
Thomas W. Waelde
Patricia K. Wouters

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hlps
Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hlps/vol2/iss1/9

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law & Policy Symposium by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
STATE RESPONSIBILITY AND THE ENERGY
CHARTER TREATY:
THE RULES REGARDING STATE ENTERPRISES,
ENTITIES, AND SUBNATIONAL AUTHORITIES

Thomas W. Waelde*
Patricia K. Wouters**

I. INTRODUCTION.

The recent adoption of the Energy Charter Treaty\(^1\) (ECT) has been hailed by the business community as "putting teeth" into transnational economic relations in the field of energy. Certainly, as with many important international agreements finalized only after much negotiation and compromise, the ECT has its strengths and shortcomings.\(^2\)

One of the interesting features of the ECT is the attempt to codify an area of state responsibility that presents some particularly difficult issues regarding the liability of states for the conduct of state enterprises, entities and subnational authorities operating in the field covered by the Treaty. The ECT requires state parties to ensure that state enterprises and other "privileged entities" conduct their operations in a manner consistent

---

* Professor of Petroleum, Mineral and International Investment Law, Executive Director, Centre for Petroleum and Mineral Law and Policy, University of Dundee; Law Degree (Frankfurt); LL.M. (Harvard); Dr. Jur. (Frankfurt).

** Lecturer of International Resources Law, Centre for Petroleum and Mineral Law and Policy, University of Dundee; LL.B. (Ottawa); LL.M. (Berkeley); Ph.D Candidate (Graduate Institute of International Studies, Geneva). The authors thank Dr. Werner Simon, UN Law Library (Geneva) for his assistance with obtaining research materials and Dr. Sergei Vinogradov for his comments on earlier drafts of this work.

with the Treaty. Each state party is also obliged to “take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.”

These provisions raise important issues with respect to the international responsibility of the state parties to the ECT. What is the substantive content of the rules contained in the ECT? To what extent does the lex specialis of the ECT modify existing rules of general international law in the field of state responsibility? This article examines these issues beginning with a survey of the general international law in the field of state responsibility.

II. STATE RESPONSIBILITY.

The notion of international responsibility arose as early as there were contacts between states. Grotius and Vattel each referred to state responsibility in the context of the duties owed by states to foreign citizens, although notably, the obligations involved existed only at the state level. Thus, injury to an alien was actionable only because it was fictionalized to be an injury to the state. The origins of state responsibility are also found in doctrinal writings concerning the diplomatic protection of nationals and injuries to aliens. More recently, human rights law has contributed to the doctrinal underpinnings of state responsibility with respect to the obligations owed by states to private persons abroad.

3. ECT, art. 22, supra note 1 at 397; see infra p.112.
4. ECT, art. 23 supra note 1 at 397; see infra p. 113; see also Waelde "International Investment", supra note 2 at 65-6.

persons. In addition, the rapid expansion of international commercial activity has added a new dimension to the traditional rules of state responsibility. It is in this context that the provisions of the ECT relating to subnational authorities and state enterprises are so important.

The United Nations first undertook study of the topic of state responsibility as an important item on the first agenda of the International Law Commission (ILC) in 1949. Work on the topic has yet to be completed. There have been four Rapporteurs to date and only Part One of the Draft Articles on state responsibility has been approved by the Commission.

The classic rules of state responsibility are reflected generally in the work of the ILC which take the form of Draft Articles. These provide that conduct attributable to a state of a breach of an international obligation will result in international responsibility. This creates a new relationship between the offending state and the victim state whereby the former is liable for reparation to the latter. Article 3 of the ILC’s Draft Articles sets forth two key elements for an internationally wrongful act:

*Article 3. Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when:

(a) Conduct consisting of an action or omission is attributable to the State under international law; and

(b) That conduct constitutes a breach of an international obligation of the State.

The Draft Articles set forth two further conditions that may apply in the overall scheme of state responsibility. In every case, there must be

---


8. The International Law Commission is the group of international lawyers appointed in their private capacity to assist the United Nations in the progressive development and codification of international law.


