Court File Nos. 38663/38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

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APPELLANT

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT

-and-

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AND BETWEEN:

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

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PART I - STATEMENT OF FACTS

1. Amnesty International ("Amnesty") accepts the facts as set out in the parties' factums and takes no position on any disputed facts.

PART II - OVERVIEW AND POSITIONS ON QUESTIONS IN ISSUE

2. Constitutional interpretation has been called "a mirror reflecting the national soul."[1] This Court has recognized that the values that constitute our 'national soul' are increasingly influenced by, and shared with, the international community. Correspondingly, Canadian judges interpreting constitutional law have recognized, and should continue to recognize, international law — and particularly international human rights law — as a valuable interpretive tool.

3. This Court has endorsed this approach. It regularly affirms that Canada's international obligations inform the interpretation of *Charter* rights. It has also applied an international human rights lens to other "quasi-constitutional documents."[2]

4. In an appropriate case, this same approach should extend to other constitutional texts, including to the interpretation of ss. 91 and 92 of the *Constitution Act*. This means that in situations where there is ambiguity regarding the scope of a ss. 91/92 power, the Court must consider whether one result will effectively undermine Canada's international human rights commitments. Amnesty argues that this perspective must inform the Court's determination of the question on these appeals

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[1] Yvonne Boyer, "First Nations, Metis, and Inuit Women's Health: A Rights-Based Approach", 2017 54-3 *Alberta Law Review* 611, 2017 CanLIIDocs 55, http://www.canlii.org/t/r4 at 625

[2] See for example, *Singh v Canada (Minister of Employment and Immigration)* [1985] 2 SCR 177; *Canada (AG) v Mossop* [1993] 1 SCR 554 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/39/index.do)

— namely, the scope of Canada's ability to establish minimum national standards for greenhouse gas (GHG) emissions.

PART III - LAW AND ARGUMENT

Anthropogenic Climate Change is a Human Rights Problem

5. Anthropogenic climate change is "an urgent and potentially irreversible threat to human societies and the planet", requiring "the widest possible cooperation by all countries, and their participation in an effective and appropriate international response."[3] This threat presents novel challenges for the Canadian legal and constitutional order, which were not (and could not have been) anticipated by drafters of the Constitution, and which will require evolving and responsive interpretations of the law.

6. Moreover, it has long been recognized that a clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living.[4] Over the course of the last decade the international community has arrived at a clear consensus on all of these issues.

7. The Intergovernmental Panel on Climate Change (IPCC)'s Fifth Assessment Report[5] provides a detailed picture of how observed and predicted climactic changes will adversely affect millions of people and the ecosystems, natural resources, and physical infrastructure upon which they depend.[6] As the Court of Appeal for Ontario acknowledged, the 1.5-degree Celsius rise in

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[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 6 ["ONCA Reference"] (http://canlii.ca/t/j16w0)
[4] ONCA Reference at para 11
[5] Cited in *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 16 ["SKCA Reference"] (http://canlii.ca/t/j03gt)
[6] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, Contribution of the Working Group II to the Fifth Assessment

temperatures projected (at current GHG emissions) to occur by 2040 will have catastrophic environmental effects.[7] These include sudden-onset events that pose a direct threat to Canadian lives and safety, as well as more gradual forms of environmental degradation that will undermine access to clean water, food, and other key resources that support human life.

8. As the courts below recognized, these outcomes are *directly* tied to human-caused GHG emissions,[8] making the regulation and control of GHG emissions a human rights issue.

9. To be clear, Amnesty does not take the position that the current GHG emissions regulation scheme is ideal or sufficient. Indeed, Canada itself agreed with other international partners that GHG pricing was a necessary, but not sufficient response to the environmental crisis.[9] Much more is needed, including complementary actions in relation to electricity generation, construction practices, transportation, industry, forestry, agriculture and waste management,[10] as well as financing for clean technology research and innovations. Nonetheless, establishing minimum national standards for greenhouse gas (GHG) emissions is an important promising step.

