ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Ответственность государств

Джеймс Катека

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Responsibility of States

James L. Kateka

ТОМ 6
VOL. 6

Москва 2022
Moscow 2022

ISSN 2687-105X

Центр международных и сравнительно-правовых исследований
International and Comparative Law Research Center

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Москва
2022

УДК 341.1/8
ББК 67.91
Л43

Лекции Летней Школы по международному публичному праву = Л43 Courses of the Summer School on Public International Law. – Т. VI. Ответственность государств = Vol. VI. Responsibility of States / Джеймс Катека = James L. Kateka. – М.: Центр международных и сравнительно-правовых исследований, 2022. – 80 с.

Настоящее издание содержит материалы лекций Джеймса Катеки по теме «Ответственность государств», прочитанных им в рамках Летней Школы по международному публичному праву 2019 года.

The present publication contains the text of lectures by James L. Kateka on the topic “Responsibility of States”, delivered by him within the frames of the Summer School on Public International Law 2019.

УДК 341.1/8
ББК 67.91

Летняя Школа по международному публичному праву 2019 года
Summer School on Public International Law of 2019

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа — проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего курса и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2019 году состоялась вторая Летняя Школа. Специальные курсы были посвящены теме «Ответственность в международном праве». Их прочитали Джеймс Катека («Ответственность государств»), Мигель де Серпа Суареш («Ответственность международных организаций»), Ивана Хрдличкова («Международная уголовная ответственность индивида»), Джон Дугард («Дипломатическая защита»), Алина Мирон («Контрмеры и санкции»). Общий курс международного публичного права прочёл Туллио Тревес.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

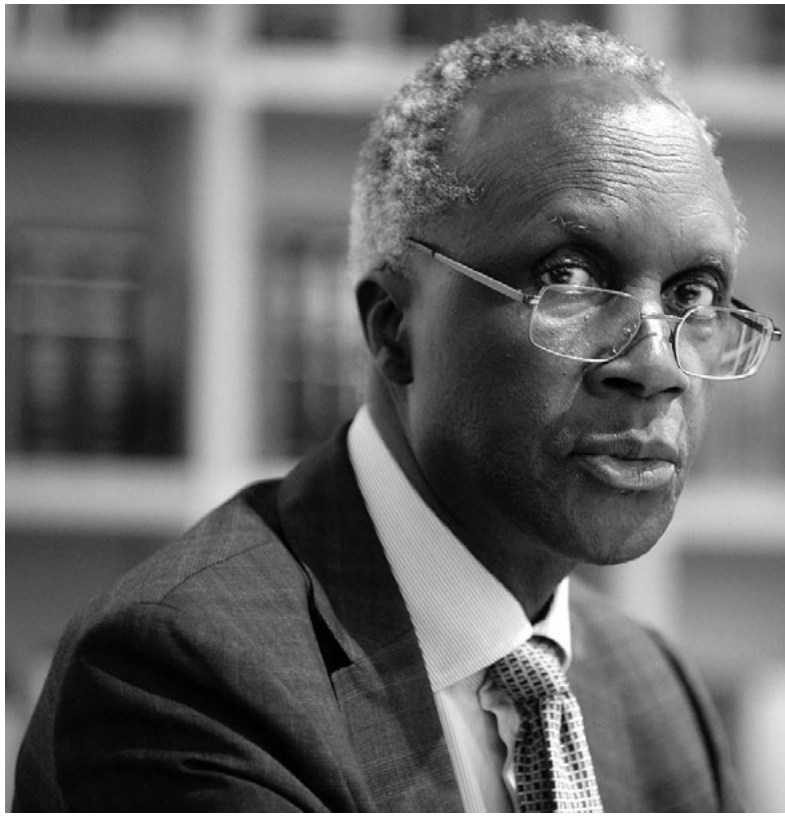
Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The second Summer School was held in 2019. The Special Courses were devoted to the topic "Responsibility in International Law". The courses were delivered by James L. Kateka ("Responsibility of States"), Miguel de Serpa Soares ("Responsibility of International Organizations"), Ivana Hrdličková ("Individual Criminal Responsibility in International Law"), John Dugard ("Diplomatic Protection"), and Alina Miron ("Countermeasures and Sanctions"). The General Course on Public International Law was delivered by Tullio Treves.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.



Джеймс Катека

Джеймс Катека является судьёй Международного трибунала по морскому праву с 2005 года и в период с 2014 по 2017 годы был Президентом Палаты Трибунала по спорам, касающимся окружающей морской среды. Он выступает в качестве судьи *ad hoc* в делах, рассматриваемых Международным Судом, а также в качестве арбитра в нескольких арбитражных разбирательствах. Судья Катека был Послом Танзании в Германии (1989–1994 гг.), Российской Федерации (1994–1998 гг.) и Швеции (1998–2005 гг.). Он также является автором многочисленных статей по различным вопросам международного права.

James L. Kateka

James L. Kateka has been a Judge of the International Tribunal for the Law of the Sea since 2005, and from 2014 to 2017 he was the President of the Tribunal's Chamber for Marine Environment Disputes. He has also served as the Judge *ad hoc* in several cases before the International Court of Justice and as an arbitrator in arbitral proceedings. Judge Kateka was Ambassador of Tanzania to the Federal Republic of Germany (1989–1994), to the Russian Federation (1994–1998) and to Sweden (1998–2005). He has published numerous articles in various fields of international law.

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LECTURE 1:

An Overview of the Topic of Responsibility of States

Introduction

For the Moscow Summer School, I have been assigned the topic of the responsibility of States. My first lecture will be an overview of the topic. As the work of the International Law Commission (the Commission or ILC) is central to the discussion of the topic, I shall focus on this. My subsequent lectures will be on serious breaches of obligations,[1] circumstances precluding wrongfulness,[2] invocation of the responsibility of States with countermeasures,[3] and the question of reparation.[4]

State Responsibility is at the heart of international law.[5] It is a cardinal institution of international law that results from the general legal personality of every State under international law. It interacts with the notion of sovereignty which influences the conception of international responsibility. As we shall see the ARSIWA ILC Articles provide for this.

The Evolution of State Responsibility

Traditionally only States were subjects of international law. However, this is no longer the case with the evolution of

[1] Chapter III of Part Two of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA or the 2001 ILC Articles).
[2] Chapter V of Part One of ARSIWA.
[3] Chapter II of Part Three of ARSIWA.
[4] Chapters I and II of Part Two of ARSIWA.
[5] Pellet citing Paul Reuter, see A. Pellet, "The Definition of Responsibility in International Law", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), p. 3, at p. 3.

international law, in particular, since the Advisory Opinion of the International Court of Justice (ICJ) in the *Reparation for Injuries* case[6] stated that the United Nations was a subject of international law with an international legal personality. Thus international organizations are subjects of international law. Like States they may be responsible for an internationally wrongful act. Draft Articles on the Responsibility of International Organizations (DARIO) were adopted on second reading by the ILC in 2011, ten years after the adoption of the Articles on State responsibility. The DARIO Articles are modelled on the ARSIWA Articles. As the DARIO Articles are being dealt with by another lecturer at this Summer School I shall not deal with them here.

The topic of State responsibility had been linked with the topic of International Liability[7] for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. The Commission included the topic in its programme of work in 1978 and appointed Robert Q Quentin-Baxter (New Zealand) as Special Rapporteur. Between 1980 and 1984 the Commission received and considered five reports from the Special Rapporteur. The Commission subsequently appointed Julio Barboza (Argentina) who between 1985 and 1996 presented 12 reports as Special Rapporteur. In 1997 an ILC Working Group on the topic of liability noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title, and the relation of the subject to "State responsibility". The Working Group further noted that the Commission had dealt with two issues under the topic: "prevention" and "international liability". These two issues were distinct from one another, though related.[8]

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[6] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1948, p. 174, at p. 179.

[7] It is concerned with the content of primary obligations of reparation and thus not in the classical field of State responsibility.

[8] A/56/10: Report of the ILC, 53rd Session (23 April — 1 June and 2 July — 10 August 2001), *Yearbook of the ILC 2001*, vol. II(2), p. 145, para. 85.