10. Thirty-two articles were adopted by the Commission between 1973-79; see Rosenne, *supra* note 50 at 1.


12. *Id.* at 325.
an examination of whether the state conduct in question may be justified. This is required where certain circumstances exist that preclude the wrongfulness of the state conduct complained of. The second condition, exhaustion of local remedies, applies to cases where private individuals are involved as potential victims. In those situations, there is no internationally wrongful act until all local remedies have been exhausted. The state alleged to have injured an alien's interest must be given every legitimate opportunity to deal with the matter domestically. Whether this rule of international law applies in cases involving transnational corporations has been questioned and this may be an issue under the ECT given the structure of its dispute settlement mechanism.

The second constituent element of state responsibility is the attribution to the state of the offending conduct. Attribution is one of the threshold tests in the operation of the traditional model of state responsibility. The ILC's formula involves a two-step approach: First, conduct (an action or omission) that potentially breaches an obligation of the state under international law must be identified; second, that conduct must be attributed to a state. The ILC has described this process as involving an "objective" test in the first step (i.e., identifying the violation) and a "subjective" test in the second step (i.e., attributing the act to the state).

The doctrine of attribution is complicated and complex at both the

---

13. See Chapter V, ILC Draft Articles, Articles 29-34. Id. at 332.
14. For the technical procedure for adjudicating nationals' claims, see RICHARD B. LILlich, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 5-6 (1962) (setting forth the conditions requisite to proceed with an individual's international claim).
16. Waelde "International Investment", supra note 2 at 60.
18. See HIGGINS, supra note 15 at 149 for a discussion on distinction.
theoretical and practical levels. Its importance in the overall scheme of state responsibility is self-evident. If the conduct complained of cannot be connected to a state, there is no wrongful act. Complications arise where non-state actors such as state enterprises, entities and subnational authorities are involved. In such instances, it must be determined whether conduct by these bodies may be attributed to the state. A related complexity is the threshold for attribution where the actors are not direct state officials or authorities. For example, can the state be held responsible for the activities of parastatal actors?

The attribution aspect of state responsibility has been addressed in the Commission’s Draft Articles. The ILC has identified six relevant categories of actors at the domestic level: (i) organs of the state; (ii) “other entities” empowered to exercise elements of governmental authority; (iii) persons acting on behalf of the state; (iv) persons not acting on behalf of the state; (v) organs placed at the disposal of the state by another state or international organization; and (vi) organs of an insurrectional movement. Generally, the conduct of the actors in the first three categories will be attributed to the state, while conduct by the latter three categories will not. However, there appear to be exceptions for each general category and in the end, the particular facts of each situation must be considered. Relevant actors for this essay are those described in categories (ii) & (iv) above (the “other entities” and persons acting on behalf of the state.) These categories of actors are analyzed in the context of liability of the state for the acts of state enterprises and entities, regional governments, subnational authorities, and private persons.

The ILC covers the acts of regional governments and subnational authorities in Articles 7 and 10 of its Draft Articles. Article 7 attributes to the state, conduct of territorial government entities and those entities empowered by internal law to exercise elements of government authority as long as the entity is acting in such a capacity at the time the

---

19. See Christenson, supra note 17 at 323.

1. The conduct of an organ of a territorial government entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.
issue of responsibility is posed. Under Article 10 of the Draft Articles, acts of such entities will also be attributed to the state even where the entity exceeded its legal competence. Under the ILC's approach, a crucial condition for the attribution to the state of the behaviour of this category of actor is that the latter acted in the capacity of a governmental authority — analogous in many respects to private law agency tests, although private law analogies do not fully describe this element at the international level.

The ILC does not deal directly with the issue of attribution to the state of the acts of commercial entities with which the state may be intimately involved. The relevant law to apply here must be found either under the category of actors described as governmental authorities (discussed above) or under that concerned with private persons.

The ILC's Draft Articles contain two provisions that deal with the conduct of private individuals. Under Draft Articles 8 and 11, the acts of private persons acting "in fact on behalf of the state" or in a
capacity exercising "governmental authority" will be attributed to the state (again, an agency-type test); conversely, the conduct of persons not acting on behalf of the state will not be attributed to the state, although the state may nonetheless bear liability for "other conduct" related to the activity of such category of actors. This important exception introduces a second level of potential liability for the state: active or omissive conduct by the state relating to non-state actors.