Anthropogenic Climate Change Impacts Canada's Obligations under IHRL

10. Many of the effects of climate change will directly impact Canadians in ways that will deprive them of rights guaranteed under Canada's international treaty obligations. For instance, under *every* projected emission scenario, there is an increased likelihood that human-caused

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Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2014) Available online: https://www.ipcc.ch/report/ar5/wg2/

[7] ONCA Reference at para 19

[8] See ONCA Reference at paras 6-21; SKCA Reference at paras 14-17

[9] SKCA Reference at para 31

[10] *Ibid*

climate change will bring about "severe, pervasive, and irreversible impacts for people and ecosystems" in this century.[11] Some of the most profound effects will be for coastal ecosystems and settlement areas — including along Canada's Northern and Western coasts and throughout the Maritimes.[12] These coastal communities will also be adversely affected by the more gradual degradation of land, soils, freshwater resources, and coastal and estuarine ecosystems.[13]

11. These impacts will deprive Canadians of rights guaranteed under international agreements and undermine Canada's ability to comply with those agreements. For instance, a number of international human rights treaties and other international instruments bind Canada to uphold the right to life,[14] liberty and security of the person,[15] adequate standards of living,[16] health,[17] and the rights of Indigenous peoples.[18] The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to self-determination broadly, for all peoples,[19] and

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[11] *Ibid* at para 16
[12] *Ibid* at para 17
[13] *Ibid*
[14] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) art 6 [ICCPR]. Available online: https://www.refworld.org/docid/3ae6b3aa0.html; UN Human Rights Committee (HRC), *General comment no. 36, on article 6 of International Covenant on Civil and Political Rights (right to life)*, 30 October 2018, CCPR/C/GC/36, para 62 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf
[15] ICCPR art. 9
[16] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) art. 11 [ICESCR] Available online: https://www.refworld.org/docid/3ae6b36c0.html
[17] ICESCR, art. 12
[18] *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html [Declaration]
[19] ICCPR, art. 1

this right would be narrowed for Canadians and others alike by the negative impacts of climate change.

12. Similar problems would arise with respect to Canada's ability to comply with international human rights commitments designed to protect marginalized and vulnerable groups, who are particularly susceptible to the economic and social disruption that will occur as a result of climate change. For example, Canada's failure to mitigate the harmful effects of climate change would undermine its compliance with agreements such as the *Convention on the Rights of the Child*,[20] which guarantees childrens' rights to "the highest attainable standard of health"[21] as well as to a "standard of living adequate for … physical, mental, spiritual, moral, and social development."[22] Similarly affected would be Canada's obligations pursuant to the *Convention on the Rights of Persons with Disabilities*,[23] which guarantees similar rights to health[24] and an adequate standard of living.[25]

13. Indigenous peoples in Canada will be especially impacted, given their reliance on and connection to the land and natural resources in their surrounding environment.[26] This raises the prospect that Canada will not be fulfilling its obligations under the UN *Declaration on the Rights of Indigenous Peoples*. In particular, that instrument guarantees for Indigenous peoples' such

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[20] C*onvention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74, available at: https://www.refworld.org/docid/3b00f03d30.html [CRC]
[21] CRC, art. 24
[22] CRC, art. 27; see also *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15 at para 50, available at: https://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15_en.doc
[23] *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106, available at: https://www.refworld.org/docid/45f973632.html [CRPD]
[24] CRPD, art. 25
[25] CRPD, art. 28
[26] ONCA Reference at paras 12-14

fundamental rights and freedoms as self-determination[27] and equality,[28] autonomy,[29] and the right to maintain and strengthen their distinct ways of living.[30]

14. Of course, Canada's international human rights commitments also impose upon it the responsibility for actions that impact the rights of individuals and communities beyond our borders. There is, therefore, not just a practical or moral imperative for thinking internationally when it comes to climate change, but a human rights *obligation* to do so.[31]

15. Finally, an inability to regulate GHG emissions through minimum national emissions standards would jeopardize Canada's ability to meet its commitments under the *Paris Agreement*,[32] which Canada ratified on and which was part of the impetus for the *Act* that is the subject of this appeal.[33] The *Preamble* to the *Paris Agreement* specifically obliges parties to "respect, promote and consider their respective obligations on human rights," including "the right to health, the rights of indigenous peoples… migrants, children, persons with disabilities