It was in this context that the Commission appointed Pemmaraju Sreenivasa Rao (India) as Special Rapporteur in 1997. Between 1998 and 2000 P.S. Rao presented three reports to the Commission. The Commission adopted a draft preamble and a set of 19 draft articles on prevention of transboundary harm[9] from hazardous activities with commentaries. These were submitted to the General Assembly with a recommendation that the GA elaborate a convention by the Assembly on the basis of the draft articles. It is to be noted that these articles were adopted in the same year (2001) that the Articles on State responsibility were adopted by the General Assembly. Subsequently, the Commission adopted Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities, together with commentaries in 2006. These Principles establish for the first time[10] a genuinely global regime of liability for transboundary damage.[11]

Consideration of the Topic by the ILC

The topic of State responsibility was one of the topics on the Commission's initial agenda in 1948. This topic had also been considered at the 1930 League of Nations Conference for the Codification of International Law at The Hague. The subject was considered by five different Special Rapporteurs between 1956 and 2001, a period of 45 years. The first Special Rapporteur, Garcia Amador (Cuba) submitted six reports to the Commission between 1956 and 1961. He concentrated on responsibility for injuries

[9] It was changed from "damage" to "harm" by the Commission.

[10] A. Boyle, "Liability for Injurious Consequences of Acts not Prohibited by International Law", in *The Law of International Responsibility*, *supra* note 5, p. 95. Boyle states that the ILC "defined *the law of State responsibility as applying only to the breach by a State of its international obligations*" (emphasis added). Liability was used for harm caused without breach of obligation. The ILC preferred the term "liability" to cover cases of a primary obligation and responsibility for secondary obligations.

[11] The Articles define "transboundary harm" as harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border.

to aliens and their property. This was a focus on what is called diplomatic protection. Owing to the Commission's other priorities there was little consideration of the reports by the first Special Rapporteur on State responsibility.

The second Special Rapporteur was Roberto Ago (Italy). He widened the scope of the topic to cover all aspects of State responsibility. Between 1969 and 1980 he presented eight reports. The Commission provisionally adopted 35 articles as Part One of the Draft Articles. Ago revolutionized the consideration of the topic in two ways. First he introduced the concept of differentiating between primary and secondary rules. From the time Ago became Special Rapporteur, the Commission focused on its codification effort on secondary rules and excluded primary rules. The 1980 report of the ILC sums up the difference between primary and secondary rules well:

> "the purpose of the present draft articles is not to define the rules imposing on States in one sector or another of inter-State relations, obligations whose breach can be a source of responsibility and which, in a certain sense, may be described as 'primary'. In preparing the present draft the Commission is undertaking solely to define those rules, which in contradistinction to the primary rules, may be described as 'secondary', in as much as they are aimed at determining the legal consequences of failure to fulfil obligations established by the 'primary' rules."[12]

It is said that it was Herbert Briggs who first used the expression "primary and secondary rules" when he observed that State responsibility was a secondary obligation, having its source in the non-observance of a primary obligation under international law.[13]

[12] A/35/10: Report of the ILC, 32nd Session (5 May-25 July 1980), *Yearbook of the ILC 1980*, vol. II(2), p. 27, para. 23.

[13] See E. David, "Primary and Secondary Rules", in *The Law of International Responsibility*, *supra* note 5, p. 27, at p. 28.

Whatever the source of the distinction may be it does not detract from the great contribution by Ago to the facilitation of the work on State responsibility by focusing on secondary rules. Without this separation between primary and secondary rules, it would have been a difficult task to codify the topic. The distinction between primary and secondary rules was one of the factors that allowed the Commission to conclude successfully one of the most ambitious codification projects of the 20th century.[14] Ago also introduced the concept of international crimes of States in the controversial but famous Article 19 which led to the concept of serious breaches of obligations. We shall deal with this later.

The third Special Rapporteur was Wilhelm Riphagen (Netherlands) who between 1980 and 1986 presented seven reports containing draft articles on Part Two (Content, Forms and Degrees of Responsibility) and Part Three on dispute settlement. Owing to priority being given to other ILC topics, the Commission provisionally adopted five articles, including a definition of "injured State" from Riphagen's Part Two.

The fourth Special Rapporteur was Gaetano Arangio-Ruiz (Italy) who in the period between 1988 and 1996 presented eight reports which enabled the Commission to adopt the text with commentaries on first reading in 1996. The 1996 Draft Articles are an amalgamation of Part One of the Ago text, a few articles of Part Two of the Riphagen text, and the Arangio-Ruiz text dealing with reparations, countermeasures, the consequences of international crimes, and the settlement of disputes.

The fifth and last Special Rapporteur on the topic of State responsibility was James Crawford (Australia) who presented four reports in the period between 1998 and 2001. His major contribution was to propose a compromise that led to the discarding of the notion of international crimes of States and its replacement with

[14] *Ibid.*, at p. 32.

serious breach of a peremptory norm. A new part was included on invocation, including countermeasures. The issue of provisions on dispute settlement was also omitted. Thus Crawford successfully brought the topic of State responsibility to an end. It may be a bit early to assess his contribution. But when the history of the topic is written he will rank along with Roberto Ago as one of the greatest special rapporteurs of the Commission.

The work of a special rapporteur of the ILC is important to the Commission's final product, whether it is a binding instrument or soft law. The reports prepared by the special rapporteur are part of the *travaux* of the ultimate product but not on the same level as the articles and commentaries. This view is expressed by some commentators[15] who also argue that the ILC is not a source of law. While this is technically correct, the invaluable role and work of the special rapporteur should not be underestimated. The work put into the reports facilitates the understanding of the topic by the Commission members. At any rate the articles such as those on State responsibility acquired legal authority even before they were finally adopted by the Commission. For example, the 1996 Articles adopted on first reading were quoted with approval by international courts[16] and tribunals.[17]

The 2001 ILC Draft Articles

When the Commission embarked on a second reading of the ARSIWA, it dealt with some procedural issues. First it changed the title of the topic from "State Responsibility" to "Responsibility of States for Internationally Wrongful Acts". The new formulation makes it easier for the text to be translated into other languages by

[15] D. Caron, "The ILC Articles on State Responsibility: the paradoxical relationship between for and authority", 96 *American Journal of International Law* (October 2002), p. 857, at p. 869.
[16] For example, the ICJ in the *Gabčíkovo-Nagymaros* case.
[17] Cited by ITLOS in the *Saiga* (No. 2) case.

clearly distinguishing it from the concept of international "liability" for acts not prohibited by international law. It also distinguishes the topic from the responsibility of the State under internal law.[18]

The Commission resolved at the outset in 1997 to complete the second reading of the topic of State responsibility at the end of its quinquennium (2001). On second reading the notion of international crimes of States was discarded and was replaced by serious breach of a peremptory norm (Articles 40 and 41 of the ARSIWA); a distinction was made between the injured State and a State seeking to maintain an interest in performance of the obligation independent of any individual injury (Articles 42 and 48); and a new part was included on invocation, including countermeasures, which were thereby placed in their proper remedial context.[19]

The ILC Articles on State responsibility are contained in four parts. Part One is on conditions for State responsibility and is titled "The Internationally Wrongful Act of a State". It has five chapters. Whereas Part One of the ILC articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State and is titled "Content of the International Responsibility of a State". It comprises three chapters. The commentary to Article 28 raises the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from Article 1 which covers all international obligations of the State and not only those owed to other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not the State. However, while Part One applies to all cases in which an internationally wrongful act may be committed by a State, Part Two

[18] Report of the ILC, *supra* note 8, at p. 25, para. 68.
[19] J. Crawford, "State Responsibility", in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006).

has a more limited scope. Its provisions are without prejudice to any right arising from international responsibility of a State which may accrue directly to any person or entity other than a State.[20] Part Three is on the implementation (invocation) of State responsibility, i.e., with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of the commission of an internationally wrongful act. Part Three has two chapters.[21] Part Four deals with general provisions applicable to the Articles as a whole.[22]

