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## THE NATURE AND FORMS OF INTERNATIONAL RESPONSIBILITY

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### SUMMARY

On the international plane, responsibility is the necessary corollary of obligation: every breach by a subject of international law of its international obligations entails its international responsibility. The chapter starts by discussing the scope of international liability, before examining the general character of State responsibility. Due to the historical primacy of states in the international legal system, the law of State responsibility is the most fully-developed branch of responsibility, and therefore is the principal focus of the chapter. Conversely, the responsibility of international organizations is extremely under-developed, and is therefore considered only in passing, as is the potential responsibility under international law of other international actors.

The law of State responsibility enunciates the consequences of a breach by a State of an international obligation, and regulates the permissible responses to such breaches; the central portion of the chapter discusses the constituent elements of State responsibility of attribution and breach, as well as the possible excuses and justifications which, if present, will preclude the responsibility of a State which has not acted in conformity with its obligations.

Attention then turns to the various secondary obligations which arise upon the commission of an internationally wrongful act by a State, and in particular the obligation to make reparation in one form or another.

Finally, the chapter provides an introduction to the question of which States are entitled to invoke breaches of international law, whether by simply demanding performance of the secondary obligations that arise upon breach of an international obligation, or by taking countermeasures.

# I. THE SCOPE OF INTERNATIONAL RESPONSIBILITY: INTRODUCTION AND OVERVIEW

Article 1 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>1</sup> adopted in 2001, provides: 'Every internationally wrongful act of a State entails the international responsibility of that State'.<sup>2</sup> Due to the historical development of international law, its primary subjects are States. It is on States that most obligations rest and on whom the burden of compliance principally lies. For example, the human rights conventions, though they confer rights upon individuals, impose obligations upon States. If other legal persons have obligations in the field of human rights, it is only by derivation or analogy from the human rights obligations that States have (see Clapham, 1993, and McCorquodale, above, Chapter 9). State responsibility is the paradigm form of responsibility on the international plane.

But there can be international legal persons other than States, as the International Court held in the *Reparation for Injuries* Advisory Opinion.<sup>3</sup> Being a subject of any legal system must surely involve being subject to responsibilities as well as enjoying rights. Thus it would seem unproblematic to substitute the words 'international organization' or 'international legal person' for 'State' in Article 1 of the ILC Articles; that basic statement of principle would seem equally applicable by definition to all international legal persons.

In relation to international organizations, at least, a corollary of their undoubted capacity to enter into treaties with States or with other international organizations is that they are responsible for breaches of the obligations thereby undertaken; this follows from the principle *pacta sunt servanda* with respect to such treaties.<sup>4</sup> The same is intuitively true for breaches of applicable general international law. The potential responsibility of international organizations under general international law was affirmed by the International Court of Justice in the *Cumaraswamy*

<sup>1</sup> Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 August 2001: *Report of the International Law Commission, Fifty-third Session, A/56/10*, Chapter IV. The General Assembly took note of them, recommended them to the attention of governments, and annexed them to GA Res 56/83 (10 December 2001). The Articles and the Commentaries are reproduced in Crawford, 2002 (the Articles at pp 61–73) and the Articles alone in Evans, 2002, pp 508–516. Subsequent references to the Commentaries will be to Crawford's text.

<sup>2</sup> See the often quoted dictum of the Permanent Court of International Justice in *Factory at Chorzów, Jurisdiction, Judgment No 8, 1927, PCIJ, Ser A, No 9* at p 21: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation'.

<sup>3</sup> *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 174 at p 179.

<sup>4</sup> See Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986), Art 26; cf Morgenstern, 1986, pp 13–16, 32–36, 115.

advisory opinion.<sup>5</sup> The difficulties are rather ones of implementation, since the system of implementation (for example, the jurisdiction of international courts and tribunals) has been developed by reference to States and not international organizations.<sup>6</sup>

The position so far as individuals, corporations, non-governmental organizations, and other groups are concerned is far less clear: just as it is doubtful whether they are in any meaningful sense 'subjects' of international law, so it is doubtful whether any general regime of responsibility has developed to cover them.

In relation to individuals, international responsibility has only developed in the criminal field, and then only in comparatively recent times. True, piracy has been recognized as a 'crime against the law of nations' for centuries. But it is better to see this as a jurisdictional rule allowing States to exercise criminal jurisdiction for pirate attacks on ships at sea rather than a rule conferring 'legal personality' on pirates.<sup>7</sup> One does not acquire international legal personality by being hanged at the yardarm.

Since the Second World War real forms of individual criminal responsibility under international law have developed. First steps were taken with the establishment of the Nuremberg and Tokyo war crimes tribunals and the conclusion of the Genocide Convention in the immediate post-war period; after the end of the Cold War there followed in rapid succession the creation by Security Council resolution of the International Criminal Tribunals for Yugoslavia (1992) and Rwanda (1994), and then the adoption of the Rome Statute of the International Criminal Court (1998) which entered into force on 1 July 2002.

By contrast, so far there has been no development of corporate criminal responsibility in international law. Under the two ad hoc Statutes and the Rome Statute only individual persons may be accused. The Security Council often addresses recommendations or demands to opposition, insurgent, or rebel groups—but without implying that these have separate personality in international law. Any international responsibility of members of such groups is probably limited to breaches of applicable international humanitarian law or even of national law, rather than general international law. If rebel groups succeed in becoming the government of the State (whether of the State against which they are fighting or of a new State which they succeed in creating), that State may be responsible for their acts (ARSIWA, Article 10; Commentary, Crawford, 2002, pp 116–120). But if they fail, their opponent State is in

<sup>5</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p 62, para 66.

<sup>6</sup> Thus the EU, which is not a State, has had to be specifically provided for in order to be a party to contentious proceedings under the 1982 UN Convention on the Law of the Sea (see Art 305 and Annex IX) and under the WTO dispute settlement mechanism. See generally Wellens, 2002; Klabbers, 2002.

<sup>7</sup> See the Separate Opinion of Judge Moore in '*Lotus*', Judgment No 9, 1927, PCIJ, Ser A, No 10 at p 70; United Nations Convention on the Law of the Sea 1982, Articles 101–107; Rubin, 1998; Oppenheim's *International Law*, 1992, vol 1, pp 746–755.

principle not responsible, and any possibility of collective or corporate responsibility for their acts fails with them.

It is also very doubtful whether 'multi-national corporations' are subjects of international law for the purposes of responsibility, although steps are being taken to develop voluntary adherence to human rights and other norms by corporations.<sup>8</sup> From a legal point of view, the so-called multinational corporation is better regarded as a group of corporations, each created under and amenable to its own national law as well as to any other national legal system within which it operates.

Thus although Article 58 reserves in general terms the possibility of 'individual responsibility under international law of any person acting on behalf of a State', a reservation which is not limited to criminal responsibility, so far there has been virtually no development in practice of civil responsibility of individuals or corporations for breaches of international law. Only the United States has legislation dealing (in a very uneven way) with this issue.<sup>9</sup> As the dissenting judges in the *Arrest Warrant* case pointed out, this may be seen as 'the beginnings of a very broad form of extraterritorial jurisdiction'<sup>10</sup> in civil matters. They further commented that although 'this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally'.<sup>11</sup>

The development of international criminal law is considered in Chapter 23 of this book. In this chapter we examine the foundational rules of State responsibility—in particular the bases for and consequences of the responsibility of a State for internationally wrongful acts. Questions of the implementation of such responsibility by an injured State or by other interested parties, as well as questions of possible responses (retorsion, countermeasures, or sanctions) are discussed in the following two chapters.

<sup>8</sup> See, eg the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977 (adopted by the Governing Body at its 204th Session), 17 ILM 416; the OECD's 'Guidelines for Multinational Enterprises' (2000), 40 ILM 237; and the 'Nine Principles' of the UN Global Compact Initiative (2000) (relating to human rights, labour standards, and the environment). On the problems of establishing international responsibility of corporations, see Ratner, 2001.