The ILC limits the type of conduct that might be attributed to the state by restrictively defining the categories of actors. Only those actors that can be identified as governmental authorities, or acting in such a capacity, are liable to have their actions attributed to the state. The actions of actors falling outside of these two areas will not be directly attributable to the state. However, actors' activities falling outside those two categories may give rise to another state obligation, the breach of which could implicate the state in an international wrong. The duty of due diligence requires states to exercise due care in protecting the lives and property of aliens on their territory and in ensuring that justice is applied where injury to either has occurred. The state also must take certain preventive measures to limit transboundary harm.

The operation of state responsibility principles may be demonstrated through two simple examples.

28. Article 11. Conduct of persons not acting on behalf of the State.
1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.
29. This exception also relates to the conduct of the state with respect to organs of other states and insurrectional movements; see Articles 12 and 14 of the Draft Articles.
30. Christenson, supra note 17 at 327, identifies three patterns of substantive norms governing state activity based on the obligation not to cause intentional harm, not to cause harm by failing to meet a due diligence standard and the affirmative duty to apprehend and punish wrongdoers.
Example 1.

Gasworks, a private company from state A, signs a production-sharing agreement with the government of state B regarding the development of certain gas fields in the northern regions of B. Having obtained the necessary licence from the appropriate state supervisory mining body, Gasworks contacts the local authority of the region with a view to commencing their drilling operations. The local authority denies Gasworks the right to proceed on the grounds that this contradicts the development plans of the region, which have been formulated in light of previous contacts with a local company of the region.

The issue in this first example is whether state B is responsible for the acts of the local authority. Responsibility may lie in this case because the acts of the local authority can be considered as conduct of an entity empowered with governmental authority (covered by Article 7 of the ILC Draft Articles) and thus, attributable to state B.

The second example is drawn directly from the Banec case decided by the United States Supreme Court. The broad inquiry in this scenario is whether DCorp may seek redress from State C.

Example 2.

Bank CC is country C's official bank for foreign trade financing. Bank CC's bylaws describe its purpose as "contributing to and collaborating with the international trade policy of the government and the application of the measures concerning foreign trade adopted by C's Central Bank." Bank CC is governed by delegates from C's government ministries and received its capital stock from the government. Bank CC's functions are comparable to those usually managed by governments (even in capitalist countries). DCorp, a foreign bank has provided letters of credit and operating capital to Bank CC, which suddenly is dissolved with losses to DCorp.

The U.S. Supreme Court in Banec found that "form was more important

than function" and held that the separate corporate identity of the particular Bank in question had to be respected.

Similar findings were made in other cases, leading one commentator to conclude that "[t]he arbitral and judicial decisions in this area generally accept without question the sanctity of corporate form." In theory, a parastatal entity organized in corporate form, relieves the state, except in extraordinary circumstances, of responsibility even if the state controls the corporation and it acts for the state's benefit. That commentator argues against such an approach and suggests that the rules of attribution at the international law level ought to be governed by private law theories of agency and that the test for attribution should be the extent of control that the state exercises over the parastatal in question.

Such an approach is generally consistent with other commentators on the subject. For example, Smith concludes:

"It would seem that the most appropriate key to attribution with respect to commercial entities would be the state's own perspective of the 'public' character or function of the entity . . . The state's own conduct provides the best evidence of the state's definition of public versus private commercial conduct."

32. Id.

33. Id. The Supreme Court, however, found equitable circumstances permitting the claim of foreign bank to proceed. 462 U.S. 611 at 630-3.

34. The cases surveyed included: Letelier v. Republic of Chile, 471 U.S. 1125 (1985); Hercaire International Inc. v. Argentina, 821 F.2d 559 (1987); Minpeco, S.A. v. Hunt, 1989 WL 57704 (SDNY) and Czarnikow v. Rollimpex [1979] App. Cas. 351 (U.K.). Summarizing these decisions, Chalmers asserts, "[t]hese cases assume that a presumption of legal separation should govern in the sphere of relations between a private sector corporation and its shareholder" and she suggests that this strict limitation of liability approach with such a high threshold for piercing the corporate veil, should not automatically be imported in public sector cases. 84 PROC. AM. SOC'Y INT'L. L. 62-63 (1990).

35. Id. Chalmers is legal advisor at the Overseas Private Investment Corporation (OPIC), a U.S. Government agency responsible for insuring foreign investment risks. OPIC will insure ventures only where there is chance that the agency might recover claims paid by subrogated actions against the host government based on that state's responsibility.