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[27] Declaration, art. 3
[28] Declaration, art. 2
[29] Declaration, art. 4
[30] Declaration, art. 5
[31] *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Economic and Social Council, E/C.12/GC/24 (10 August 2017), Available online: https://tbinternet.ohchr.org/_layouts/15%20Available%20/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en
[32] *Paris Agreement*, being an Annex to the *Report of the Conference of the parties on its twenty-first session, held in parties from 30 November to 13 December 2015--Addendum Part two: Action taken by the Conference of the parties at its twenty-first session*, 4 November 2016, UN Doc FCCC/CP/2015/Add.1, 55 ILM 740 (entered into force 29 January 2016) [*Paris Agreement*] Available online: https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf
[33] ONCA Reference at para 25

and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."[34]

16. Without the ability to legislate this Act, it is unlikely that Canada will be able to discharge its international obligations and carry out its share of the changes required to reduce global GHG emissions.

Climate Change Requires International Cooperation, which Requires National Cohesiveness

17. Climate change is a problem that cannot be solved by piecemeal litigation or individual nations acting alone. It is an all-or-nothing affair, requiring concerted *international* cooperation.[35]

18. Yet international cooperation over environmental problems presents a high-stakes version of a prisoner's dilemma, with potentially devastating consequences. Broadly speaking, environmental regulation often comes at a perceived cost to economic production, at least in the short-term. When any one nation reneges, or fails in its ability to perform on its commitments, all other nations become dis-incentivized from fulfilling their commitments as well.[36] As such, the real question for the international community is whether there can be effective "cooperative arrangements that promote sustainable development rather than self-serving, nationalistic ventures that will heighten international conflict and perpetuate international injustices."[37] As the Court of Appeal for Ontario put it, "the international community has recognized that the

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[34] *Paris Agreement*, *supra*, Preamble
[35] ONCA Reference at para 21
[36] See Eva Abrahams, "Climate Change is the Ultimate Prisoner's Dilemma" (May 9, 2013) *Global Risks Insight* (online): https://globalriskinsights.com/2013/05/climate-change-is-the-ultimate-prisoners-dilemma/
[37] Marvin S. Soroos, "Global Change, Environmental Security, and the Prisoner's Dilemma" *Journal of Peace Research* 31:3, 317-332 at 317.

solution to climate change is not within the capacity of any one country and has, therefore, sought to address the issue through global cooperation".[38]

19. Whether Canada can be a participant in these effective cooperative agreements will, in large part, come down to the decision of this Court on this appeal.

IHR Commitments Should Inform the Scope of ss 91/92 Powers in these Appeals

20. When interpreting the scope of Canada's powers, Amnesty submits that this Court should consider the impact of any decision on Canada's compliance with its international human rights commitments. This means that where there are ambiguities or uncertainties regarding the scope of Canada's powers, a division-of-powers interpretation that facilitates Canada's ability to meet its international human rights obligations ought to be preferred over one that undermines or risks compromising Canada's ability to meet those obligations.

21. These appeals fall squarely within the zone where Amnesty submits that international law is a relevant consideration. As suggested by the split decisions and opinions in the courts below, the division-of-powers questions before this Court are novel and the application of ss. 91/92 is not something that can be unambiguously determined based on the constitutional text or standard division-of-power doctrines. And the power at issue — the ability to set minimum national standards to reduce GHG emissions — engages Canada's international human rights commitments.

22. To be clear, Amnesty does not suggest that the federal government can unilaterally expand the scope of its s. 91 powers simply by entering into international treaties. Nor does

[38] ONCA at para 21

Amnesty suggest that Canada's international commitments can prevail over the clear text of ss. 91 or 92. But where Canada is bound by international human rights obligations, and a particular issue with human rights implications does not fit neatly into either s. 91 or s. 92, Canada's ability to effectively discharge its international obligations ought to be given careful consideration.