The first three articles of the ILC 2001 Articles establish general principles for State responsibility[23]: (i) an internationally wrongful act or omission (Article 1); (ii) attributable to a State under international law (Article 2); (iii) constituting a breach of an international obligation of the State (Article 2); (iv) the breach of obligation being determined by international law, it being irrelevant that national law determined that the act is lawful (Article 3). These three articles are now part of customary international law.[24]

Article 1 is the foundational principle which is elaborated in other articles. The commentary states that an internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both.[25] It adds that the ICJ and its predecessor have applied the principle set out in Article 1.[26] Article

[20] Article 33 makes this clear (see commentary to Art. 28, para. 3).
[21] Chapter I deals with the invocation of State responsibility by other States and certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.
[22] General commentary to Part IV.
[23] C.F. Amerasinghe, "The Essence of the Structure of International Responsibility" in M. Ragazzi (ed.), *International Responsibility Today — Essays in Memory of Oscar Schachter* (Martinus Nijhoff Pub., 2005), p. 3.
[24] J. Crawford, *supra* note 19.
[25] Commentary to Art. 1, para. 1.
[26] *Corfu Channel, Merits, Judgment*, ICJ Reports 1949, p. 4, at p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *USA), Merits, Judgment*, ICJ Reports 1986, p. 14, at p. 142, para. 283, p. 146, para. 292.

2 has two conditions or constituent elements: first, the conduct in question must be attributable to a State, and, second, the conduct must constitute a breach of an international obligation. Thus, attribution and breach are the two necessary elements for an internationally wrongful act to engage the responsibility of a State. Wrongful acts can consist of acts or omissions. There are numerous cases in which the responsibility of a State has been invoked on the basis of an omission. The commentary to Article 2 cites the *Corfu Channel* case[27] where the ICJ held that Albania knew or must have known of the presence of the mines in its territorial waters and did nothing to warn third States of their presence. In the *Diplomatic and Consular Staff* case the Court concluded that the responsibility of Iran was entailed by the inaction of its authorities which failed to act when action was called for.

Contrary to the traditional view of State responsibility which required injury in addition to a wrongful act, injury or damage is no longer necessary. The commentary explains that in the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention.[28] In this connection, Pellet[29] is of the view that as long as damage was central to ascertaining when international responsibility arose, the unity of the notion was assured, or at the least, defensible. The elimination of damage as a condition for, or the trigger of, State responsibility for internationally wrongful acts has destroyed that unity.

Chapter II of Part Two deals with attribution of conduct to a State. Conduct attributable to a State is that of its organs, i.e., agents of the State.[30] Article 4 states the basic rule that conduct of any State

[27] *Corfu Channel*, *supra* note 26, at pp. 22–23 cited in para. 4 of the commentary.
[28] Commentary to Art. 2, para. 10.
[29] Pellet, *supra* note 5, at p. 11.
[30] General commentary to Chapter II, para. 2.

organ is attributable to the State.[31] There is no distinction based on whether it is the executive, legislative or judicial organ. The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility.[32] Article 5 deals with the conduct of a person or entity which is not a State organ in the sense of Article 4 but which is authorized to exercise governmental authority. This may include public corporations, semi-public entities and private companies.[33] Article 6 concerns situations where the organs of one State are placed at the disposal of another State.[34] Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. The article is not concerned with the question whether the conduct amounted to a breach of an international obligation.[35]

Articles 8 to 11 deal with the additional cases where conduct is attributable on the analogy of agency.[36] Article 8 deals with circumstances where the conduct of private persons or entities

[31] "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character…", *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p. 62, at p. 87, para. 62 (referring to the Draft Articles on State Responsibility, Art. 6, now embodied in Art. 4 of ARSIWA; quoted in the commentary to Art. 4, para. 6).

[32] Commentary to Art. 4, para. 5.

[33] Commentary to Art. 5 (para. 2) gives an example of private security companies in some countries being contracted to act as prison guards and to exercise some public powers of detention and discipline pursuant to a judicial sentence or to prison regulations.

[34] Commentary to Art. 6 (para. 3) cites examples of the health service or some other unit might be placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State.

[35] See commentary to Art. 7, para. 11: the fact that instructions given to an organ or entity where ignored or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.

[36] J. Crawford, *supra* note 19.

may be attributable to the State.[37] First is the situation where private persons act on the instructions of the State in carrying out a wrongful conduct. Second is the general situation where private persons act under the State's direction or control. Taking into account the principle of effectiveness in international law, it is necessary to bear in mind in both cases the existence of a real link between the person or group performing the act and the State machinery.[38]

The degree of control mentioned in Article 8 to be exercised by the State in order for conduct to be attributable to the State was considered in the *Military and Paramilitary Activities* case.[39] The Court was of the view that mere financing, organizing, training, supplying and equipping of the *contras* was held not sufficient for the purpose of attributing to the USA the acts committed by the *contras*. For this conduct to give rise to legal responsibility of the USA, it would have to be proved that the USA had effective control of the military and paramilitary operations.

The Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia (ICTY) also considered these issues. In *Prosecutor v. Tadić*, the Chamber held that overall control suffices without it being necessary to prove that specific orders have been given in relation to each action. The Appeals Chamber reversed the decision of the Trial Chamber which had ruled that the forces of the Bosnian Serbs were not in a situation of dependence on Belgrade such that all their acts could be imputed to the FR Yugoslavia. In the ILC commentary to Article 8 (paragraph 5) it is observed that the legal issues and the factual situation in the *Nicaragua* case before the Court and in the *Tadić* case before the ICTY were different. The

[37] Commentary to Art. 8, para. 1: as a general principle, the conduct of private persons or entities is not attributable to the State under international law.
[38] Commentary to Art. 8, para. 1.
[39] *Military and Paramilitary Activities in and against Nicaragua, supra* note 26, at paras. 86, 109 and 115.

ICTY's mandate concerns issues of individual criminal responsibility, not State responsibility.[40]

Article 9 deals with the exceptional case of conduct of a person or group of persons being considered an act of a State under international law if the persons exercising elements of governmental authority in the absence or default of the official authorities. An example is the position of the Revolutionary Guards in Iran following the revolution. The Iran-United States Claims Tribunal treated the Guards as covered by the principle expressed in Article 9 because of their performing immigration, customs and similar functions at Tehran airport. Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new government of the State or succeeds in establishing a new State. The acts of such movements are not attributable to the State, unless under some other article in Chapter II, for example in the special circumstances envisaged by Article 9. Article 11 deals with conduct acknowledged and adopted by a State as its own. Thus, as in Article 10, purely private conduct cannot be attributed to a State. But such conduct is nevertheless considered to be an act of a State to the extent that the State acknowledges and adopts the conduct in question as its own.[41] The case of the United States *Diplomatic and Consular Staff in Tehran* is cited as an example. The policy announced by Ayatollah Khomeini to maintain the embassy occupation and the failure by Iranian authorities to take sufficient action to prevent the seizure

[40] The issue in the ICTY was the applicable rules of international humanitarian law; see B. Stern, "The Elements of an Internationally Wrongful Act", in *The Law of International Responsibility*, *supra* note 5, p. 193. In the *Bosnian Genocide* case, the Court strongly criticized the approach of the ICTY Chamber for its doctrine in the *Tadić* case and reiterated its jurisprudence concerning the effective control test (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, at p. 207 et seq., paras. 398 et seq.).

[41] Commentary to Art. 11, paras. 3 and 4.

or to bring it to an immediate end are examples of adopting the unlawful conduct of the Guards.

Chapter III of Part One comprises four articles which deal with the breach of an international obligation. While these articles do not purport to specify the content of the primary rules of international law, in determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned.[42] Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation regardless of its origin.[43] Article 13 states the principle that for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is the application to State responsibility of the general principle of intertemporal law which was stated by Judge Huber in another context in the *Island of Palmas* case:

> [A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[44]

Article 14 deals with the notion of continuing breaches of obligations. It develops the distinction between breaches not

[42] General commentary to Chapter III of Part One, para. 2. The commentary adds that there is no such thing as a breach of an international obligation in the abstract. It is the primary obligation concerned which has to be applied to the situation, determining thereby the substance of the conduct required, the standard to be observed and the result to be achieved.