36. Id.

37. Id., at 64. Christenson, supra note 17 at 327, discusses this issue and endorses the questions raised by Clive Parry in "Some Considerations upon the Protection of Individuals in International Law", 90 R.C.A.D.I. II 657 (1956) and by Ian Brownlie in PRINCIPLES OF PUBLIC INTERNATIONAL LAW, at 434-435 (3d ed. 1979).

38. SMITH, supra note 5 at 30. See also Arghyrios A. Fatouros, Transnational Enterprise in the Law of State Responsibility, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS at 361 (Richard B. Lillich ed., 1983).
Seidl-Hohenveldern looks to the nature of the conduct involved, but is less conclusive about the results of his survey of the jurisprudence in the field:

"[t]he distinction between a state and its corporations ... becomes irrelevant in the field of state responsibility under international law, when acts of *jure imperii* character are done by corporations, whether state-owned or not, and by private persons."  

He believes that such "acts will be attributed to the state if done on the latter's order or instigation."  

Dupuy refers to the "paradox" between the approaches in international jurisprudence regarding attribution of the conduct of private persons compared with that of parastatals. He questions why the principle of "effectivity" should apply to conduct relating to the first category of actor and not to that concerning the second? Caron, analyzing the practice of the Iran-U.S. Claims Tribunal, argues that that organ's work has been "stifled" by its rigid application of the rules of attribution contained in the ILC Draft Articles. He proposes that a more reasonable approach might utilize the notion of causation — as opposed to the all-or-nothing result of the attribution rules. Under his approach, the state could be held responsible for the conduct of private persons where that conduct was a foreseeable consequence of an act of the state. Higgins adds a dimension to the overall issue by asking whether states should not be held internationally responsible for their *acta jure gestionis*, including all unlawful commercial acts?

However, the American Law Institute in Section 207 of its Restatement on Foreign Relations Law follows to a large extent the ILC Draft Articles:

---


40. *Id.*


42. *Id.*


44. *Id.*, 70-71.

45. HIGGINS, *supra* note 15 at 152.
207. Attribution of Conduct to States.

A state is responsible for any violation of its obligations under international law resulting from action or inaction by
(a) the government of the state,
(b) the government or authorities of any political subdivision of the state, or
(c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under colour of such authority.\textit{46}

The law of state responsibility analyzed above suggests three propositions which may relate to the ECT:

1. Conduct by regional government entities, authorities or private persons empowered with governmental authority and acting in such a capacity in breach of international obligations will be attributed to the state.
2. Conduct by private persons not acting on behalf of the state will not be attributed to the state. In this situation, however, the state may be liable for acts or omissions on its behalf relating to such conduct. This obligation arises under the primary duty of due diligence.
3. The existing rules of state responsibility do not provide clear rules with respect to the attribution to the state of conduct of parastatal entities, including state enterprises, or other non-state actors involved in commercial activity.

III. THE ENERGY CHARTER TREATY (ECT).

The next step is to examine whether the rules of general international law relating to state responsibility apply to the state-parties of the ECT. Are the obligations contained in the ECT consistent with the general international law in the area or are new obligations created?

Signed in 1994 by 49 countries, the ECT is aimed at regulating investment and trade in the particular sector of energy and related resources. The key principles of the ECT are nondiscrimination (national treatment) and most favoured treatment for investors.\textit{47}

Central to the investor-protection regime of the ECT are the obligations spelled out in Articles 22 and 23.

Article 22 of the ECT sets forth the obligations of the state parties

\textit{47. See Waelde "International Investment", supra note 2.}
for "state enterprises" and "entities" described collectively under the heading, "State and Privileged Enterprises":

Article 22. State and Privileged Enterprises.
(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.
(2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.
(3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.
(4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.
(5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual.

Article 22 creates a primary obligation of contracting states to be responsible for the conduct of state enterprises and entities. By making the contracting states responsible in the first instance for regulating and supervising the activities of state and privileged enterprises, the ECT solves the problems inherent in an attribution-based approach to state responsibility. Instead of seeking to attribute to the state acts of organs that may fall outside of Article 7 of the ILC Draft Articles, the ECT makes the contracting states directly liable for the actions of its enterprises and entities, each of which have been broadly defined.