<sup>9</sup> Private parties (US or foreign) can be sued for torts occasioned 'in violation of the law of nations' anywhere committed against aliens, under the unusual jurisdiction created by the Alien Tort Claims Act (28 USC §1350). The US cases distinguish between corporate complicity with governmental violations of human rights, and those violations (eg genocide, slavery) which do not require any governmental involvement or State action. See, eg *Kadić v Karadžić*, 70 F3d 232 (1995); 104 ILR 135 (Court of Appeals, 2nd). Cf also the Torture Victims Protection Act 1992 (PL 102-256, 106 Stat 73), under which only designated 'rogue' States can be defendants: the Act on its face contradicts the principle of universality on which it purports to be based.

<sup>10</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Preliminary Objections and Merits, Judgment, ICJ Reports 2002, p 3, Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 48.

<sup>11</sup> Ibid.

## II. STATE RESPONSIBILITY: ISSUES OF CLASSIFICATION AND CHARACTERIZATION

The category 'State responsibility' covers the field of the responsibility of States for internationally wrongful conduct. It amounts, in other words, to a general law of wrongs. But of course, what is a breach of international law by a State depends on what its international obligations are, and especially as far as treaties are concerned, these vary from one State to the next. There are a few treaties (especially the United Nations Charter) to which virtually every State is a party; otherwise each State has its own range of bilateral and multilateral treaty obligations. Even under general international law, which might be expected to be virtually uniform for every State, different States may be differently situated and may have different responsibilities—for example, upstream States rather than downstream States on an international river, capital importing and capital exporting States in respect of the treatment of foreign investment, or States on whose territory a civil war is raging as compared with third parties to the conflict. There is no such thing as a uniform code of international law, reflecting the obligations of all States.

On the other hand, the underlying concepts of State responsibility—attribution, breach, excuses, consequences—seem to be general in character. Particular treaties or rules may vary these underlying concepts in particular respects, otherwise they are assumed and they apply unless excluded.<sup>12</sup> These background or standard assumptions of responsibility on the basis of which specific obligations of States exist and are applied are set out in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (2001). The Articles are the product of more than forty years' work by the ILC on the topic, and in common with other ILC texts they involve both codification and progressive development (Crawford, 2002, pp 1–60; *Symposium*, 2002, 96 *AJIL* pp 773–890). They are the focus of what follows.

### A. RESPONSIBILITY UNDER INTERNATIONAL OR NATIONAL LAW?

Evidently State responsibility can only be engaged for breaches of international law, ie for conduct which is internationally wrongful because it involves some violation of an international obligation applicable to and binding on the State. A dispute between two States concerning the breach of an international obligation, whether customary or deriving from treaty, concerns international responsibility, and this will be true whether the remedy sought is reparation for a past breach, or cessation of the internationally wrongful conduct for the future. On the other hand, not all

<sup>12</sup> ARSIWA, Article 55 (*lex specialis*). For examples of a *lex specialis* see, eg the provisions of the WTO Agreements excluding compensation for breach and focusing on cessation, and (perhaps) Article 41 (ex 50) of the European Convention on Human Rights which appears to give States an option to pay compensation rather than providing restitution in kind.

claims against a State involve international responsibility, even if international law may be relevant to the case. For example, if a State is sued on a commercial transaction in a national court, international law helps to determine what is the extent of the defendant State's immunity from jurisdiction and from measures of enforcement, but the underlying claim will derive from the applicable law of the contract. There is thus a distinction between State responsibility for breaches of international law, and State liability for breaches of national law. One does not entail the other.<sup>13</sup>

Responsibility claims were traditionally brought directly between States at the international level, or (much less often) before an international court or tribunal. Both these avenues remain but there is now a further range of possibilities. For example in some cases individuals or corporations are given access to international tribunals and can bring State responsibility claims in their own right, eg for breach of the European Convention on Human Rights before the European Court of Human Rights, or for breach of a bilateral investment treaty before an arbitral tribunal established under the treaty. Whether such international claims could also be enforced in national courts depends on the approach of the national legal system to international law in general (see Denza, above, Chapter 13) as well as on the rules of State immunity (see Fox, above, Chapter 11). In certain circumstances it is possible for responsibility claims to be 'domesticated', and the principles of subsidiarity and complementarity indicate an increasing role for national courts in the implementation and enforcement of international law. But the interaction between rules of jurisdiction and immunity and the relation between national and international law make this a complex area. For the sake of simplicity, this chapter will be confined to claims of State responsibility brought at the international level.

#### B. THE TYPOLOGY OF STATE RESPONSIBILITY

National legal systems often distinguish types or degrees of liability according to the source of the obligation breached—for example, crime, contract, tort, or delict.<sup>14</sup> In international law it appears that there is no general distinction of this kind. As the arbitral tribunal said in the *Rainbow Warrior* case:

the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so

<sup>13</sup> ARSIWA, Articles 1, 3, 27; *Elettronica Sicula SpA (ELSI)*, Judgment, ICJ Reports 1989, p 15, paras 73 and 124. See also *Compañía de Aguas del Aconquija and Vivendi Universal v Argentine Republic* (ICSID Case No ARB/97/3), Decision on Annulment, 3 July 2002, 41 ILM 1135, paras 93–103.

<sup>14</sup> Cf the division of sources of obligation in Roman law into contract, delict, and quasi-contract/unjust enrichment: D.1.1.10.1 (Ulpian): 'Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere' ('the principles of law are these: to live honourably, not to harm any other person, and to render to each his own').

that any violation of a State of any obligation, of whatever origin gives rise to State responsibility.<sup>15</sup>

To this extent the rules of State responsibility form a single system, without any precise comparator in national legal systems. The reason is that international law has to address a very wide range of needs on the basis of rather few basic tools and techniques. For example, treaties perform a wide range of functions in the international system—from establishing institutions in the public interest and rules of an essentially legislative character to making specific contractual arrangements between two States. Unlike national law, there is no categorical distinction between the legislative and the contractual.

The Tribunal in the *Rainbow Warrior*<sup>16</sup> arbitration and the International Court in the *Gabčíkovo-Nagymaros Project*<sup>17</sup> case both held that in a case involving the breach of a treaty obligation, the general defences available under the law of State responsibility coexist with the rules of treaty law, laid down in the 1969 Vienna Convention on the Law of Treaties. But they perform a different function. The rules of treaty law determine when a treaty obligation is in force for a State and what it means, ie, how it is to be interpreted. The rules of State responsibility determine what are the legal consequences of its breach in terms of such matters as reparation. Of course there is some overlap between the two but they are legally and logically distinct. A State faced with a material breach of a treaty obligation can choose to suspend or terminate the treaty in accordance with the applicable rules of treaty law, thus releasing itself from its obligation to perform its obligations under the treaty in the future (VCLT, Article 60). But doing so does not prevent it also from claiming reparation for the breach.<sup>18</sup>

In addition, national legal systems also characteristically distinguish 'civil' from 'criminal' responsibility, although the relations between the two differ markedly between various systems. By contrast there is little or no State practice allowing for 'punitive' or 'penal' consequences of breaches of international law. In 1976, Chilean agents killed a former Chilean minister, Orlando Letelier, and one of his companions by a car bomb in Washington, DC. The United States courts subsequently awarded both compensatory and punitive damages for the deaths, acting under the local torts

<sup>15</sup> *Rainbow Warrior (France/New Zealand)*, (1990) 20 RIAA 217, para 75; for the arguments of the parties, see *ibid*, paras 72–74. See also the ICJ in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, ICJ Reports 1997, p 7, paras 46–48, especially para 47: 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect', citing what is now ARSIWA, Article 12: 'There is a breach of an international obligation by a State 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*' (emphasis added).

