals is in principle distinct from the responsibility of the state. Mr Rogers' argument, which elides the two, therefore loses any force. Moreover, this instrument postdates the Torture Convention by some years and there is no basis for our being able to conclude that it comprised a customary rule of international law in existence at the time of the Torture Convention so as to form a legitimate aid to its construction."

R (on the application of Tag Eldin Ramadan Bashir and others) (Respondents) v Secretary of State for the Home Department (Appellant) [2018] UKSC 45

On appeal from: [2017] EWCA Civ 397

"67. … As to proposition (ii), it is correct that a state cannot rely on its domestic law as authorising or excusing a breach of its international obligations: see Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (1932) PCIJ, Series A/B No 44, p 4, at p 24. The proposition is stated as follows in article 3 of the International Law Commission's Articles of Responsibility of States for Internationally Wrongful Acts (2001):

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

68. This, however, assumes that the state in question is subject to the relevant international obligation. Where that obligation is derived from a treaty, the prior question is whether the treaty applies to the particular State in respect of the particular territory. That will necessarily depend on the current constitutional relationship between the state and the territory in question …"

GPF GP S.à.r.l. v The Republic of Poland [2018] EWHC 409 (Comm)

"120. State responsibility for creeping expropriation is itself reflected in the concept of a composite act, defined in Article 15(1) of the ILC's Articles on State Responsibility as follows:-

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

R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade (Defendant) v (1) Amnesty International (Intervenors), (2) Human Rights Watch, (3) Rights Watch (UK), (4) Oxfam [2017] EWHC 1754 (Admin)

"56. In addition, Mr Swaroop QC sought to argue a further point … The Defendant was in breach of Criterion 1 of the Consolidated Criteria (which deals with respect for the UK's international obligations) because he had failed to consider the UK's obligations reflected in Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally

Wrongful Acts (which prohibits aiding or assisting another state in the commission of internationally wrongful acts). Mr Swaroop QC agreed in argument that it was not the function of this Court to find in these proceedings that Saudi Arabia had breached international law, which would have been a necessary stepping stone to a conclusion that the Secretary of State had misapplied Criterion 1. In these circumstances, it is difficult to see that Criterion 1 has any relevance."

Belhaj and another (Respondents) v Straw and others (Appellants); Rahmatullah (No 1) (Respondent) v Ministry of Defence and another (Appellants) [2017] UKSC 3

"11. …

(iii) Three types of foreign act of state can be identified under current English authority:

a) The first is the rule of private international law, whereby a foreign state's legislation will normally be recognised and treated as valid, so far as it affects movable or immovable property within the foreign state's jurisdiction: para 35.

b) The second is that a domestic court will not normally question the validity of any sovereign act in respect of property within the foreign state's jurisdiction, at least in times of civil disorder: para 38.

c) The third is that a domestic court will treat as non-justiciable – or, to use language perhaps less open to misinterpretation, abstain or refrain from adjudicating upon or questioning - certain categories of sovereign act by a foreign state abroad, even if they occur outside the foreign state's jurisdiction: para 40.

…

76. It is only in particular situations, like the present, that foreign act of state of the second type could conceivably be relevant. I see no reason to extend the doctrine (assuming the second type to exist at all) to cover such situations. On the contrary, to do so would, once again, be on the face of it to render the appellants immune from suit both in their own jurisdiction and anywhere else, while leaving the foreign states at least vulnerable to suit in their own jurisdictions.

77. The appellants submit in response to this last point that foreign act of state would cease to be an objection to English proceedings against the appellants as secondary parties, if and when the respondents had successfully established the relevant facts and the liability of each of the relevant foreign states by proceedings in those states' domestic courts. It is true that General Assembly Resolution 56/83 on Responsibility of States for internationally wrongful acts deals in turn with a state which breaches an international obligation (articles 12–15), before dealing with the responsibility of a state in connection with the act of another state. In the latter connection, it addresses situations of aid or assistance (article 16), direction and control (article 17) and coercion (article 18). A régime which insisted on the actual actor being sued first would attach jurisdictional significance to a factor which would not normally have this significance and which might distort the natural course of events: a state aiding or assisting, and certainly a state procuring, directing, controlling or coercing, might be the more culpable party and natural target than the actual actor. There could also be two main actors, or it could be uncertain which state was a main actor and which a secondary participant; eg in the present case, take for example

the alleged wrongful rendition from Malaysia by collaboration between Malaysian and United States authorities. So it could be uncertain which should be sued first. It would on any view be optimistic to view the proposed course as a light task. It would make recourse against the appellants dependent upon the operation, in the present case, of up to four separate foreign court systems.

…

270. … But it is clear that the irreducible core of the international obligation, on which there is almost complete consensus, is that detention is unlawful if it is without any legal basis or recourse to the courts. The consensus on that point is reflected in the terms of the International Covenant on Civil and Political Rights (1966), an expansion in treaty form of the Universal Declaration of 1948, which provides by article 9:

> ‘1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
>
> …
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release …
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.’

The Covenant has been ratified by 167 states to date, including the United Kingdom, the United States, Thailand and Libya. Malaysia is one of a handful of states which are not a party, but it has declared that it adheres to its principles.

271. The UN Working Group regarded this irreducible core as *jus cogens*: loc cit, para 49. In my opinion they were right to do so. It is fair to say that article 4 of the Covenant does recognise a limited right to derogate from its terms ‘in time of public emergency which threatens the life of the nation … to the extent strictly required by the exigencies of the situation’, with certain exceptions such as torture, arbitrary killing and slavery. The existence of a right to derogate is normally regarded as inconsistent with the status of *jus cogens*: see article 53 of the Vienna Convention on the Law of Treaties. But this difficulty is more apparent than real. Although expressed as a right of derogation, the exception for public emergencies corresponds to the general exception from state responsibility which international law recognises in cases where an act prohibited by international law is shown to be ‘the only way for a state to safeguard an essential interest against a grave and imminent peril’: see the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, article 25, and the extensive review of judicial decisions and state practice cited in the associated commentary. For this reason the UN Working Group considered that non-derogability in an emergency was consistent with the prohibition being a peremptory norm: UN A/HRC/22/44, at paras 50-51. The same view is expressed in the Reporters’ Notes to para 702 of the American Restatement: see Note 11.”