Article 23 covers regional and local governments and authorities under the umbrella term "subnational authorities". Article 23 adopts an approach to subnationals similar to that of Article 22 with respect to state enterprises. State parties to the ECT are required to take "reasonable measures" to regulate the activities of regional and local governments insofar as the *ratione materiae* of the ECT.
Article 23. Observance by Subnational Authorities.

(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.

(2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party.

Article 23 requires contracting states to use reasonable efforts in supervising the actions of regional and local governments and authorities. This reflects to some degree the difficulties associated with a federal system and might be aimed at the particular case of the Commonwealth of Independent States. The softness of subparagraph one of Article 23 is mitigated somewhat by the contents of subparagraph two which provides that the ECT dispute settlement provisions may be invoked against a state party for actions taken by regional or local governments. That is, Article 22 extends the regulatory and supervisory obligations (and thus control) of contracting states with respect to state enterprises and entities through direct, authoritative, prescription ("shall ensure"). Article 23 implicates the state indirectly for the action of subnational authorities through the threat of the dispute resolution mechanisms referred in subsection (2). This is as far as the ECT permits intrusion into domestic politics. The interrelationship between federal and subnational authorities is likely, in some cases, to be beyond unilateral control by the state.\(^4^{8}\)

The drafters of the ECT have employed a formula that circumvents this problem by making the state liable for the conduct of subnationals indirectly through the application of the dispute settlement provisions of the Treaty.

The substantive norm contained in Article 23 is less categorical than that adopted by the ILC in Article 7 of its Draft Articles which attributes to the state the conduct of territorial government entities.\(^4^{9}\) However, the threat of exposure to dispute settlement requirements in the ECT might succeed in accomplishing indirectly what may have been impossible

---

48. For example, the 10th Amendment to the U.S. Constitution reserves to state governments a reservoir of power apart and distinct from the federal national government.
49. Draft Articles, supra note 5.
directly. The overall goal of protecting investors from domestic practices inconsistent with the ECT has been preserved and the state is made overall guarantor of the Treaty’s obligations, despite the independence of regional or local governments or authorities.

IV. CONCLUSION.

General international law, in its current state, is inadequate to deal with the complex issues arising out of the wrongful acts of non-state actors in the area of international economic law. However, recent developments indicate an appreciation of the problems involved and a move towards remedying the shortcomings of the law in the area. The ECT provides one example of how these issues may be addressed in the context of international commercial relations. The creation of treaty-based rules for states regarding the conduct of non-state actors can circumvent the cumbersome application of the attribution rules used in the traditional state responsibility model. ⁵⁰

The ECT establishes direct obligations for the contracting parties regarding the conduct of state enterprises, entities and subnationals in the energy sector. Insofar as subnational authorities are concerned, state-parties are held to a standard of due diligence to “take such reasonable measures as may be available” to ensure compliance with the Treaty by regional and local governments. This obligation is strengthened by the fact that actions of regional and local governments and authorities may implicate the state through the dispute settlement provisions of the Treaty. ⁵¹

Article 22 of the ECT is more innovative than Article 23 in that it extends the state’s obligations to control, regulate and supervise state enterprises and entities in all areas related to the ECT. Through this mechanism, the Treaty precludes the necessity of reverting to the rules of attribution in the quest for assigning state responsibility from the conduct of state enterprises or entities. The ECT makes the contracting state liable for its failure to ensure that these organs act in compliance with the Treaty. Through this means, the state is held directly account-

---

⁵⁰ Christenson, supra note 17 at 345-346 lists three positive functions of the attribution doctrine, suggesting, in short, that attribution principles bridge the gap between public and private spheres of responsibility and offer the possibility for developing substantive norms in the field. In addition, attribution principles offer the means to apply sanctions to achieve the goals of primary norms.

⁵¹ ECT, art. 23(2), supra note 1 at 397.
able for actions of potentially non-state actors and this should be an added insurance to investors. This approach goes beyond the ILC’s scheme which, founded on an attribution-based model, requires first that the entities involved be confirmed to have been exercising governmental authority before the state can be implicated for the conduct of such actors. The ECT extends the breadth of a state-party’s liability by making the conduct of state enterprises and entities in the energy sector the responsibility of the contracting-state. As such, the Banec-type case\(^2\) is less a possibility under the ECT, although clearly the residual rules of state responsibility apply to fill the gaps left by the \textit{lex specialis} of the ECT.\(^3\)

Whether the regime established by the ECT will be successful in resolving the relevant issues in the field of state responsibility remains to be seen. Left to be answered also is the broader question of how the complexities of state responsibility will be resolved in the area of international economic relations generally.