<sup>16</sup> *Rainbow Warrior (France/New Zealand)*, (1990) 20 RIAA 217, para 75.

<sup>17</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, ICJ Reports 1997, p 7, paras 46–48.

<sup>18</sup> In other words a State can terminate a treaty for breach while claiming damages for breaches that have already occurred: see VCLT, Articles 70(1)(b), 72(1)(b), 73.



exception of the Foreign State Immunity Act.<sup>19</sup> But the local judgment was practically unenforceable.<sup>20</sup> Subsequently, as part of the restoration of relations between the United States and Chile following the latter's return to democracy, it was agreed that a bilateral commission would determine the amount of compensation payable as an *ex gratia* settlement without admission of liability. Under the terms of reference of the Commission, the damages were to be assessed 'in accordance with applicable principles of international law, as though liability were established'.<sup>21</sup> The Commission awarded sums only on a compensatory basis for loss of income and moral damage; the separate opinion of the Chilean member of the Commission made clear that punitive damages were not accepted in international law.<sup>22</sup>

The ILC Draft Articles as adopted on first reading in 1996 sought to introduce the notion of 'international crimes' of States.<sup>23</sup> It was not envisaged that States could be fined or otherwise punished—no State has ever been accused of a criminal offence before an international court, even where the conduct was criminal in character, eg aggression or genocide (see, eg *Abi-Saab*, 1999, p 339; de Hoogh, 1996; Jørgensen, 2000; Pellet, 2001). However certain limited consequences were attached to the concept. For instance, in the case of State crimes, all other States were to be regarded as injured, and could thus invoke responsibility. But none of these consequences could properly be characterized as 'penal'. The notion caused a great amount of controversy, and deep differences of opinion within the Commission. In 1998, the concept of 'international crimes of States' was set aside, contributing to the unopposed adoption of the ILC Articles in 2001. Again the episode suggests that State responsibility is an undifferentiated regime, which does not embody such domestic classifications as 'civil' and 'criminal'.

But this does not prevent international law responding to different kinds of breaches and their different impacts on other States, on people and on international order. First, individual State officials have no impunity if they commit crimes against international law, even if they may not have been acting for their own individual ends but in the interest or perceived interest of the State.<sup>24</sup> Secondly, the ILC Articles make special provision for the consequences of certain serious breaches of peremptory

<sup>19</sup> See *Letelier et al. v The Republic of Chile et al.*; see 488 F.Supp 665 (1980); 19 ILM 409; 63 ILR 378 (District Court, DC) for the decision on State immunity, and see 502 F.Supp 259 (1980); 19 ILM 1418; 88 ILR 747 (District Court, DC) for the decision as to quantum; the Court awarded the plaintiffs approximately \$5 million, of which \$2 million were punitive damages.

<sup>20</sup> The Court of Appeals for the 2nd Circuit, reversing the District Court, refused to allow enforcement against the Chilean national airline: 748 F.2d 790 (1984); the Supreme Court denied certiorari: 471 US 1125 (1985).

<sup>21</sup> *Re Letelier and Moffitt* (1992), 88 ILR 727 at 731.

<sup>22</sup> *Ibid.*, p 741. The resulting award was paid to the victim's heirs on condition that they waived their rights under the domestic judgment.

<sup>23</sup> For the text of former Article 19 see Crawford, 2002, pp 352–353.

<sup>24</sup> At the international level see the Statute of the ICTY, Article 7(2), (4); the Statute of the ICTR, Article 6(2), (4); Rome Statute of the ICC, Articles 27, 33. At the national level see *R v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet Ugarte (No 3)* (Pinochet III); [2001] 1 AC 147. The ICJ has held, however, that serving foreign ministers (and by implication, serving heads of State and other senior ministers)



norms of general international law (*jus cogens*). A breach is serious if it involves a 'gross or systematic failure by the responsible State to fulfil' such an obligation (Article 40(2)). The major consequence of such a breach are the obligation on all other States to refrain from recognizing as lawful the situation thereby created or from rendering aid or assistance in maintaining it (Article 41(2)). In addition, States must cooperate to bring the serious breach to an end 'through any lawful means'. The principal avenues for such cooperation are through the various international organizations, in particular the Security Council, whose powers to take measures to restore international peace and security substantially overlap with these provisions (Koskenniemi, 2001). But they are not the only ones, since the possibility remains of individual action seeking remedies against States responsible for such serious breaches as genocide, war crimes, or denial of fundamental human rights.<sup>25</sup>

### III. THE ELEMENTS OF STATE RESPONSIBILITY

As already noted, the international responsibility of a State arises from the commission of an internationally wrongful act. An internationally wrongful act presupposes that there is conduct consisting of an action or omission that (a) is attributable to a State under international law; and (b) constitutes a breach of the international obligations of the State (ARSIWA, Article 2). In principle, the fulfilment of these conditions is a sufficient basis for international responsibility, as has been consistently affirmed by international courts and tribunals.<sup>26</sup> In some cases, however, the respondent State may claim that it is justified in its non-performance, for example, because it was acting in self-defence or in a situation of *force majeure*. In international law such defences or excuses are termed 'circumstances precluding wrongfulness'. They will be

while in office are inviolable and have absolute jurisdictional immunity from prosecution in national courts of other states: *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Preliminary Objections and Merits, Judgment, ICJ Reports 2002, p 3, paras 51–61. The Court protested that this immunity did not involve impunity, *inter alia* because of the possibility of prosecution at the international level, or prosecution by the national State. The jurisdictional immunity apparently lasts only so long as the individual holds office: however, cf *ibid*, paras 60–61, and compare with the Separate Opinion of Judges Higgins, Kooijmans, and Buergerthal, *ibid*, para 89.

<sup>25</sup> For instance States may adopt measures which are not inconsistent with their international obligations (retorsion). In addition, a right *may* exist allowing States which themselves are not injured to take counter-measures in the case of breach of certain types of obligation. See, for instance, the catalogue of State practice discussed in the commentary to ARSIWA, Article 54, which may be evidence of such a customary international rule. The ILC left the question open in Article 54 for future development.

<sup>26</sup> See, eg the Permanent Court of International Justice in *Phosphates in Morocco*, Preliminary Objections, Judgment, PCIJ, Ser A/B, No 74, p 10; the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p 3, para 56; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14, para 226, and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7, para 78. See also the Mexico-United States General Claims Commission in *Dickson Car Wheel Company* (1931) 4 RIAA 669, 678.

a matter for the respondent State to assert and prove, not for the claimant State to negative.

The three elements—attribution, breach, and the absence of any valid justification for non-performance—will be discussed in turn before we consider the consequences of State responsibility, in particular for the injured State or States.

#### A. ATTRIBUTION OF CONDUCT TO THE STATE

Although they seem real enough to their citizens, States are juridical abstractions. Like corporations in national law, they necessarily act through organs or agents. The rules of attribution specify the actors whose conduct may engage the responsibility of the State, generally or in specific circumstances. It should be stressed that the issue here is one of responsibility for conduct allegedly in breach of existing international obligations of the State. It does not concern the question which officials can enter into those obligations in the first place. Only senior officials of the State (the head of State or government, the minister of foreign affairs, and diplomats in certain circumstances: see VCLT Article 7) have inherent authority to bind the State; other officials act upon the basis of express or ostensible authority (VCLT Article 46).<sup>27</sup> By contrast, any State official, even at a local or municipal level, may commit an internationally wrongful act attributable to the State—the local constabulary or army torturing a prisoner or causing an enforced disappearance,<sup>28</sup> for example, or the local mayor requisitioning a factory.<sup>29</sup>

A clear example of attribution of conduct performed by State agents vis-à-vis another State was the sinking on 10 July 1985 of the Greenpeace ship *Rainbow Warrior* in Auckland harbour. The French Government subsequently admitted that the explosives had been planted on the ship by agents of the Directorate General of External Security, acting on orders received. New Zealand sought and received an apology and compensation for the violation of its sovereignty.<sup>30</sup> This was quite separate from the damage done to Greenpeace, a non-governmental organization, and to the Dutch national who was killed by the explosion; separate arrangements were made to provide compensation for these interests.