23. The proposition that international human rights law has a role to play when interpreting ss. 91/92 of the *Constitution Act* has yet to be expressly recognized by this Court. But it flows naturally from principles that *have* long been recognized. In particular, this Court's jurisprudence has consistently held that international law should inform both the interpretation and content of *Charter* rights.[39] The reason for that broad, purposive approach in the *Charter* context stems from the fact that it was conceived of as a product of the international human rights movement, and because of a general posture that Canada's rights-granting documents should, insofar as it is possible, be construed in a manner that reflects Canada's international commitments, in part as a means for Canada to give effect to international human rights standards.

24. In the present appeals, interpreting the scope of federal and provincial powers carries human rights consequences that are just as significant as those that flow from interpreting the

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[39] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 349 (http://canlii.ca/t/1ftnn); *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391 at 70 (http://canlii.ca/t/1rqmf); *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22–23 (http://canlii.ca/t/g0mbh); *India v Badesha*, 2017 SCC 44 at para 38 (http://canlii.ca/t/h5t15); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para 64 (http://canlii.ca/t/gg40r); *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 70 (http://canlii.ca/t/1rqmf); *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 65 (http://canlii.ca/t/hmtxn)

scope of a *Charter* right. In this situation, the interpretive approach ought to be similarly sensitive to Canada's obligations under international human rights law.

25. Amnesty's proposed interpretive approach is also consistent with a basic principle of international law[40] that is expressly codified in many international human rights instruments to which Canada is a party: a party cannot invoke provisions of its internal law to justify derogations from its international obligations.[41] In most cases, this principle means that Canada must take steps to act — for example, by providing funding or other resources to certain communities or vulnerable groups — even where provincial or territorial governments have not acted. But in the unique case of climate change, Canada's very *ability* to ensure it effectively meets many of its international human rights commitments first requires having the *authority* to set minimum national GHG emission standards.

26. Accordingly, Amnesty submits that this Court should take account of Canada's obligations under international human rights law in these appeals. Interpreting the scope of federal powers narrowly under s. 91 of the *Constitution Act* in this case — so as to preclude Canada from setting minimum national standards to reduce GHG emissions — would undermine Canada's ability to comply with these obligations, including obligations to uphold the right to life, liberty and security of the person, adequate standards of living, health, and the rights of Indigenous peoples. Amnesty submits that this consideration should weigh heavy in the balance when undertaking the interpretive exercise.

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[40] Malcolm N. Shaw, *International Law*, 5th Edition, Cambridge: Cambridge University Press, 2003 at p. 125, citing *Polish Nationals in Danzig Case* [1932] PCIJ, Series A/B, No. 44, pp. 21, 24 and the *Georges Pinson* case, 5 RIAA, p. 327 [Attached as Schedule A]

[41] See, for example, Art. 50, ICCPR; Art. 28, ICESCR; Art. 27 of the *Vienna Convention on the Law of Treaties*; General Comment No 31 of the UN *Human Rights Committee*

PART IV - COSTS

27. Amnesty International seeks no costs and asks that no costs order be made against it.

PART V - ORDER REQUESTED

28. Amnesty International takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2020.

STOCKWOODS LLP
Justin Safayeni
Zachary Al-Khatib

Counsel for the Intervenor,
Amnesty International Canada

PART VI - TABLE OF AUTHORITIES

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To my mother, Paulette

And in memory of my father, Ben Shaw CBE
And of my mother-in-law, Denise Axelrod

But above all to my wife Judith

assets and debts in the succession process affecting the successor states of the Former Yugoslavia. The Commission, in producing a negative answer, emphasised that the question of war damage was one that fell within the sphere of state responsibility, while the rules relating to state succession fell into a separate area of international law. Accordingly, the two issues had to be separately decided.[9]

In addition to the wide range of state practice in this area, the International Law Commission has been working extensively on this topic. In 1975 it took a decision for the draft articles on state responsibility to be divided into three parts: part I to deal with the origin of international responsibility, part II to deal with the content, forms and degrees of international responsibility and part III to deal with the settlement of disputes and the implementation of international responsibility.[10] Part I was provisionally adopted by the Commission in 1980[11] and the Draft Articles were finally adopted on 9 August 2001.[12] General Assembly resolution 56/83 of 12 December 2001 took note of the adopted articles and commended them to governments.