---

\(^2\) \textit{Supra} note 31 and accompanying text.

\(^3\) There may exist cases where the conduct of state enterprises, entities or subnational authorities will have to be attributed to the state for responsibility to arise, although Articles 22 and 23 of the ECT make this a secondary route of going after the state.
TABLE I: Fundamental elements of State Responsibility under the ILC Draft Articles

<table>
<thead>
<tr>
<th>Elements</th>
<th>Qualification</th>
</tr>
</thead>
<tbody>
<tr>
<td>conduct (an action or omission that constitutes a breach of an international obligation)</td>
<td>“objective” test</td>
</tr>
<tr>
<td>attributable to the State under international law</td>
<td>“subjective” test</td>
</tr>
</tbody>
</table>

TABLE II: Conditions Affecting the Final Determination of an Internationally Wrongful Act of the State under the ILC Draft Articles

No internationally wrongful act of the State where the following special conditions apply:

<table>
<thead>
<tr>
<th>Special Conditions</th>
<th>ILC Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) in the case involving injury to private persons, local remedies have not been exhausted</td>
<td>Article 22 Exhaustion of Local Remedies (every state has the right to “correct the result” of its conduct with respect to aliens)</td>
</tr>
<tr>
<td>(b) in all cases, where there exist circumstances precluding the wrongfulness of the act</td>
<td>Articles 29-34 (consent; countermeasures; force majeure; distress; necessity; self-defence)</td>
</tr>
</tbody>
</table>
TABLE III: Rules of Attribution under the ILC Draft Articles

<table>
<thead>
<tr>
<th>Categories of Actors Relevant to State Attribution Issues</th>
<th>Conduct Will Be Attributed</th>
<th>Conduct Will Not Be Attributed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Organ(s) of the state having that status under internal law &amp; acting in that capacity, regardless of the position of the organ</strong> (Art. 5 &amp; 6)</td>
<td>Person(s) not acting on behalf of the state** (Art. 11)</td>
<td></td>
</tr>
<tr>
<td><strong>Organ(s) of a territorial governmental entity or organs of entities empowered to act in such a capacity, acting in that capacity</strong> (Art. 7(1)(2))</td>
<td>Organ of another state** (Art. 12)</td>
<td></td>
</tr>
<tr>
<td>Person(s) acting in fact on behalf of the state (Art. 8)</td>
<td>Organ of an international organization (Art. 13)</td>
<td></td>
</tr>
<tr>
<td>Act of an insurrectional movement that becomes the new government**</td>
<td>Organ of an insurrectional movement**</td>
<td></td>
</tr>
<tr>
<td>* regardless of whether the organ exceeded its competence or contravened instructions (Art. 10)</td>
<td>** without prejudice to attribute to the state other conduct related to conduct by this category of actor (Art. 11(2); 12(2); 14(2))</td>
<td></td>
</tr>
</tbody>
</table>
TABLE IV: Attribution Rules for State Enterprises, Entities & Subnationals under the ILC Draft Articles

<table>
<thead>
<tr>
<th>Attribution Rules Involving Subnational Entities</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct Will Be Attributed</strong></td>
<td><strong>Conduct Will Not Be Attributed</strong></td>
</tr>
<tr>
<td>Organ(s) of a territorial governmental entity within a state or organs of entities not part of the formal structure of the state or a territorial governmental entity, but empowered by internal law to exercise elements of the governmental authority, acting in that capacity* (Art. 7(1)(2))**</td>
<td>Person(s) not acting on behalf of the state** (Art. 11)</td>
</tr>
<tr>
<td>Person(s) acting in fact on behalf of the State or exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority (Art. 8)**</td>
<td></td>
</tr>
<tr>
<td>* regardless of whether the organ exceeded its competence or contravened instructions (Art. 10)</td>
<td>** without prejudice to attribute to the state other conduct related to conduct by this category of actor (Art. 11(2))</td>
</tr>
</tbody>
</table>

***In all cases not expressly covered in Articles 7 & 8, the conduct is in "no circumstances" attributable to the state regardless of whether there is a causal link (see ILC Commentary to Articles 7 & 8).