On the other hand, a State does not normally guarantee the safety of foreign nationals on its territory or the security of their property or the success of their

<sup>27</sup> See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, ICJ Reports 1994, p 112, paras 26–27; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Equatorial Guinea Intervening, Merits, Judgment*, ICJ Reports 2002, not yet reported, paras 264–268.

<sup>28</sup> See, eg *Velásquez Rodríguez v Honduras, Merits, Inter-AmCtHR, Ser C, No 4* (1989); 95 ILR 259, para 183 ('not all levels of the Government of Honduras were necessarily aware of those acts, nor is there any evidence that such acts were the result of official orders. Nevertheless, those circumstances are irrelevant for the purposes of establishing whether Honduras is responsible under international law'). See also *ibid*, 296, para 170.

<sup>29</sup> *Elettronica Sicula SpA (ELSI), Judgment*, ICJ Reports 1989, p 15.

<sup>30</sup> *Rainbow Warrior (No 1)* (1986), 74 ILR 256.

investments. In terms of any injury suffered, there has to be some involvement by the State itself—in effect, by the government of the State, in the conduct which is complained of. A State will generally only be liable for the conduct of its organs or officials, acting as such (ARSIWA, Article 4, Commentary, Crawford, 2002, pp 94–99). Purely private acts will not engage the State's responsibility, although the State may in certain circumstances be liable for its failure to prevent those acts, or to take action to punish the individuals responsible.<sup>31</sup> On the other hand, the scope of State responsibility for official acts is broad, and the definition of 'organ' for this purpose comprehensive and inclusive. There is no distinction based on the level of seniority of the relevant officials in the State hierarchy; as long as they are acting in their official capacity, responsibility is engaged. In addition, there is no limitation to the central executive; responsibility may be engaged for acts of provincial or even local government officials. Further, the classification of powers is also irrelevant: in principle, the concept of 'organ' covers legislatures, executive officials and courts at all levels (ARSIWA, Article 4).<sup>32</sup>

Acts or omissions of any organ or official are attributable to the State provided they were acting in that capacity at the time, even if they may have been acting *ultra vires*.<sup>33</sup> Indeed, the State may be responsible for conduct which is clearly in excess of authority if the official has used an official position. For example, in the *Caire* case, a French national in Mexico was shot and killed by members of the Mexican army after he had refused their demands for money. The tribunal held that, for the *ultra vires* acts of officials to be attributable to the State, 'they must have acted at least to all appearances as competent officials or organs, or they must have used powers or methods appropriate to their official capacity'.<sup>34</sup> In the circumstances the responsibility of the State was engaged 'in view of the fact that they acted in their capacity of officers and used the means placed at their disposition by virtue of that capacity'. Similarly, in *Youmans*, United States citizens cornered in a house by a mob were killed after 'soldiers sent to disperse the crowd, contrary to orders, opened fire on the house, forcing the inhabitants out into the open. The Tribunal held that there was State responsibility given that 'at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer'. The Tribunal went on to comment that:

Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldier in contravention of instructions must always be considered as personal acts.<sup>35</sup>

<sup>31</sup> *Janes (US v Mexico)* (1926) 4 RIAA 82; cf *Noyes (US v Panama)* (1933) 6 RIAA 308.

<sup>32</sup> ARSIWA, Article 4. See also *LaGrand (Germany v United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p 9, para 28: 'Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be'.

<sup>33</sup> *Union Bridge Company Claim (USA v Great Britain)* (1924) 6 RIAA 138.

<sup>34</sup> *Caire* case (1929) 5 RIAA 516 at p 530.

<sup>35</sup> *Youmans* case (1926) 4 RIAA 110; (1927) 21 AJIL 571, para 14.

By contrast, a State is not responsible for the acts of mobs or of private individuals as such. Their conduct will only be attributable to the State if they were in fact acting under the authority or control of the State (ARSIWA, Article 9), or if the State adopts (or in common law terminology 'ratifies') their acts as its own (ARSIWA, Article 11). In the *Tehran Hostages* case, the International Court held that although initially the students who took control of the US embassy in Tehran were not acting as agents of Iran, a subsequent decree of Ayatollah Khomeini endorsing the occupation of the embassy:

translated continuing occupation of the Embassy and detention of the hostages into acts of [Iran]. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.<sup>36</sup>

Similarly, the State will be responsible if the authorities act in collusion with the mob, or participate in the mob violence. However, international tribunals generally require strong evidence of such collusion.<sup>37</sup>

In addition, conduct which is not attributable to a State because it was not carried out by its organs or agents may nonetheless be chargeable to the State because it failed in some obligation to prevent the conduct. For instance, in the *Tehran Hostages* case, Iran was held to have breached its special obligation of protection of the embassy and consular premises and personnel, even prior to its adoption of the acts of the occupying students.<sup>38</sup> The duty to control a mob is particularly important when the mob is in some way under the control of the authorities.<sup>39</sup>

Like other systems of law, international law does not limit attribution to the conduct of the regular officials or organs of the State; it also extends to conduct carried out by others who are authorized to act by the State or who at least act under actual direction or control. For instance, in the *Nicaragua* case, the International Court stated that :

For this conduct [of the *contra* rebels] to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>40</sup>

It is true that this standard was criticized by the majority of the Appeals Chamber of the ICTY in the *Tadić* case, who preferred a threshold of '*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'.<sup>41</sup> But the question in that case was not one of State responsibility. The Chamber was concerned to determine

<sup>36</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p 3, paras 73-74.*

<sup>37</sup> *Janes case (1926) 4 RIAA 82.*

<sup>38</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p 3, para 63.*

<sup>39</sup> See, eg *The Zafiro (1925) 6 RIAA 160.*

<sup>40</sup> *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment (Nicaragua v United States of America), ICJ Reports 1986, p 14, para 115 (emphasis added).*

<sup>41</sup> Case No IT-94-I-A, *Prosecutor v Tadić*, Judgment of 15 July 1999, (1999) 38 ILM 1518, para 145 (emphasis added).

whether Bosnian Serb forces were under the control of the FRY with the result that the armed conflict was to be considered as international in character, and that therefore the more extensive rules of humanitarian law applicable in international armed conflict applied. There was a quite different context: merely by accepting that an armed conflict is internationalized, the State does not (and should not be required to) accept responsibility for the acts of local militias engaged in the conflict. The reasoning of the majority was cogently criticized by Judge Shahabuddeen in his Separate Opinion, who noted that the question was not 'whether the FRY was responsible for any breaches of international humanitarian law committed by the [Bosnian Serb militia]' but the distinguishable question 'whether the FRY was using force through the [militia] against [Bosnia-Herzegovina]'.<sup>42</sup> The ILC Articles adopt the somewhat stricter test of the *Nicaragua* case. In accordance with Article 8, conduct of a person or group of persons is attributable to the state 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct' (ARSIWA, Article 8; Commentary, Crawford, 2002, pp 110–113).

In each of these respects, the governing principle is that of independent responsibility: the State is responsible for its own acts, ie for the acts of its organs or agents, and not for the acts of private parties, unless there are special circumstances warranting attribution to it of such conduct. The same applies where one State is somehow implicated in the conduct of a third State—indeed it applies *a fortiori*, since that third State will ordinarily be responsible for its own acts in breach of its own international responsibilities (ARSIWA, Article 16–19). But there is another side to the principle of independent responsibility. A State cannot hide behind the involvement of other States in common conduct. It is responsible if and to the extent that it contributed to that conduct by its own acts. Thus in *Nicaragua*, the acts of the *contras* were not as such attributable to the United States, but the United States was responsible for its own conduct in training and financing the *contras* and in carrying out some specific operations, including the mining of a Nicaraguan harbour.<sup>43</sup> Likewise if a number of States act together in administering a territory, each will be responsible for its own conduct as part of the common enterprise.<sup>44</sup>

In another and rather special form of parallelism, the State will be responsible for the conduct of an insurrectional movement which subsequently becomes the government of that State (or, if they are a secessionary movement, of the new State they are struggling to create). The rule is to some extent anomalous, since it determines the

<sup>42</sup> *Prosecutor v Tadić*, Separate Opinion of Judge Shahabuddeen, (1999) 38 ILM 1518, para 17.