The nature of state responsibility

The essential characteristics of responsibility hinge upon certain basic factors: first, the existence of an international legal obligation in force as between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the state responsible, and finally, that loss or damage has resulted from the unlawful act or omission.[13]

These requirements have been made clear in a number of leading cases. In the *Spanish Zone of Morocco* claims,[14] Judge Huber emphasised that:

> responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.[15]

and in the *Chorzów Factory* case,[16] the Permanent Court of International Justice said that:

> it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.

Article 1 of the International Law Commission's Articles on State Responsibility reiterates the general rule, widely supported by practice,[17] that every internationally wrongful act of a state entails responsibility. Article 2 provides that there is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.[18] This principle has been affirmed in the case-law.[19] It is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of municipal law.[20] Article 12 stipulates that there is a breach of an international obligation[21] when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character.[22] A breach that is of a continuing nature extends over the entire period during which the act continues and remains not in conformity with the international obligation in question,[23] while a breach that consists of a composite act will also extend over the entire period during which the act or omission continues

[9] 96 ILR, pp. 726, 728.

[10] *Yearbook of the ILC*, 1975, vol. II, pp. 55–9. See also P. Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard International Law Journal*, 1988, p. 1.

[11] *Yearbook of the ILC*, 1980, vol. II, part 2, pp. 30 ff.

[12] ILC Commentary 2001, A/56/10, 2001. This Report contains the Commentary of the ILC to the Articles, which will be discussed in the chapter. The Commentary may also be found in Crawford, *Articles*. Note that the ILC Articles do not address issues of either the responsibility of international organisations or the responsibility of individuals: see articles 57 and 58.

[13] See e.g. H. Mosler, *The International Society as a Legal Community*, Dordrecht, 1980, p. 157, and E. Jiménez de Aréchaga, 'International Responsibility' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, pp. 531, 534.

[14] 2 RIAA, p. 615 (1923); 2 AD, p. 157.

[15] 2 RIAA, p. 641.

[16] PCIJ, Series A, No. 17, 1928, p. 29; 4 AD, p. 258. See also the *Corfu Channel* case, ICJ Reports, pp. 4, 23; 16 AD, p. 155; the *Spanish Zone of Morocco* case, 2 RIAA, pp. 615, 641 and the *Mayagna (Sumo) Indigenous Community of Awas Tingni* v. *Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001 (Ser. C) No. 79, para. 163.

[17] See e.g. ILC Commentary 2001, p. 63.

[18] See *Yearbook of the ILC*, 1976, vol. II, pp. 75 ff. and ILC Commentary 2001, p. 68.

[19] See e.g. *Chorzów Factory* case, PCIJ, Series A, No. 9, p. 21 and the *Rainbow Warrior* case, 82 ILR, p. 499.

[20] Article 3. See generally *Yearbook of the ILC*, 1979, vol. II, pp. 90 ff.; *ibid.*, 1980, vol. II, pp. 14 ff. and ILC Commentary 2001, p. 74. See also above, chapter 4, pp. 124 ff.

[21] By which the state is bound at the time the act occurs, Article 13 and ILC Commentary 2001, p. 133. This principle reflects the general principle of intertemporal law: see e.g. the *Island of Palmas* case, 2 RIAA, pp. 829, 845 and above, chapter 9, p. 429.

[22] See the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 38; 116 ILR, p. 1 and ILC Commentary 2001, p. 124.