[43] Commentary to Art. 12, para. 3. The phrase "regardless of its origin" indicates that the articles in Chapter III are of general character. They apply to all international obligations whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. The commentary further states that in international law there is no distinction between responsibility for breach of a treaty and for breach of some other rule, i.e., for responsibility arising *ex contractu* or *ex delicto*. The *Rainbow Warrior* arbitration refers to no distinction between contractual and tortious responsibility.

[44] *Reports of International Arbitral Awards*, vol. II (1949), p. 829, at p. 845; cited in commentary to Art. 13 (para. 1).

extending in time (paragraph 1 of the Article) and continuing wrongful acts (paragraph 2). It also deals with the application of that distinction to the important case of obligations of prevention. Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. Examples cited include forced or involuntary disappearance as a continuing act, one which continues as long as the person concerned is unaccounted for.[45]

Article 15 deals with breaches of a composite of acts. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct. Examples include the obligations concerning genocide, *apartheid* or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement etc.

Chapter IV concerns the responsibility of a State in connection with the act of another State (Articles 16–19). The Articles are exceptional cases of derived responsibility where one State is responsible for the internationally wrongful acts of another. Article 16 deals with cases where one State provides aid or assistance to another in the commission of a wrongful act by the latter. Examples cited include the 1986 Libyan bombing by the United States which used British airbases to launch the attacks.[46] Article 17 deals with cases where one State is responsible for the internationally

[45] Commentary to Art. 14, para. 4, citing the IACtHR. The distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released or the body of a disappeared person returned to the next of kin (para. 5 of the commentary). The notion of continuing wrongful acts is common. In the *Diplomatic and Consular Staff* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963…" (*US Diplomatic and Consular Staff in Tehran (USA* v. *Iran), Judgment*, ICJ Reports 1980, p. 3, at p. 37, para. 80).

[46] The British Government denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on American targets (see commentary to Art. 16, para. 8).

wrongful act of another because it has exercised powers of direction and control over the commission of the wrongful act by the latter.[47] Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be an internationally wrongful act on the part of the coerced State. The commentary (paragraph 2) to Article 18 states that coercion for the purpose of Article 18 has the same essential character as *force majeure* under Article 23.

Chapter V of Part One deals with circumstances precluding wrongfulness. The six defences or excuses of consent (Article 20), self-defence (Article 21), countermeasures (Article 22), force majeure (Article 23), distress (Article 24) and necessity (Article 25) will be dealt with in a separate lecture.

Part Two is on the legal consequences for the responsible State. The part comprises three chapters. Chapter I comprises six articles which define the legal consequences of an internationally wrongful act of a State. Chapter II deals with the forms of reparation for injury. This will be the subject of a separate lecture. So will Chapter III on serious breaches of obligations under peremptory norms of general international law.

Part Three is on the implementation of the international responsibility of a State. It deals with the giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of a commission of an internationally wrongful act. The two chapters of Part Three on invocation of the responsibility of a State and countermeasures will be dealt with in a separate lecture.

The last part (Part Four) contains general provisions which are applicable to the Articles as a whole. Article 55 provides that the

[47] See, for example, commentary to Art. 17 (para. 2) citing the *Rights of Nationals of the United States in Morocco (France* v. *USA), Judgment*, ICJ Reports 1952, p. 176. The direction and control in Art. 17 is by one State against another, in contrast to Art. 8 on the direction and control of private persons by a State.

Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act are determined by special rules of international law.[48] Article 56 states that the Articles are not exhaustive and that they do not affect the applicable rules of international law on matters not dealt with by the Articles. Article 57 is a without prejudice clause that excludes from the scope of the Articles questions dealing with the responsibility of international organizations. Article 58 states that the Articles are without prejudice to any question of individual responsibility. The last article (Article 59) of the ILC Draft Articles on State responsibility states that the Articles are without prejudice to the Charter of the United Nations. The Articles cannot affect the Charter and must be interpreted in conformity with the UN Charter.

Dispute Settlement

Before concluding this lecture, I wish to raise two further matters of importance that were considered by the ILC during the deliberation on the Articles on State Responsibility. They concern the question of dispute settlement and the form of the Articles.

The Draft Articles adopted on first reading in 1996 included Part Three dealing with dispute settlement. When the issue was taken up by the Commission during the second reading of the Articles, members were of different views. Some members favoured the inclusion of general dispute settlement provisions if the Commission was to recommend the elaboration of a convention on the topic of State responsibility. This was more so in view of the significant and complex matters covered by the topic. A compulsory dispute settlement mechanism was necessary in relation to countermeasures which were liable to abuse.[49]

[48] It reflects the maxim *lex specialis derogat legi generali*.
[49] Report of the ILC, *supra* note 8, at p. 23, para. 57.

Those opposed to inclusion of dispute settlement provisions contended that dispute settlement provisions were already sufficiently covered by a growing body of conventional international law, underlying which was the principle expressed in Article 33 of the UN Charter. A special regime on dispute settlement in the framework of State responsibility might result in overlap with existing mechanisms and would lead to the fragmentation and proliferation of such mechanisms.[50]

On the recommendation of the ILC Working Group, the Commission decided not to include provisions for dispute settlement mechanism,

> "but would draw attention to the machinery elaborated by the Commission in the first reading draft as a possible means for settlement of disputes concerning State responsibility; and would leave it to the General Assembly to consider whether and what form of provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention".[51]

Form of the Draft Articles

Those ILC members favouring the adoption of an international convention argued that the Commission's task was to state the law, which could only be done through conventions. Furthermore, the Commission had a tradition of having all its major drafts adopted as conventions. Adopting such a convention on State responsibility would ensure the Draft Articles place, together with the Vienna Convention on the Law of Treaties, as one of the fundamental pillars of public international law. Stating customary rules of

[50] *Ibid*., at para. 58.
[51] *Ibid*., at para. 60 (footnote omitted).

international law in treaty form would give the articles additional certainty, reliability, and binding force.[52]

Members opposed to a binding instrument noted the destabilizing and even "decodifying" effect that an unsuccessful convention could have. They argued that the Vienna Convention on the Law of Treaties was not an accurate analogy since it dealt largely with matters of form, whereas the topic of State responsibility covered the substance of international law and "presupposed a disagreement or dispute between the parties concerned rather than a consensual activity such as treaty-making".[53]

The ILC Report states that many members[54] supported the conclusion of a convention. This writer as a participant can state that in fact the majority of the members were in favour of a binding instrument. However, on the recommendation of the open-ended Working Group, the Commission recommended that in the first instance, the General Assembly adopt a resolution taking note of the draft articles and annex the text of the articles to the resolution. The recommendation would also propose that, "given the importance of the topic, in second and later stage the Assembly should consider the adoption of a Convention on this topic".[55]

Conclusion

The 2001 ILC Draft Articles involve both codification and progressive development of international law. Although the distinction between codification and progressive development is increasingly falling into disuse, it still remains in the Statute

[52] *Ibid*., at p. 24, para. 62.
[53] *Ibid.*, at para. 63.
[54] *Ibid*., at para. 61.
[55] *Ibid*., para. 67.

of the ILC.[56] This is because the major topics for codification have been dealt with. Notwithstanding these distinctions the work which was done by the Commission on the topic of State responsibility is monumental and will go along in legal history with other major codification great achievements of the 20th century.

[56] Article 15: the expression "progressive development of international law" means the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.
"Codification" means the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

LECTURE 2:

Serious Breaches of Obligations Under Peremptory Norms of General International Law

Introduction

The question of serious breaches of obligations under peremptory norms of general international law is one of the key issues of the topic of the responsibility of States for internationally wrongful acts. There are several reasons for this view. First, the ILC spent a great deal of time on the famous Art. 19. To use a mixed metaphor, it was a case of the elephant in the room that roared for several years in the Commission. Furthermore, in its final form Article 19 has the longest commentaries which take up 27 pages and 73 paragraphs of the ILC's first reading Articles. We shall examine this article. The second reason for the importance of the issue of serious breaches is that Article 19 of the first reading Draft Articles was replaced in the final Draft Articles of the ILC by a new article on the concept of "serious breaches" of peremptory obligations. This phraseology replaces the notion of "international crimes" in former Article 19. The serious breaches are in Articles 40 and 41 of the 2001 ILC Articles on State responsibility which form Chapter III of Part Two. Consideration of this aspect will follow that of Article 19. However, whenever appropriate, reference will be made to the ARSIWA Articles in the discussion of Article 19.