<sup>43</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14, in particular paras 75–80, 238, 242, 252, 292(3)–(6).

<sup>44</sup> Cf *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, ICJ Reports 1992, p 240 where the International Court left the question of possible apportionment of any compensation between the other implicated States to the merits stage. See also the *Legality of the Use of Force* cases between Yugoslavia and the NATO States (eg *Yugoslavia v Belgium*, Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, p 124).

attribution of conduct not by events at the time of that conduct but by reference to later contingencies, ie the success or failure of the revolt or secession. But it is established, and finds expression in Article 10 of the ILC Articles. For instance, in *Yeager*<sup>45</sup> immediately after the revolution in Iran in 1979, the claimant had been detained for several days by 'revolutionary guards' and had then been evacuated from the country. The Tribunal held that, although the guards were not recognized under internal law as part of the State apparatus, they were in fact exercising public functions in the absence of the previous State apparatus: Iran was thus held responsible for their acts.<sup>46</sup>

#### B. BREACH OF AN INTERNATIONAL OBLIGATION OF THE STATE

The second element of responsibility is breach of an international obligation of the State. Here an initial distinction is drawn between State responsibility arising in the context of direct State-to-State wrongdoing and State responsibility arising in the context of diplomatic protection (injury to aliens or their property). This is so even though the relevant obligations may be contained in a treaty, the breach of which in principle engages direct State-to-State responsibility. The International Court was careful to preserve the distinction in the *ELSI* case, where the United States sought to base its action on breach of a bilateral treaty: nonetheless, the Chamber said, its claim was in the nature of diplomatic protection and was thus subject to such requirements as the exhaustion of local remedies.<sup>47</sup>

Many of the problems which arise in the context of diplomatic protection (nationality of claims, exhaustion of local remedies) do not arise in the context of direct State-to-State disputes. The only issue in these direct State-to-State cases is whether conduct attributable to State B causes legal harm to State A in violation of international law. If so, responsibility is *prima facie* engaged.

On its face, the requirement that there should be a breach of an international obligation of the State seems obvious enough. However, a number of questions arise: for example, causation, the notion of injury, the time factor (rules concerning non-retrospectivity of international law and acts continuing in time), and so on. An important preliminary point should be made: international law is a distinct system, separate from national legal systems. In its own terms it prevails over national law in the event of conflict, and this irrespective of the approach taken by the national legal system. Several consequences follow. First, a State cannot invoke its own municipal law as a justification for refusal to comply with its international obligations, whether under treaties or otherwise.<sup>48</sup> The fact that an act or omission is lawful (or unlawful)

<sup>45</sup> *Yeager* (1987), 82 ILR 178.

<sup>46</sup> Cf however *Short* (1987), 82 ILR 148 and *Rankin* (1987), 82 ILR 204 (decided on the basis that the claimants had failed to prove that their departure was caused by actions attributable to Iran, rather than the general turmoil accompanying the revolution).

<sup>47</sup> *Elettronica Sicula SpA (ELSI)*, Judgment, ICJ Reports 1989, p 15.

<sup>48</sup> *Greco-Bulgarian 'Communities'*, Advisory Opinion, 1930, PCIJ, Ser B, No 17 at p 32; ARSIWA, Articles 3, 32.

under national law does not prejudice the question of its lawfulness or otherwise under international law. Secondly, the content of municipal law is a matter of fact for international law;<sup>49</sup> in theory, the two live in distinct spheres, communicating via the rules of evidence. Thirdly, a State cannot seek to invalidate the entry into force of international obligations by reference to municipal law constraints which it failed to observe.<sup>50</sup>

Of course conduct attributable to a State may consist of both actions and omissions; breach of international obligations by omissions is relatively common. For instance in the *Tehran Hostages* case, the International Court held that the responsibility of Iran was due to the 'inaction' of its authorities which 'failed to take appropriate steps' in circumstances where such steps were evidently called for.<sup>51</sup>

### 1. Fault, injury, and damage

There has been a major debate about whether international law has a general requirement of fault (Brownlie, 1983, pp 37-48). The debate is between those who maintain that international law requires some fault on the part of the State if it is to incur responsibility and supporters of so-called 'objective responsibility'. The case law tends to support the objective school. Thus in *Caire*, the arbitral tribunal affirmed 'the doctrine of the "objective responsibility" of the State, that is, the responsibility for the acts of its officials or organs, which may devolve upon it despite the absence of any "faute" on its part'.<sup>52</sup> However, there are statements going the other way. In the *Corfu Channel* case, the International Court held that:

It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosion of which the British warships were victims . . . [I]t 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.<sup>53</sup>

In that case Albania's responsibility was upheld on the basis that (according to the evidence gathered, including by an expert commission) Albania must have known

<sup>49</sup> *Certain German Interests in Polish Upper Silesia, Merits, Judgment No 7, 1926, PCIJ, Ser A, No 7* at p 19.

<sup>50</sup> *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, PCIJ, Ser A/B, No 46*, p 96 at p 170; *Legal Status of Eastern Greenland, Judgment, 1933, PCIJ, Ser A/B, No 53*, p 22 at p 71, and the dissenting opinion of Judge Anzilotti, *ibid*, 91-92. In relation to the law of treaties, see Vienna Convention on the Law of Treaties, Articles 27, 46.

<sup>51</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, paras 63, 67. See also Velásquez Rodríguez, *Inter-AmCtHR, Ser C, No 4* (1989); 95 ILR 259, para 170: 'under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions . . .'; *Affaire relative à l'acquisition de la nationalité polonaise* (1924) 1 RIAA 425.

<sup>52</sup> *Caire* (1929) 5 RIAA 516 at p 529.

<sup>53</sup> *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at p 18. See also the decision in *Home Missionary Society* (1920) 6 RIAA 42.



that the mines had been recently laid and nonetheless failed to warn ships passing through the strait of their presence.

When scholarly debate bogs down around some dichotomy such as 'responsibility for fault'/'objective responsibility', something has almost always gone wrong. Here the problem is one of level of analysis: there is neither a rule that responsibility is always based on fault, nor one that it is always independent of it—indeed, there appears to be no presumption either way. This is hardly surprising, in a legal system which has to deal with a wide range of problems and disposes of a limited armoury of techniques. But in any event circumstances alter cases, and it is illusory to seek for a single dominant rule. Where responsibility is essentially based on acts of omission (as in *Corfu Channel*) considerations of fault loom large. But if a State deliberately carries out some specific act, there is less room for it to argue that the harmful consequences were unintended and should be disregarded. Everything depends on the specific context and on the content and interpretation of the obligation said to have been breached.

Thus the ILC Articles endorse a more nuanced view. Under Articles 2 and 12, the international law of State responsibility does not require fault before an act or omission may be characterized as internationally wrongful. However, the interpretation of the relevant primary obligation in a given case may well lead to the conclusion that fault is a necessary condition for responsibility in relation to that obligation, having regard to the conduct alleged (ARSIWA, Articles 2 and 12; Commentary, Crawford, 2002, pp 83–85, 125–130).

