

Violation of International Law & State Responsibility Outline

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State Responsibility

- **1) When Action may be attributed to the State**
- **2) When the State's action may be excused (valid defense, circumstances precluding wrongfulness)**
- **3) Remedies**
- **4) Use of Countermeasures**

International Law Commission

- **Articles on Responsibility of States for Internationally Wrongful Acts (2001)**
- **Secondary rules drawn from state practice, court decisions and legal scholarship**
- **Does not distinguish between civil or criminal**
- **Seeks to crystallize customary rules on responsibility, but remain a source in addition to state practice and opinio juris**

Article 1

- **Every internationally wrongful act of a state entails its international responsibility** (Customary law)
- Nonconformance with conduct expected to comply with legal obligation in treaty, custom, etc.
- Does not address fault or injury
- Cases: ICJ: Corfu Channel, Military and Paramilitary Activities in Nicaragua Case, Gabcikovo-Nagymaros Project
- Arbitration: Rainbow Warrior

Article 2 Objective Responsibility

- **Caire case: Whether Mexico was responsible for the actions of Mexican soldiers who shot a French national after trying to extort money from him. The French-Mexican Claims Commission applied principle of objective responsibility- responsibility for the acts of officials or organs of the state- even in the absence of fault of its own.**

Article 3

- The characterization of an act as internationally wrongful is not affected by its characterization in internal law. State may not legislate away international obligations or plead insufficiency of internal law.

Articles 4 & 5 Attribution of Conduct of Organs of a State

- **Conduct of legislature, executive, judicial function (federal, provincial and local levels)**
- **Persons or entity empowered to exercise governmental authority (private security firms)**
- **Attribution possible above even if persons exceed authority Case: Caire, Youmans**

Indirect State Responsibility

- Failure to prevent act or to punish individuals.
- Cases: Janes (US v. Mexico), Noyes (US v. Panama)

Articles 6,8, 9,10, 11

Attribution

- State organs placed at disposal of another state (army)
- Conduct directed or controlled by a State (How do we define "direct" and "control"?- See Nicaragua Case ICJ- US support to contras did not amount to "effective control" of paramilitary, But see ICTY in Tadic uses "overall control")
- Persons exercising governmental authority in the absence of official authority (failed state) (Case Yeager v. Iran, Iran-US Cl. Trib 1987)
- Insurrection that becomes new government
- Conduct acknowledged and adopted by a State (Case US Diplomatic and Consular Staff in Tehran, US v. Iran, ICJ 1980)

Breach of International Obligation

- Act in violation of international obligation
- Omission to act in conformity with international obligation

- Single Act

- Series of Acts that are wrongful when taken together

Assistance to another State committing a wrongful act can engage attribution

(Duty to Protect- US v. Iran, ICJ, Janes Claim Mexico)

Article 13

International obligation in force for a State

- 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.
- Continuing violation- Case: Loizidou ECHR (continuing deprivation of property)

Preclusion of Wrongfulness: Justifications

- Art. 20 Consent by state (transit through airspace, arrest of suspects in territory, but no violation of peremptory norms)
- Art. 21 Lawful self-defense (ICJ Nuclear Weapons Case)
- Art. 22 Lawful countermeasures to induce a state to comply with international duties
- Art. 23 Force Majeure (Unless State's conduct is responsible for situation or state assumed risk)
- Art. 24 Distress (But not if it will create greater peril, Rainbow Warrior Case- agent repatriated for serious medical treatment- threat to life)
- Art. 25 Necessity- Only means to safeguard an essential state interest against a grave and immediate peril and does not seriously imperil an essential interest of the other state (Gabcikovo-Nagymaros Project Case ICJ, Israeli Wall Case ICJ- infringements of human rights and IHL not justified by requirements of national security)

Article 29 Continued duty of performance

- The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.
- State must stop the act in violation of the duty (cessation), and offer assurances and guarantees of non-repetition (Art. 30)

Chorzow Factory Case

PCIJ

- It is a principle of international law that a 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.
- Reparation must, as 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.