The Concept of "International Crimes" of States in General

I start with international crimes.

The traditional view of international law on the international crimes of States was expressed by the Nuremberg International Military Tribunal (IMT):

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[57]

The IMT's view was affirmed in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) which provided in Article IX for State responsibility with respect to genocide. This responsibility is civil, not criminal.[58] The IMT position was further affirmed in *Application of the Convention for the Prevention and Punishment of the Crime of Genocide* where the ICJ observed that the obligations under the Genocide Convention are not of a criminal nature. Indeed there have never been any judicial decisions concerning criminal responsibility of a State.[59]

Special Rapporteur James Crawford observed aptly in his first report on State responsibility that[60]

> "[t]here is little or no disagreement with the proposition that 'the law of international responsibility in neither civil nor criminal, and that it is purely and simply international'".

Article 19 of the First Reading of the ILC Draft Articles on State Responsibility

I now turn to the consideration of Article 19.

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[57] International Military Tribunal (IMT) for the Trial of the Major War Criminals, Judgment of 1 October 1946, quoted in para. 5 of the general commentary to Chapter III of Part Two. See J. Crawford, *The International Law Commission's Articles on State Responsibility — Introduction, Text and Commentaries* (Cambridge University Press, 2002).

[58] J. Crawford, "International Crimes of States", in *The Law of International Responsibility*, *supra* note 5, p. 405.

[59] *Ibid.*, at p. 406.

[60] UN Doc. A/CN.4/490 (24 April 1998), with several addenda of which Add. 1–3 are devoted to Art. 19; quoted in G. Abi-Saab, "The Uses of Article 19", 10 *European Journal of International Law* (1999), p. 339, at p. 346.

Given the above scenario of international law not recognizing the notion of criminal responsibility of States, it was a bold move for the Special Rapporteur on State responsibility, Professor Roberto Ago, to come up with a proposal for a distinction between categories of wrongful acts on the basis of the *subject-matter* of the obligation breached and specifically regarding the importance of the obligation breached for the international community. It was contended that formerly the rules of State responsibility provided for *a single regime of responsibility* applying to all internationally wrongful acts of the State whatever the content of the obligation breached by such acts. The commentary to Article 19 adds that today the situation is different. General international law provides *for two completely different regimes of responsibility*. One regime applies to *obligations of fundamental importance to the international community as a whole, e.g., obligations to refrain from aggression and genocide.* The other regime applies to *obligations of lesser importance*.[61] This distinction although debatable revolutionized the thinking and challenged the view that international law does not recognize any differentiation between international crimes, be they known as "crimes" or "delicts". As we shall see later, the Commission by adopting the idea of "serious breaches" of peremptory norms of general international law has accepted the distinction between serious and lesser breaches of obligations.

It is in the above setting that Article 19 of Part One was adopted in 1976 distinguishing between "international crimes" and "international delicts" as follows:

Article 19. International Crimes and International Delicts

(1) An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

[61] Commentary to Art. 19 of first reading Draft Articles.

(2) An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

(3) Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

(4) Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 19 raised several questions. Firstly, the distinction between “international crimes” and “international delicts”. This distinction was contested by States and some ILC members and some academicians although it fascinated some of them,

including Georges Abi Saab and Alain Pellet whose views we shall consider later. The addition of paragraph 4 which states that an internationally wrongful act which is not an international crime constitutes an international delict compounded the confusion surrounding Article 19. Secondly, the question of "subject-matter" in paragraph 1 seems to contradict Special Rapporteur Roberto Ago's views and the commentary by raising the unitary nature of the subject matter. Thirdly, legislating by example would provide critics with ammunition to defeat the concept of international crimes of States. It would be stated by critics that such examples belonged to the commentaries and not in the article text. Fourthly, the use of the expression "obligation of essential importance" would be a precursor of the later expression of "serious breaches of peremptory norms".

Article 19 immediately came up for criticism by opposed States and some Commission members. The strongest objection came from powerful nations including the USA, the UK, France, Japan, and Australia. They argued that the concept was non-existent, undesirable, impractical, and not in conformity with the well-advanced and accepted trend to *individual criminal responsibility*. One of the major critics was the US member of the Commission, Robert Rosenstock. He contended that the notion of "crimes by States" "is variously unsound and without legal or conceptual foundation".[62] He argued that Article 19 was a clear case of *primary rules* whereas the Commission was codifying secondary rules of State responsibility.

In my view, this criticism by Rosenstock that Article 19 was a case of primary rules is not tenable. The Commission was aware of the difficulty of a strict distinction between primary and secondary rules. When considering the subject of circumstances precluding

[62] R. Rosenstock, "An International Criminal Responsibility of States?" in *International on the Eve of the Twenty first Century — Views from the ILC* (United Nations, 1997), p. 265.

wrongfulness, there were articles that were deemed to be on primary rules. This includes Article 20 on consent and Article 21 on self-defence. One commentator refers to what he calls a sometimes artificial distinction between primary and secondary rules.[63] Thus while the distinction between primary and secondary rules was not always respected by the Commission, it was necessary to facilitate the conclusion of the topic of State responsibility.

Here one may pose to ask: besides the philosophical disapproval of the concept of international crimes what *were the real problems* with Article 19 as drafted? The answer is to be found in the severe criticism of Article 19 by Special Rapporteur James Crawford. He had several criticisms. Some of these were of a drafting nature while others were substantive. I shall state them as they were presented by Professor Abi-Saab[64] and will cite his response to each criticism. First, Crawford criticized the circular nature of the definition of a crime in Article 19(2):

> "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community as a whole constitutes an international crime".

While he points out the circular nature of the definition of crime, Professor Crawford admits that it is no more circular than the definition of peremptory norms in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) which is widely accepted.[65] The relevant provision of Article 53 reads:

> "For the purposes of the present Convention, *a peremptory norm of general international law* is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be

[63] E. David, *supra* note 13, at p. 29.
[64] *Supra* note 60.
[65] J. Crawford's First Report, *supra* note 61, at para. 48.

modified only by a subsequent norm of general international law having the same charachter" (emphasis added).

Abi-Saab responds to Crawford by stating that the definition in Article 19 is much better than that of the VCLT which defines *jus cogens* rules by their effect. Effects are the consequences, not the cause.

The second criticism of Crawford of Article 19 was against drafting the article by examples. Article 19(3) provides for a serious breach of an obligation prohibiting aggression; a serious breach of an obligation prohibiting slavery, genocide, and apartheid; and a serious breach of an obligation prohibiting massive pollution. Abi Saab[66] blames the clumsy loose language on the ILC Drafting Committee which replaced Ago's earlier draft which was tighter and better. This criticism of legislating by example is, in my opinion, valid.

In terms of procedures, Crawford underscores the contrast between the strong procedural guarantees that surround countermeasures and their absence in the consideration of international crimes. Abi Saab argues in response that procedures do not develop, at least *ab initio* through custom. They have to be devised and added by agreement even to a codification treaty.

Interestingly, Rosenstock points out that the acceptance of the notion of *jus cogens* was conditioned on the acceptance of compulsory dispute settlement through the ICJ.[67] Pellet adds that countermeasures, by the nature of things, are reserved to powerful States.[68] In my opinion, Rosenstock's view is an inconsistent argument. Dispute settlement was accepted by the Vienna

[66] *Supra* note 60, at p. 342.
[67] *Supra* note 62, at p. 272.
[68] A. Pellet, "Can a State Commit a Crime? Definitely, Yes!", 10 *European Journal of International Law* (1999), p. 425, at p. 431. He adds that "the United States is very enthusiastic about them (countermeasures) — Chad is not, nor am I".