Similarly, there has been an intense debate concerning the role of harm or damage in the law of State responsibility. Some authors (and some governments) have claimed that the State must have suffered some form of actual harm or damage before responsibility can be engaged (Bollecker-Stern, 1973). Once more, the ILC Articles leave the question to be determined by the relevant primary obligation: there is no *general* requirement of harm or damage before the consequences of responsibility come into being. In some circumstances, the mere breach of an obligation will be sufficient to give rise to responsibility; for instance, even a minor infringement of the inviolability of an embassy or consular mission. On the other hand, in the context for example of pollution of rivers, it is necessary to show some substantial impact on the environment or on other uses of the watercourse before responsibility will arise.<sup>54</sup>

A corollary of this position is that there may have been a breach of international law but no material harm may have been suffered by another State or person in whose interest the obligation was created. In such cases courts frequently award merely declaratory relief on the ground that nothing more is required.<sup>55</sup> Here the main point

<sup>54</sup> Thus the mere risk of future harm was not a sufficient basis for responsibility in the *Lac Lanoux Arbitration* (1957), 24 ILR 101. In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7, preparations for the diversion of the Danube on the territory of a State did not involve a breach of treaty until the diversion went ahead (and caused damage to the other State).

<sup>55</sup> *The 'I'm Alone'* (1935) 3 RIAA 1609; *Corfu Channel, Merits, Judgment*, ICJ Reports 1949, p 4 at pp 35–36.

of asserting responsibility may be for the future, to avoid repetition of the problem, rather than to obtain compensation for the past.

## 2. Continuing wrongful acts and the time factor

The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. It is therefore necessary to examine closely at what point an obligation entered into force, or at what point the obligation was terminated or ceased to bind the State.

For example in the *Mondev* case,<sup>56</sup> a claim was brought by a Canadian company alleging breach of the NAFTA Chapter 11 investment protection provisions by the United States. The claimant alleged that by various actions of the Boston city authorities the value of the applicant's interests in building and development projects had effectively been expropriated. But all of these actions took place before NAFTA's entry into force on 1 January 1994: the only later events were decisions of United States courts denying *Mondev*'s claims under United States law. The tribunal held that NAFTA could not be applied retrospectively to actions prior to its entry into force. This left open the possibility of a claim of denial of justice in respect of the court decisions after NAFTA came into force, but the courts had not in any way acted improperly, and thus there had been no denial of justice. The claim accordingly failed.

The relevant principle is stated in Article 13 of the ILC Articles: 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'. The principle is clear enough, but its application may cause problems, in particular regarding changes in customary international law obligations, when it will not be clear precisely when an old customary rule was replaced by a new one.<sup>57</sup> For example, slavery was not always unlawful under international law, yet claims are sometimes made for reparation for persons or groups whose lives are said to have been affected by slavery and the slave trade.<sup>58</sup>

Another problem in applying Article 13 involves determining exactly when, or during what period, a wrongful act occurs. Wrongful acts can continue over a period of time—for instance the continued detention of diplomatic and consular personnel in the *Hostages* case, or the forced or involuntary disappearance of a person contrary to human rights norms.<sup>59</sup> Other wrongs may be instantaneous, even though their effects may continue after the point of breach. For example, an unlawful killing or a law expropriating property have effect at a specific time; the breach occurs at the moment the victim is killed or the property passes, and this even though the effects of these breaches may be enduring. In general such continuing consequences concern the

<sup>56</sup> *Mondev International Ltd v United States of America* (Case No ARB(AF)/99/2), award of 11 October 2002.

<sup>57</sup> See, eg *Fisheries Jurisdiction (United Kingdom v Iceland)*, *Merits, Judgment*, ICJ Reports 1974, p 3.

<sup>58</sup> *Le Louis* (1817) 2 Dodson 210.

<sup>59</sup> See, eg *Blake v Guatemala*, *Inter-AmCHR, Ser C, No 36* (1998), pára 67.

scope of reparation, not whether there has been a breach in the first place (ARSIWA, Article 14; Commentary, Crawford, 2002, pp 135–140).

These distinctions may also be significant when it comes to issues of the jurisdiction of courts in responsibility cases. For example under the European Convention on Human Rights, claims can only be brought against a State party concerning breaches occurring after the Convention entered into force for that State. But it may be—depending on how one characterizes the conduct—that a breach which was initially committed by a State before it became a party continues thereafter and to that extent falls within the jurisdiction *ratione temporis* of the European Court of Human Rights. For example, the circumstances of the *Loizidou* case went back to the Turkish intervention in Cyprus in 1974, long before Turkey became a party to the European Convention; but the continuing exclusion of Mrs Loizidou from access to her property in the Turkish-controlled north continued after that date and could be dealt with by the Court.<sup>60</sup>

### C. CIRCUMSTANCES PRECLUDING WRONGFULNESS: DEFENCES OR EXCUSES FOR BREACHES OF INTERNATIONAL LAW

As noted above, although conduct may be clearly attributable to a State, and be clearly inconsistent with its international obligations, it is possible that responsibility will not follow. The State may be able to rely on some defence or excuse: in the ILC's Articles these are collected under the heading of 'Circumstances precluding wrongfulness' in Chapter V of Part One. Chapter V is essentially a catalogue or compilation of rules that have been recognized by international law as justifying or excusing non-compliance by a State with its international obligations, and it is not exclusive.<sup>61</sup> It should be noted that none of the circumstances precluding wrongfulness can operate to excuse conduct which violates a peremptory norm (ARSIWA, Article 26): one cannot plead necessity to justify invading Belgium, for example.<sup>62</sup>

#### 1. Consent

Valid consent by a State to action by another State which would otherwise be inconsistent with its international obligations precludes the wrongfulness of that action (ARSIWA, Article 26). This is consistent with the role of consent in international relations generally: thus a State may consent to military action on its territory which (absent its consent) would be unlawful under the United Nations Charter. More mundanely, a State may consent to foreign judicial inquiries or arrest of suspects on its territory.<sup>63</sup> But consent only goes so far: a State cannot waive the application

<sup>60</sup> See *Loizidou v Turkey (Preliminary Objections)*, ECtHR Ser A, No 310 (1995), 20 EHRR 99; *Merits*, RJD 1996–VI, p 2216, 23 EHRR 513.

<sup>61</sup> Specific defences or excuses may be recognized for particular obligations: eg Article 17 of the 1982 Convention on the Law of the Sea. Cf ARSIWA, Article 55.

<sup>62</sup> As Chancellor von Bethmann-Hollweg did before the Reichstag in 1914: see Crawford, 2002, p 178.

<sup>63</sup> See, eg *Savarkar* (1911) 11 RIAA 243.

of what in national law would be called mandatory rules and in international law are called peremptory norms. Thus a State cannot (by treaty or otherwise) consent to or legitimize genocide, a situation allowed for in the ILC's formulation of the defence of consent—consent must be 'valid' (ARSIWA Article 20; cf Article 26). Further, consent will only preclude the wrongfulness with regard to the giving State; if the obligation breached is owed in parallel to more than one State, the wrongfulness of the act will not be precluded with regard to those States that have not consented.<sup>64</sup>

## 2. Self-defence

In certain circumstances, a State may permissibly disregard other international obligations whilst acting in self-defence in accordance with the Charter of the United Nations (ARSIWA, Article 21). The point was implicitly recognized by the International Court in the *Nuclear Weapons Advisory Opinion*, when it distinguished between *per se* restrictions on the use of force, whatever the circumstances—in another formulation, 'obligations of total restraint'—and considerations which, even if mandatory in time of peace, might be overridden for a State facing an imminent threat and required to act against it in self-defence.<sup>65</sup>

## 3. Force majeure

In common with most legal systems, international law does not impose responsibility where the non-performance of an obligation is due to circumstances entirely outside the control of the State. This defence obviously needs to be tightly circumscribed, and the language of Article 23(1) of the ILC Articles provides that *force majeure* is a defence only where 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, [makes] it materially impossible in the circumstances to perform the obligation'. The defence of *force majeure* is further circumscribed by the limitations in Article 23(2), which provide that *force majeure* will not apply if either the situation 'is due, either alone or in combination with other factors, to the conduct of the State invoking it', or if, as a result of assessment of the situation, the State seeking to invoke *force majeure* assumed the risk of the situation occurring.