Art. 34 Forms of reparation

- Full reparation for the injury caused by the internationally wrongful act shall take the form of **restitution**, **compensation** and **satisfaction**, either singly or in combination, in accordance with the provisions of this chapter.

Forms of Reparation

- **Restitution: Reestablish Status Quo Anten (return of property, release of detainee)**
- **Compensation: Monetary Payment (for damage to State and damage to nationals (persons or companies) entitled to diplomatic protection)**
- **Satisfaction: Public acknowledgement of injury, public apology, disciplinary action against persons causing affront, payment of symbolic damages (Corfu Channel Case ICJ)**

Compensation

- Material Losses- loss of earnings, earning capacity, medical expenses
- Moral damage (loss of loved ones, pain & suffering, intrusion in private life)
- Capital value of property- Fair market value v. Net book value (total assets minus total liabilities)
- **Hull Formula**- Prompt, adequate & effective compensation (intl. Currency, full value of property & lost profits, timely payment with interest) v. **Appropriate Compensation** (economic viability of nationalising state, importance of property, benefits nationals have already acquired through commercial actions, (not market value and no future lost profits))

Art. 43 Notice of claim by an injured State

- 1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
- 2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of Part Two.

Serious breaches of obligations under peremptory norms of general international law

- Art. 40 (1) This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
- (2) A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

ICJ Bosnian Genocide Case

- **Whether Serbia was responsible for the Srebrenica genocide committed by the Bosnian Serb insurrectional movement, Republika Srpska. ICJ held that Genocide Convention impliedly imposed state responsibility for genocide, including complicity in genocide. ICJ refers to ILS's rejection of state crimes and denied that obligations and responsibilities under international law can be of a criminal nature.**

Particular consequences of a serious breach of an obligation under this chapter

- Art. 41 (1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. (UN Security Council, or possibly individual countermeasures)
- 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. (ICJ The Wall Case- Israel in breach of self determination and IHL (obligations erga omnes), call for UN SC and GA to consider action)

Art. 48 Invocation of responsibility by a State other than an injured State

- 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 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; (regional human rights treaty) or
 - (b) The obligation breached is owed to the international community as a whole. (Erga omnes, prohibition on aggression, genocide, slavery, racial discrimination, self-determination)
- Consider *lex ferenda* Responsibility to Protect

Art 44 Admissibility of claims

Espousal of claims of a national

- (Every state has duty not to ill-treat foreign nationals in territory.)
- The responsibility of a State may not be invoked if:
 - (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
 - (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Countermeasures, Art. 52

Conditions relating to resort to countermeasures

- 1. Before taking countermeasures, an injured State shall:
 - (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
- 2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

Article 52 (3)

- 3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased; and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
- 4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Art. 49 Object and limits of countermeasures

- 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
- (Must be reversible, proportionate, See Gabčíkovo-Nagymaros Project ICJ)

Art. 49

- 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
- 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Art. 50 Obligations not affected by countermeasures

- 1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.

- 2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Art. 51 Proportionality

- Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Art. 53 Termination of countermeasures

- Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Art. 58 Individual responsibility

- These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.
- May be civil or criminal (but little practice re. civil responsibility for breaches of intl law)
- **US Alien Torts Claims Act- Kadic v. Karadzic 70 F. 3d 232 (1995)**

Group Work- Susan Breu

- You are the Attorney-General of Pakistan. It has been brought to your attention that groups of al-Qaeda terrorists are training in your North-West Frontier provinces, that some of your security forces are conducting training and that some of your defence officials are providing the group with arms.
- You must advise the Prime Minister of Pakistan whether other countries could argue, based on the international law of state responsibility that any conduct of al-Qaeda in any other countries could be attributed to your state.
- Discuss the relevant Articles of State Responsibility on attribution
- Describe how conduct may be imputed to a state with reference to case law
- Discuss the acts of insurrectionaries