Conference in 1969 on the VCLT because of the controversial nature of the concept of *jus cogens*. But compulsory dispute settlement was not acceptable to the ILC in the case of countermeasures which are more controversial than *jus cogens*. Compulsory dispute settlement procedures were rejected for international crimes by the Commission deleting Part III of the first reading Draft Articles.

To conclude the consideration of Article 19, it must be said that supporters of the article reluctantly gave up in order to enable the adoption of the Draft Articles within the time frame envisaged by the Commission. Some members of the Commission such as P.S. Rao argued passionately against the idea that States cannot be punished like individuals. Rao observed that sanctions can be imposed on States when they are responsible for crimes through the Security Council or by a State acting unilaterally. Rao added the view that crimes such as genocide cannot take place or continue if there is no complicity.[69]

Some States, it must be added, that favoured the idea of State crimes were not worded to the use of the term "crime". Austria, some Nordic States and the Netherlands were ready to settle for terms such as "serious breaches of a fundamental norm of general international law".

Serious Breaches of Peremptory Norms

The ILC settled on serious breaches of peremptory norms rather than obligations to the international community as a whole for Chapter III of Part Two. This followed the Commission's acceptance of the compromise proposed by Special Rapporteur Crawford. The compromise comprised the abandonment of the concept of international crimes of States. A "package deal" referring to

[69] P.S. Rao, "International Crimes and State Responsibility", in *International Responsibility Today — Essays in Memory of Oscar Schachter*, *supra* note 23, p. 63.

serious breaches of obligations would include aggravated damages which would replace the unacceptable notion of punitive damages. Aggravated damages, while controversial, were not as objectionable as were punitive damages when the ILC considered the concept of State crimes. This compromise by the Special Rapporteur to decriminalize the topic of State responsibility proved unworkable and the idea of damages reflecting the gravity of the breach was not accepted by the Commission.

However, the second part of the compromise was agreeable despite some reservations. It concerned the question of serious breaches of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.[70] This was taken up in Chapter III of Part Two. The general commentary observes that the Draft Articles on State Responsibility do not recognize the existence of any distinction between State "crimes" and "delicts" for the purpose of Part One. The commentary adds that, on the other hand, it is necessary for the articles on State responsibility to reflect that there are certain consequences flowing from the concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Here it bears stressing, or even repeating that, the ILC rejected the distinction between State crimes and delicts during the first reading but accepted the notion of serious breaches which implies there are lesser breaches. The Commission may have been influenced by the concept of peremptory norms or *jus cogens* enunciated in the 1969 Vienna Convention on the Law of Treaties. The Commission's view was further influenced by the *Barcelona Traction* case which came before the ICJ the following year after the adoption of the VCLT.

The ICJ in its famous dictum in the *Barcelona Traction* case had stated that:

[70] J. Crawford, *supra* note 58.

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former 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; they are obligations *erga omnes*".[71]

The above dictum in the *Barcelona Traction* case "corrected" the aberration[72] of the *South West* Africa cases which held, by a casting vote of the ICJ President Spender that Ethiopia and Liberia had no "legal interest" in the case and refused to allow what amounted to an *actio popularis*.[73]

To revert to the narrative, Crawford observes that it is significant that the ILC eventually settled on serious breaches of peremptory norms rather than obligations to the international community as a whole as the defining term of Chapter III.[74] The 2001 ILC Articles treat peremptory norms as concerned with substance and obligations *erga omnes* with invocation. After cautioning that the international community is not to be conflated with the number of States that happen to exist at any given time, Crawford states that there is no plausible example of an obligation *erga omnes* which is not also peremptory. This suggests that the two are different aspects of a single underlying concept, Crawford further states.

Here it may be interesting to compare the views of Crawford on the relationship between peremptory norms and obligations *erga omnes* with those of Abi Saab and Pellet. Abi Saab contends that

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[71] *Barcelona Traction, Light and Power Company, Limited, (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment*, ICJ Reports 1970, p. 3, at p. 32, para. 33.
[72] *The Oxford English Dictionary* defines "aberration" as an unwelcome or unacceptable deviation from what is normal.
[73] Right resident in any member of the international community to take legal action in vindication of a public interest; *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment*, ICJ Reports 1966, p. 6, at p. 47, para. 88.
[74] J. Crawford, *supra* note 19.

obligations deriving from *jus cogens* norms are necessarily *erga omnes*, but the reverse is not true.[75] Pellet while discussing international crimes asks: if it is accepted that a crime is a breach of a norm of *jus cogens*, could it not be said as well that it is a breach of an *erga omnes* obligation? He adds that this would be debatable, since if all norms of *jus cogens* are certainly *erga omnes*, there is no reciprocity; one can think of many obligations *erga omnes* which could be seen as deriving from peremptory norms.[76] Here there seems to be a concurrence between Abi Saab and Pellet that *jus cogens* norms are necessarily *erga omnes* whereas Crawford has a nuanced view that obligations *erga omnes* and peremptory norms are two aspects of a single concept.

Chapter III of Part Two on Serious Breaches of Obligations

The second part of the lecture concerns serious breaches of obligations of peremptory norms of general international law to be found in Part Two of Chapter III. This chapter consists of two articles which represent progressive development of international law. In view of the importance of these two articles I shall quote them in full.

Article 40 provides:

(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.

[75] *Supra* note 60, at p. 348.
[76] *Supra* note 68, at p. 429. Pellet cites the example of the right of passage in international straits or international canals as a case of *erga omnes* obligation.

The commentary to Article 40 states that the two article chapter applies to those violations of international law that fulfil two criteria:

(i) the obligation breached must derive from a peremptory norm of general international law;

(ii) the breach must have been serious in nature.

As for the first criterion which relates to the character of the obligation breached, the article and the commentary state that the breach must concern an obligation arising under a peremptory norm of general international law whose definition has already been stated above. This norm known also as *jus cogens* is to be found in the VCLT. Just as in the Vienna Convention the commentary states that it is not appropriate to set out examples of peremptory norms referred to in Article 40. The commentary mentions the prohibition of aggression. It is noted that since the adoption of the definition of aggression in 1974 there has been progress in the last decade of extending the application of aggression to individuals through the Kampala amendments to the Rome Statute.

UN General Assembly resolution 3314 (XXIX) of 14 December 1974 defines aggression in Article 1 of the Annex to the resolution as:

"the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations…"

The ICC's Rome Statute Kampala amendment of 2010 defines the crime of aggression as:

"the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression

which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".

The UN General Assembly definition applies to aggression by States while the one by the States Parties to the Rome Statute applies to individuals. Thus for the first time since the Nuremberg and Tokyo trials an international court will be able to hold leaders individually criminally responsible for aggression.

To revert to Article 40 on serious breach, the second criterion for the application of the Draft Articles on State responsibility is the seriousness of the breach. Article 40(2) describes a "serious breach" as one which "involves a gross or systematic failure by the responsible State to fulfil the obligation" in question. Emphasis by States when reacting against breaches of international law has often stressed their systematic, gross or egregious nature. For it to be systematic, a breach would have to be carried out in an organized and deliberate way.[77]

Here one may pose to wonder if the introduction of the concept of serious breaches as opposed to minor breaches has not brought back the differentiation that was opposed when the Commission considered Article 19. The commentary argues that the ILC Articles do not recognize the existence of any distinction between State "crimes" and "delicts".[78] This is true in terms of terminology but in terms of substance it may be difficult to defend the criteria for establishing serious breaches from less serious ones. In addition to a certain lack of clarity surrounding the peremptory norms, the Commission has muddied the waters by using *jus cogens* to describe serious breaches. As already stated the circular nature of the definition of peremptory norms when it is linked to its non-derogable nature complicates matters. Now the addition of "serious breaches" has heightened the confusion of establishing the serious

[77] Commentary to Art. 40, para. 7.
[78] General commentary to Chapter III, para. 7.

breaches. The factors cited for establishing the seriousness of a violation include intention and the number of individual violations. These factors are no less subjective than those of Article 19. Worse, the commentary states that Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is an added uncertainty of identifying serious breaches. The Commission has set a complex threshold for identifying serious breaches. It may be less complicated to identify serious breaches such as genocide and aggression which by their nature are serious crimes. Other categories may prove more controversial.