## 4. Distress and necessity

The two circumstances of distress and necessity have much in common in that they both excuse conduct which would otherwise be wrongful because of extreme circumstances. According to Article 24, distress operates to excuse conduct where the author of the act 'had no other reasonable way . . . of saving the author's life or the lives of other persons entrusted to the author's care.' By contrast, necessity operates to excuse conduct taken which 'is the only means for the State to safeguard an essential interest

<sup>64</sup> See, eg *Customs Régime between Germany and Austria, 1931, Advisory Opinion, PCIJ, Ser A/B, No 41*, p 37.

<sup>65</sup> On *per se* restrictions see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, paras 39 and 52; on 'obligations of total restraint', *ibid*, para 30.

against a grave and imminent peril'. Distress and necessity are to be distinguished from *force majeure* in that violation of the obligation in question is theoretically avoidable, although absolute compliance of the State with its international obligations is not required; a State is not required to sacrifice human life or to suffer inordinate damage to its interests in order to fulfil its international obligations.

The possibilities of abuse are obvious, in particular for invocation of necessity, and in the ILC Articles both circumstances are narrowly confined. Thus reliance on them is precluded if the State has in some way contributed to the situation which it is seeking to invoke to excuse its conduct. Further, the invoking State can only excuse conduct which is not unduly onerous for other States. Reliance on distress is precluded if the act in question 'is likely to create a comparable or greater peril' (Article 24(2)(b)). Likewise, the invocation of a state of necessity is precluded if the action would 'seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole' (Article 25(1)(b)).

Although the wrongfulness of the act is precluded, other States are not expected to bear the consequences of another State's misfortune; the invoking State may have to pay compensation for any material loss caused to the State or States to which the obligation breached was owed (Article 27(b)).

### 5. Countermeasures

As the International Court affirmed in the *Gabčíkovo-Nagymaros Project* case, countermeasures taken by a State in response to an internationally wrongful act of another State are not wrongful acts, but are recognized as a valid means of self-help as long as certain conditions are respected.<sup>66</sup> Countermeasures as described in the ILC Articles only cover the suspension of performance by a State of one or more of its obligations; they are to be distinguished from acts of retorsion which, since they are by definition not a breach of the obligations of the State, cannot give rise to State responsibility and therefore require no justification. Certain obligations, such as that to refrain from the use of force, those of a humanitarian character prohibiting the taking of reprisals, and those under other peremptory norms may not be suspended by way of countermeasure.

### 6. Consequences of invoking a circumstance precluding wrongfulness

Despite the fact that the wrongfulness of an act may be precluded by international law, that is not the end of the question. First, the wrongfulness of the act will only be precluded so long as the circumstance precluding wrongfulness continues to exist. For

<sup>66</sup> The conditions required by the ARSIWA, in order for countermeasures to be lawful are: they must be taken to induce compliance with the obligations contained in Part Two of the Articles (reparation, cessation ...) (Article 49(1)); they must be as far as possible reversible (Article 49(3)); they must be proportionate (Article 51); there must have been a request to the State to fulfil its obligations, and notification of the decision to take countermeasures accompanied by an offer to negotiate (Article 52(1)). For the recognition of these conditions as customary see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7.

instance, if State A takes countermeasures in response to a breach by State B of obligations owed to State A, if State B recommences performance of its obligations State A must terminate its countermeasures; if it does not, it will incur responsibility for the period from which the countermeasure was no longer justified (Article 27(1)). Secondly, the preclusive effect may be relative rather than general: again, this is obviously true of countermeasures, where conduct which is justified vis-à-vis a wrongdoing State will not or may not be justified *erga omnes*. In certain circumstances, the State having committed the act which would otherwise be a breach of its international obligations will not necessarily be absolved from providing some form of compensation if other States are injured in some way (Article 27(2)).

#### IV. THE CONTENT OF INTERNATIONAL RESPONSIBILITY

Upon the commission of an internationally wrongful act, certain secondary obligations arise by operation of law. These are contained in Part Two, Chapter I of the ILC Articles. Article 30 identifies two main categories, the obligations of cessation and reparation. The equal emphasis on these is an important insight. Issues of State responsibility are not only backward-looking, concerned at obtaining compensation for things past. They are at least as much concerned with the restoration of the legal relationship which has been threatened or impaired by the breach—ie with the assurance of continuing performance. This is particularly clear where the individual breach may not have in itself caused any great amount of harm but where the threat of repetition is a source of legal insecurity. It can be seen in matters as diverse as the protection of embassies and protection of the environment. In these and other contexts, the relevant rules exist to protect ongoing relationships or situations of continuing value. The analogy of the bilateral contract, relatively readily terminated and replaceable by a contract with someone else, is not a useful one even in the context of purely inter-State relations, and *a fortiori* where the legal obligation exists for the protection of a wider range of (non-synallagmatic) interests.

Thus the fact that the responsible State is under an obligation to make reparation for a breach does not mean that it can disregard its obligation for the future, effectively buying its way out of compliance; when an obligation is breached, it does not disappear of its own accord. The obligation continues to bind the responsible State, and the State therefore remains obliged to perform the obligation in question (Article 29). As a corollary, in the case of a continuing act which breaches an international obligation, the responsible State is under an obligation to bring that act to an end (Article 30(a)). Indeed in certain circumstances it will be appropriate for—and may be incumbent upon—the responsible State to offer appropriate assurances and guarantees of non-repetition of the act in question to the State to which the obligation is owed (Article 30(b)).

The point was made by the International Court in the *LaGrand* case, which concerned United States non-observance of obligations of consular notification under Article 36 of the Vienna Convention on Consular Relations. The particular occasion of Germany's complaint was the failure of notification concerning two death row inmates who (notwithstanding their German nationality) had hardly any connection with Germany; but there was a wider concern as to United States' compliance with its continuing obligations of performance under the Consular Relations Convention. Indeed the United States accepted this, and spelled out in detail the measures it had taken to ensure compliance for the future. In consequence the Court held:

that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), must be regarded as meeting Germany's request for a general assurance of non-repetition.<sup>67</sup>

But of course questions of reparation also arise, especially where actual harm or damage has occurred, and under international law the responsible State is obliged to make full reparation for the consequences of its breach, provided that these are not too remote or indirect. The linkage between breach and reparation is made clear, for example, in the Statute of the International Court of Justice, which specifies among the legal disputes which may be recognized as falling within the Court's jurisdiction:

- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

This link was spelled out by the Permanent Court in the *Factory at Chorzów* case, in a classic passage:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.<sup>68</sup>

Thus there is no need for a specific mandate to an international court or tribunal to award reparation, if it has jurisdiction as between the parties in the matter: a dispute as to the interpretation or application of a treaty covers a dispute as to the consequences of its breach and thus the form and extent of reparation.

The underlying principle is that reparation must wipe out the consequences of the breach, putting the parties as far as possible in the same position as they would have been if the breach had not occurred. In order to achieve that, reparation may take

<sup>67</sup> *LaGrand (Germany v United States of America)*, Merits, Judgment, ICJ Reports 2001, not yet reported; 40 ILM 1069, para 124; see also the dispositif, para 128(6).

<sup>68</sup> *Factory at Chorzów, Jurisdiction, Judgment No 8, 1927, PCIJ, Ser A, No 9* at p 21.



several forms, including but not limited to monetary compensation. Again, both points were made by the Permanent Court in the *Chorzów* case:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>69</sup>

As this passage suggests, in theory at least, international law has always placed restitution as the first of the forms of reparation; it is only where restitution is not possible that other forms are substituted. This contrasts with the common law approach, under which money was taken to be the measure of all things and specific performance or restitution in kind were historically somewhat exceptional. In practice the two approaches are tending to converge—on the one hand, it is not infrequently found that specific restitution is not possible or can only be made in an approximate form in international law, while courts in the common law tradition have been expanding the scope of non-pecuniary remedies.