[23] See article 14. See also e.g. *Loizidou* v. *Turkey*, Merits, European Court of Human Rights, Judgment of 18 December 1996, paras. 41–7 and 63–4; 108 ILR, p. 443 and *Cyprus* v.

and remains not in conformity with the international obligation.[24] A state assisting another state[25] to commit an internationally wrongful act will also be responsible if it so acted with knowledge of the circumstances and where it would be wrongful if committed by that state.[26]

The question of fault[27]

There are contending theories as to whether responsibility of the state for unlawful acts or omissions is strict or whether it is necessary to show some fault or intention on the part of the officials concerned. The principle of objective responsibility (the so-called 'risk' theory) maintains that the liability of the state is strict. Once an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, that state will be responsible in international law to the state suffering the damage irrespective of good or bad faith. To be contrasted with this approach is the subjective responsibility concept (the 'fault' theory) which emphasises that an element of intentional (*dolus*) or negligent (*culpa*) conduct on the part of the person concerned is necessary before his state can be rendered liable for any injury caused.

The relevant cases and academic opinions are divided on this question, although the majority tends towards the strict liability, objective theory of responsibility.

In the *Neer* claim[28] in 1926, an American superintendent of a Mexican mine was shot. The USA, on behalf of his widow and daughter, claimed damages because of the lackadaisical manner in which the Mexican authorities pursued their investigations. The General Claims Commission dealing with the matter disallowed the claim, in applying the objective test.

Turkey, European Court of Human Rights, Judgment of 10 May 2001, paras. 136, 150, 158, 175, 189 and 269; 120 ILR, p. 10.

[24] Article 15.

[25] Or directing or controlling it, see article 17; or coercing it, see article 18.

[26] Article 16.

[27] See e.g. Crawford, *Articles*, p. 12; H. Lauterpacht, *Private Law Sources and Analogies of International Law*, Cambridge, 1927, pp. 135–43; Nguyen Quoc Dinh et al., *Droit International Public*, p. 766; Brownlie, *Principles of Public International Law*, 5th edn, Oxford, 1998, p. 439 and *System*, pp. 38–46, and Aréchaga, 'International Responsibility', pp. 534–40. See also J. G. Starke, 'Imputability in International Delinquencies', 19 BYIL, 1938, p. 104, and Cheng, *General Principles*, pp. 218–32.

[28] 4 RIAA, p. 60 (1926); 3 AD, p. 213.

In the *Caire* claim,[29] the French–Mexican Claims Commission had to consider the case of a French citizen shot by Mexican soldiers for failing to supply them with 5,000 Mexican dollars. Verzijl, the presiding commissioner, held that Mexico was responsible for the injury caused in accordance with the objective responsibility doctrine, that is 'the responsibility for the acts of the officials or organs of a state, which may devolve upon it even in the absence of any "fault" of its own'.[30]

A leading case adopting the subjective approach is the *Home Missionary Society* claim[31] in 1920 between Britain and the United States. In this case, the imposition of a 'hut tax' in the protectorate of Sierra Leone triggered off a local uprising in which Society property was damaged and missionaries killed. The tribunal dismissed the claim of the Society (presented by the US) and noted that it was established in international law that no government was responsible for the acts of rebels where it itself was guilty of no breach of good faith or negligence in suppressing the revolt. It should, therefore, be noted that the view expressed in this case is concerned with a specific area of the law, viz. the question of state responsibility for the acts of rebels. Whether one can analogise from this generally is open to doubt.

In the *Corfu Channel* case,[32] the International Court appeared to lean towards the fault theory[33] by saying that:

> it cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.[34]

On the other hand, the Court emphasised that the fact of exclusive territorial control had a bearing upon the methods of proof available to establish the knowledge of that state as to the events in question. Because of the difficulties of presenting direct proof of facts giving rise to

[29] 5 RIAA, p. 516 (1929); 5 AD, p. 146.

[30] 5 RIAA, pp. 529–31. See also *The Jessie*, 6 RIAA, p. 57 (1921); 1 AD, p. 175.

[31] 6 RIAA, p. 42 (1920); 1 AD, p. 173.

[32] ICJ Reports, 1949, p. 4; 16 AD, p. 155.

[33] See e.g. *Oppenheim's International Law*, p. 509.

[34] ICJ Reports, 1949, pp. 4, 18; 16 AD, p. 157. Cf. Judges Krylov and Ecer, *ibid.*, pp. 71–2 and 127–8. See also Judge Azevedo, *ibid.*, p. 85.