The second article of Chapter III is Article 41 which provides for consequences of a serious breach of an obligation under Chapter III. It reads as follows:

> (1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> (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 to maintaining that situation.
>
> (3) This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Paragraph 1 of Article 41 provides that States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of Article 40. The form of such cooperation is not spelt out in the article. This lack of clarity adds to the uncertainty of the article. The uncertainty is compounded by the commentary expressing doubt about whether general international law at present prescribes a positive duty to cooperate.[79] It adds that paragraph 1 in that respect may reflect the progressive development of international law.

[79] Commentary to Art. 41, para. 3.

By paragraph 2 of Article 41 States are under a duty of abstention which comprises two obligations. First is the duty not to recognize as lawful a situation created by a serious breach within the meaning of Article 40. Second is the duty not to render aid or assistance in maintaining that situation. The commentary gives several examples of non-recognition of serious breaches arising under peremptory norms. One such example is the principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized. This principle found expression in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter which affirms this principle by stating that States shall not recognize as legal any acquisition of territory brought about by the use of force. The principles stated in the Friendly Relations Declaration are accepted as reflecting customary international law.

Conclusion

The issues raised by Article 19 of the ILC first reading Draft Articles of 1996 and incorporated into Article 40 of the second reading 2001 ILC Articles are of paramount importance to the progressive development of international law. We have to wait to see the acceptability of the 2001 ILC Articles on this matter by States and by international courts and tribunals.

LECTURE 3:

Circumstances Precluding Wrongfulness

Introduction

Circumstances precluding the wrongfulness of conduct for international responsibility is provided for in Chapter V of Part One of the 2001 ILC Articles on State responsibility (ARSIWA). The six circumstances covered are: consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). There are two other articles on compliance with peremptory norms (Article 26) and consequences of invoking a circumstance precluding wrongfulness (Article 27).

Circumstances precluding wrongfulness do not invalidate or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.[80] Crawford observes that the six circumstances accord with the premise underlying the 2001 ILC Articles that fault is objective rather than subjective.[81]

The commentary underlines the distinction between the effect of circumstances precluding wrongfulness and the termination of the obligation itself.[82] The circumstances operate as a shield rather than a sword. An illustration of the distinction is in the *Gabčíkovo-Nagymaros* case where the International Court noted that

> "even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may be invoked to exonerate

[80] General commentary to Chapter V of Part One, para. 2.
[81] J. Crawford, *State Responsibility — The General Part* (Cambridge University Press, 2013).
[82] General commentary, para. 2.

> from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a treaty; the Treaty[83] may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives".[84]

The concept of circumstances precluding wrongfulness goes back to the Preparatory Committee of the 1930 Hague Conference. The category of circumstances precluding wrongfulness was developed by the ILC in its work on international responsibility for injuries to aliens.[85] Roberto Ago's initial work on the six circumstances survived intact with slight modifications. For example, Article 31 of the first reading Draft Articles referred to "*force majeure* and fortuitous event"; the term "fortuitous event" was removed because the two terms denote the same thing. Crawford states that the Ago's list was influenced by Fitzmaurice's work on the law of treaties.[86]

In his comments Rosenstock stated that since States are the clients of the ILC's end product, the Commission should be sensitive to the comments of the international community. He added that with respect to circumstances precluding wrongfulness, they demonstrate that States' freedom to look out for themselves should have priority over community mechanisms or concerns.[87] The arguments by Rosenstock can be misleading. In the first instance, while it is true that States are the consumers of the ILC end-product, it has to be stated that by the nature of things, a majority of the

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[83] 1977 Treaty between Hungary and Czechoslovakia.
[84] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, ICJ Reports 1997, p. 7, at p. 63, para. 101.
[85] F.V. García Amador, "First Report on State Responsibility", *Yearbook of the ILC 1956*, vol. II, p. 173, at pp. 203–209.
[86] J. Crawford, *supra* note 81, at p. 276.
[87] R. Rosenstock, "The ILC and State Responsibility", 96 *American Journal of International Law* (2002), p. 792.

UN Member States do not comment on ILC drafts either in writing to the Commission or orally in the Sixth Committee. This is due to competing priorities among especially the developing countries which constitute the majority of the international community. A question of limited capacity to comment on the ILC drafts makes it inevitable that only the views of the developed States are heard and thus influence the work of the Commission. As a former member of the Commission for ten years, I can testify to this reality.

Secondly, Rosenstock's argument about freedom of States to look out for themselves evokes the concern of power triumphing over justice. This is unacceptable in a globalized world based on the equality of States. Rosenstock's approach on this matter and on countermeasures reflects the unwelcome face of power politics and not the international rule of law.

In this regard, it was suggested by Professor Lowe that the Commission should have placed more emphasis on treating the six exceptions to wrongfulness as excuses for conduct that remains wrongful rather than as "circumstances precluding wrongfulness".[88] Rosenstock responds to the Lowe's approach by arguing that while it might make it harder and more costly for the responsible States to cross the line, it seems problematic and would find little support among States. For example, not many States would agree that self-defence is wrongful in any sense.

This argument is pursued from a different angle by Crawford[89] who reacts to Lowe's exculpation or excuses approach by stating that, to have left the wrongful circumstances topic out of the ARSIWA would have left States without the clear guidance the Articles were intended to provide. As a result, there is no categorical distinction between justifications and excuses to the ARSIWA.

[88] Vaughan Lowe, "Precluding Wrongfulness or Responsibility: A plea for excuses", 10 *European Journal of International Law* (1999), p. 405.
[89] J. Crawford, *supra* note 81.

It would seem that there is no agreement among commentators on which would have been the best approach to circumstances precluding wrongfulness. For example, Stern thinks that it would have been better to provide that what is at issue are not circumstances precluding wrongfulness but circumstances precluding responsibility, in spite of wrongfulness.[90]

Consent

I shall now consider the six circumstances precluding wrongfulness in turn, starting with consent.

Article 20 provides that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of the consent". Whereas States can terminate or suspend a treaty by consent, what is stated in Article 20 implies the primary obligation continues to govern relations between the two States. They dispense with it only for the particular purpose consented to.[91]

It may be noted that the examples on consent in the Draft Articles relate to primary rules that are not framed in absolute terms. An example is the 1960 breakaway of Katanga province from the rest of the Congo. It proclaimed independence under Moise Tshombe, who with the support of *Union Minière du Haut Katanga*, a Belgian mining company, invited Belgian troops to protect his breakaway republic. The question arose whether a regional authority could validly express consent or whether such consent could only be given by the central government for the intervention of foreign troops in the Congo. The matter was not resolved by the UN Security Council. The example of the Katanga secession raises

[90] B. Stern, *supra* note 40, at p. 218.
[91] J. Crawford, *supra* note 81, at p. 283.

the question of who has the authority to validly give consent. The principles in the Vienna Convention on the Law of Treaties (VCLT) concerning the validity of consent to the conclusion of treaties may be helpful. Part II of the VCLT, in particular Article 7 (full powers), and different forms of consent to be bound by a treaty in Articles 12, 13, 14, and 15 are relevant.

Another example from the same Congo concerned the presence of Ugandan troops in what had become the Democratic Republic of the Congo (DRC). The ICJ noted that the consent by the DRC to the presence of Ugandan troops was not open-ended. It was to assist against rebels operating across the common border. The Court added that no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil.[92]

Self-Defence

Article 21 states that the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations. It reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law.[93] The reference is to action "taken in conformity with the Charter of the United Nations". The negative formulation to be found in the first reading's Article 34: "not in conformity with an international obligation of that State" has been deleted from the final text.