The basic requirement of compensation is that it should cover any 'financially assessable damage' flowing from the breach (ARSIWA, Article 36). In many cases (especially those involving loss of life, loss of opportunity, or psychiatric harm), the process of quantification is approximate and may even appear arbitrary. By contrast in cases involving loss of property (eg expropriation) a market for the property may exist which will give greater guidance. In addition, issues such as loss of profits may arise and, provided they are clearly established, may be compensable. Compensation may be supplemented by interest (including, if this is justified, compound interest); after some prevarication, the ILC decided to treat the issue of interest in a separate article (ARSIWA, Article 38; Commentary, Crawford, 2002, pp 235–239).

Although international tribunals have gradually been moving towards a more realistic and complete appreciation of issues of compensation (Gray, 1987, pp 77–95; Crawford, 2002, pp 218–230)—and of remedies more generally—it remains the case that many international disputes have a distinctly symbolic element. The claimant (whether a State or some other entity) may seek vindication more than compensation, and this is recognized in the international law of reparation by way of the somewhat protean remedy of 'satisfaction'. According to Article 37(2) of the ILC Articles, satisfaction 'may consist in an acknowledgement of the breach, an expression of regret, an apology or another appropriate modality'. In many cases before international courts and tribunals, an authoritative finding of the breach will be held to be

<sup>69</sup> *Factory at Chorzów, Merits, Judgment No 13, 1928, PCIJ, Ser A, No 17* at p 47.

sufficient satisfaction: this was the case in terms of Albania's claim that the United Kingdom had violated its sovereignty by conducting certain mine-sweeping operations in its territorial waters in the *Corfu Channel* case,<sup>70</sup> and it has been held to be the situation in innumerable human rights cases, including some where more substantial remedies might have seemed justified (Shelton, 1999, pp 199–213).

As was noted above in Section II.B, if the breach in question constitutes a serious breach of an obligation arising under a peremptory norm of general international law certain additional consequences arise for all other States under Article 41, the principle of which is the obligation not to recognize as lawful the situation created, or to render aid or assistance in its maintenance.

## V. INVOCATION OF RESPONSIBILITY: RESPONSES BY THE INJURED STATE AND OTHER STATES

Although international responsibility is deemed to arise directly by operation of law on the occurrence of a breach, for practical purposes that responsibility has to be invoked by someone. It may be invoked by the injured State or other party, or possibly by some third State concerned with the 'public order' consequences of the breach. Part Three of the ILC Articles deals with this important issue but in a non-exclusive way. In particular, while it acknowledges that the responsibility of a State may be invoked by an injured party other than a State (eg by an individual applicant to the European Court of Human Rights), Article 33(2) leaves issues of invocation by persons or entities other than States for treatment elsewhere. The scope of Part Three is thus narrower than that of Parts One and Two of the Articles: these deal with the conditions for and consequences of *all* breaches of international law by a State in the field of responsibility, whereas Part Three only deals with the invocation of the responsibility of a State by another State or States.

Even so, the subject of Part Three is a large and controversial one. To what extent is a State to be considered as injured by a breach of international law on the part of another State? And if not individually injured, to what extent might it demand remedies for the breach—with the inferential consequence of countermeasures if such remedies are not forthcoming? Given that international law includes not only bilateral obligations analogous in national systems to contract and tort (or delict), but also obligations intended to protect vital human interests of a generic kind (eg peace and security, the environment, sustainable development), the questions dealt with in Part Three could scarcely be more important.

They are primarily addressed through two Articles. One (Article 42) defines in relatively narrow and precise terms the concept of the 'injured State', drawing in

<sup>70</sup> *Corfu Channel, Merits, Judgment*, ICJ Reports 1949, p 4 at p 25.

particular on the analogy of Article 60(2) of the Vienna Convention on the Law of Treaties.<sup>71</sup> The second (Article 48) deals with the invocation of responsibility in the collective interest, in particular with respect to obligations owed to the international community as a whole, giving effect to the Court's dictum in the *Barcelona Traction* case, set out below. The former category covers the breach of an obligation owed to a State individually. Also treated as 'injured States' are those which are particularly affected by the breach of a multilateral obligation, either because they are 'specially affected' or because the obligation is integral in character, so that a breach affects the enjoyment of the rights or the performance of the obligations of all the States concerned. The contrast is with the 'other States' entitled to invoke responsibility, which are specified in Article 48(1):

Any State other than an injured State is entitled to invoke the responsibility of another State ... if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.

Article 48(a) reflects the distinction drawn by the International Court in *Barcelona Traction* between 'bilateralizable' obligations and obligations owed to the international community as a whole (sometimes called obligations '*erga omnes*'). In the case of the latter:

By their very nature [they] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection ...<sup>72</sup>

The Court in 1970 gave a number of examples of such obligations *erga omnes*, including the prohibition of acts of aggression and genocide and 'the principles and rules concerning the basic rights of the human person, including protection from slavery and discrimination'.<sup>73</sup> Since then, the Court has also recognized the right of self-determination as falling within the category.<sup>74</sup>

<sup>71</sup> Article 60(2) provides as follows:

2. A material breach of a multilateral treaty by one of the parties entitles:

- (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
  - (i) in the relations between themselves and the defaulting State; or
  - (ii) as between all the parties;
- (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
- (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

<sup>72</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, ICJ Reports 1970, p 3, para 33.

<sup>73</sup> *Ibid*, para 34.

<sup>74</sup> See *East Timor (Portugal v Australia)*, Judgment, ICJ Reports 1995, p 90, para 29.

Article 48(b) tackles the problem of obligations owed to a group of States where in the case of a breach there is no individual State injured in the sense of Article 42. Examples of such obligations are human rights norms and certain environmental protection norms; the beneficiaries of such obligations are either individuals in the case of the former, or the group of States as a whole in the case of the latter.<sup>75</sup>

In the case of breach of one or other of these categories of obligation, third States can demand cessation and assurances and guarantees of non-repetition, as well as performance of the obligation of reparation on behalf of either the State injured or the beneficiaries of the obligation breached.

Part Three of the ILC Articles goes on to consider a number of related questions, for example, the consequences of invocation of responsibility by or against several States, circumstances such as waiver or delay where a State may be considered to have lost the right to invoke responsibility, as well as that ultimate form of invocation, the taking of countermeasures in response to an international wrongful act which remains unredressed and unremedied. Some of these issues are dealt with elsewhere in this volume.

## VI. CONCLUSION: FURTHER DEVELOPMENT OF THE LAW OF INTERNATIONAL RESPONSIBILITY?

As we have seen, there has been a tendency to view international responsibility as, in the first place, essentially a bilateral matter, without wider consequences for others or for the international system as a whole, and, in the second place, as quintessentially an inter-State issue, separated from questions of the relations between States and individuals or corporations, or from the rather unaccountable world of international organizations. This approach works well enough for bilateral treaties between States or for breaches of general international law rules which have an essentially bilateral operation in the field of intergovernmental relations. But international law now contains a range of rules which cannot be broken down into bundles of bilateral relations between States but cover a much broader range. How can these be accommodated within the traditional structure of State responsibility? The attempt to develop the law beyond traditional paradigms was the greatest challenge facing the ILC, and constitutes one of the more fascinating fields of a rapidly developing—and yet precarious—international order.

<sup>75</sup> This does not exclude the possibility that one or more States may be injured in the sense of Article 42 by a breach of an environmental protection norm. In addition, Article 48 seeks to articulate the possible interest of other States in compliance with the obligation.