This reports on the above session, held on 10 September 2020 at the Cape Town Convention Academic Project Conference.

The session consisted of a presentation given by Jeffrey Wool (Harris Manchester College, University of Oxford) and Miguel Ruelas (Abogados Sierra, Mexico) (‘Presentation’), which was commented on by Dr Rumiana Yotova (University of Cambridge) (‘Comment’).

Following an introduction on treaty compliance, impediments thereto, and the enforcement of treaty rights, each with a focus on private international law treaties, the Presentation outlined ten general principles, which, taken together, were offered as a basic framework (‘Framework’) for assessing potential judicial breaches of the Cape Town Convention (‘Convention’) and its Aircraft Protocol (‘Protocol’). The Framework was supplemented by a grouping of breach consequences: from non-compliance with international obligations generally, to formal international responsibility to another State, to liability to adversely impacted private parties.

The Presentation then applied that Framework to three hypothetical examples of judicial breach in the context of these instruments (‘CTC’), concluding that judicial breaches would occur in each: first, a court’s non-compliance with applicable timetables to grant ‘relief pending final determination’ under Article 13 of the Convention and Article X of the Protocol; secondly, a court’s following its pre-CTC jurisdiction rules without applying Article 42 of the Convention (permitted exclusive jurisdiction); and thirdly, a court’s failure to order the giving of possession where applicable under Article XI (Alternative A) of the Protocol.

The Framework is set as Annex 1. The Presentation reduced the Framework to this core proposition: ‘A state breaches a treaty, and thus its international law obligations, if its courts fail to apply or misapply a treaty, save for a good faith error which cannot be corrected, regardless of intention or degree of judicial independence’.

The Comment focused on, and took issue with, principle 8 of the Framework, which was stated as follows: ‘Unless a treaty states or necessarily implies otherwise, the intent to breach a treaty by a court is not relevant to international responsibility. Breach is determined objectively’. The Comment noted more than simple or objective error may be required: case law supports the propositions that (1) willful disregard, gross incompetence, or lack of impartiality may be necessary, and (2) international law jurisprudence relating to denial of justice may be relevant. This line of thought intersected, but was not in full accord, with the Presentation’s treatment of ‘good faith error’ (in the content of CTC).

END
ANNEX 1 FRAMEWORK FOR ASSESSMENT OF JUDICIAL BREACH OF TREATIES

Principle 1: Treaties are a source of international law.1

Principle 2: *Pacta sunt servanda*: treaties are binding on States and must be performed in good faith.2

Principle 3: There is a breach of an international obligation by a State when an act by that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.3

Principle 4: Every ‘internationally wrongful act’ of a State entails international responsibility of that State.4

Principle 5: There is an international wrongful act of a State when a conduct consisting of an action or omission constitutes a breach of an international obligation of the State.5

Principle 6: The conduct of any State organ shall constitute an act of that State under international law whether the organ exercises legislative, executive, judicial, or any other function, whatever position it holds in the organization of that State, and whatever its character as an organ of the central government.6

Principle 7: National law (here: lack of implementation or primacy) is not a justification for failure to perform a treaty.7

Principle 8: Unless a treaty states or necessarily implies otherwise, the intent to breach a treaty by a court is not relevant to international responsibility. Breach is determined objectively.8

Principle 9: Judicial independence is not a defense to judicial breach of a treaty.

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1. Article 38(1)(a) of the Statute of the International Court of Justice (adopted 26 June 1945).
7. Article 27 of the Vienna Convention.
Principle 10: A good faith interpretative error made despite judicial diligence (which will not be considered an error by that court, hereinafter ‘good faith error’) will not result in judicial breach, though there is a continuing State obligation to correct it (that is, reverse on appeal).9


A deliberate refusal by the courts of a Contracting State to apply a particular provision of the Convention or Protocol, for example, denial of a Convention remedy on the ground that no such remedy exists under local law, would also place the Contracting State in breach of its international obligations if the offending decision was not rectified by the appeal process or by legislation. On the other hand, room must be allowed for differing interpretations of a provision of an international instrument. The mere fact that the courts of a Contracting State adopt in good faith an interpretation contrary to that adopted by the majority of courts of other States does not place the Contracting State in breach. There are many cases in national legal systems where a judge’s minority view is later upheld as being the correct view.