Crawford speaks of the seeming incongruity of Article 21 due to the fact that States that are acting in self-defence are not even potentially in breach of the UN Charter Article 2(4). He adds that

[92] *Armed Activities on the Territory of the Congo (DRC* v. *Uganda), Judgment*, ICJ Reports 2005, p. 168, at pp. 196–199.
[93] Commentary to Art. 21, para. 6.

the "inherent right" to act is part of the primary obligation which does not belong to circumstances precluding wrongfulness.[94] Thus Article 21 simply reflects the basic principle of the circumstances in Chapter V and leaves the extent and application of self-defence to the applicable primary rules referred to in the Charter. The main drawback of Article 21 is its wholesale incorporation of primary rules of the UN Charter which do not belong to circumstances precluding wrongfulness.

Countermeasures

Article 22 concerns countermeasures in respect of an internationally wrongful act. It will be recalled that a suggestion was made to delete the chapter on countermeasures and to strengthen the article on the preclusion of the wrongfulness of an act of a State if it constitutes a countermeasure. Such a move would have eliminated the confusion on countermeasures brought about by their bifurcation into two different parts of the ARSIWA. Unfortunately, the idea was not accepted by the Commission which decided not to "overburden Article 23 (now Article 22) with additional countermeasures which could make it incomprehensible."[95] The complicated situation is illustrated by paragraph 6 of the commentary to Article 22. It is stated that if Article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures, and the status of certain fundamental obligations which may not be subject to countermeasures. As this is not the case, it is sufficient to make a cross-reference to Chapter II of Part Three on countermeasures. Thus Article 22 covers action which qualifies as a countermeasure in accordance with those conditions.

[94] J. Crawford, *supra* note 81.
[95] Report of the ILC, *supra* note 8, at p. 23, para. 55.

An added complication is the commentary[96] asking whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed by the obligation which has been breached. The commentary notes that the ICJ has affirmed that in the case of an obligation owed to the international community as a whole, all States have a legal interest in compliance. Article 54 leaves open the question whether any State may take measures to ensure compliance with certainty in this situation. The commentary concludes that "[w]hile Article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility".[97] This is not a very helpful commentary in interpreting Article 22, to put it mildly!

The examples given in paragraphs 3–5 of the commentary on reprisals are unfortunate. In paragraph 3 it is stated that the term "reprisals" is now no longer widely used because of its association with the law of belligerent reprisals involving the use of force. Preference is given to the term "countermeasures". However, the commentary gives further examples from cases of reprisals taken against the provoking State and a case of belligerent reprisals rather than countermeasures in the sense of Article 22. I am of the view that there seems to be no useful purpose served by these examples.

Force Majeure

Article 23 deals with *force majeure*. It is a situation involving compulsion to act in a manner not compatible with an international obligation. *Force majeure* differs from distress (Article 24) or necessity (Article 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary.[98]

[96] Commentary to Art. 22, para. 6.
[97] *Ibid.*
[98] Commentary to Art. 23, para. 1.

Force majeure requires three elements. First, the act in question must be brought about by an irresistible force or an unforeseen event. Secondly, the situation is beyond the control of the State concerned. Thirdly, the situation must make it materially impossible in the circumstances to perform the obligation.[99]

The "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility. Material impossibility giving rise to *force majeure* may be due to a natural or physical event. Examples include earthquakes, floods or drought, or weather stress which may force aircraft into the airspace of another State.

The circumstances precluding wrongfulness in the context of Article 23 can be compared to that under the VCLT's Article 61 on supervening impossibility of performance. According to the commentary[100] the degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by Article 61 of the VCLT for termination of a treaty on grounds of supervening impossibility, as the ICJ pointed out in the *Gabčíkovo-Nagymaros* case.[101] In other words, the bar for material impossibility under the ARSIWA Article 23 is lower than that of terminating or suspending a treaty under Article 61 of the VCLT.[102]

Examples given of *force majeure* include those from the law of the sea. In Article 18(2) of the UN Convention on the Law of the Sea (UNCLOS) in relation to innocent passage it is stated that:

> "Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary

[99] *Ibid.*, para 2.
[100] *Ibid.*, para 4.
[101] *Gabčíkovo-Nagymaros Project*, *supra* note 84, at p. 63, para. 102.
[102] Crawford, *supra* note 81, at p. 299.

by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress" (emphasis added).

Here *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in this case helps to confirm the existence of a general principle of international law to similar effects.[103]

An important principle is stated in the case of *Libyan Arab Foreign Investment Company v Republic of Burundi*[104] where the arbitral tribunal rejected a plea of *force majeure* because the alleged impossibility was not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility was the result of a unilateral decision of that State. Thus the principle here is that a State may not invoke *force majeure* if it has caused or produced the situation in question.

Distress

Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care.[105] The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Distress is distinct from *force majeure* in that, first, it precludes wrongfulness of *voluntary* acts. Whereas *force majeure* requires material impossibility, in distress the author of the act has no real choice than to breach an obligation. Second, it deals with a specific act by individuals.

[103] Commentary to Art. 23, para. 6.
[104] 96 *International Law Reports* (1994), p. 279.
[105] Commentary to Art. 24, para. 1.

Article 24(1) states that:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care".

Hence the article is limited to cases where human life is at stake. Although historically practice has focused on cases involving ships and aircraft, Article 24 is not limited to such cases. The *Rainbow Warrior* arbitration[106] involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France invoked circumstances of distress to justify its conduct in removing the two officers from the island of Hao. The arbitral tribunal accepted the plea.

As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed even if indirectly to the situation. Priority should be given to necessary life-saving measures; however, under Article 24(2)(a) distress is only excluded if the situation of distress is due to the conduct of the State invoking it.

Necessity

The last circumstance precluding the wrongfulness of conduct is distress in Article 25. Necessity is the most controversial of the six circumstances.[107] Brownlie states that necessity as an omnibus category probably does not exist and its availability as a defence is circumscribed by fairly strict conditions.[108]

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[106] *Reports of International Arbitral Awards*, vol. XX (1990), p. 215.
[107] J. Crawford, *supra* note 81, p. 274.
[108] I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008), p. 466.

The importance and hence the controversy of "distress" in Article 42 is attested to by the 21 paragraphs devoted to the provision. It is a provision subject to abuse. For example, the commentary cites the case where the German Chancellor in 1914 sought to justify the occupation of Luxembourg and Belgium by Germany when he spoke in the Reichstag and stated that: "we are in a State of self-defence and necessity knows no law".[109]

The article is formulated in the negative to emphasize the exceptional nature of necessity.[110] It mirrors the language of Article 62 of the VCLT on fundamental change of circumstances. Article 25(1) contains three requirements: (i) the act in question is the *only means* for a State; (ii) an *essential interest* is safeguarded by the act; (iii) a grave and imminent peril exists. The article lays down two conditions without which necessity may not be invoked. The first condition laid down in Article 25(1)(a) is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The second condition is set out in Article 25(1)(b). The conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole. In this regard, paragraph 18 of the commentary to Article 25 refers to a matter of terminology. It refers to the "international community as a whole" rather than the "international community of States as a whole" which is used in the specific context of Article 53 VCLT. This was meant to stress the pre-eminence of States in the making of international law.

Among the examples cited in the commentary about necessity protecting the State and the environment is the 1967 *Torrey Canyon* incident where a Liberian tanker ran aground outside British territorial sea off the coast of Cornwall. The British Government decided to bomb the ship and to burn the remaining oil. This was

[109] Commentary to Art. 25, para. 2 and fn. 398, translation from German: "*wir sind jetzt in der Notwehr; und Not kennt kein Gebot!*".
[110] *Ibid.*, para 14.

done in view of the existence of a situation of extreme danger and after all other means had failed. The *Torrey Canyon* incident resulted in the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution.

Conclusion

The circumstances precluding wrongfulness considered above have contributed to both codification and progressive development of international law. Some of them, such as necessity, remain controversial. The other two articles (26 and 27) in Chapter V concern compliance with peremptory norms and consequences of invoking a circumstance precluding wrongfulness respectively.

LECTURE 4:

The Invocation of the Responsibility of State

Introduction

The invocation of the responsibility of States is provided for in Part Three as Implementation of the International Responsibility of a State. Chapter I which comprises seven articles specially focuses on the invocation of responsibility of a State. Chapter II consisting of six articles is on countermeasures. In considering countermeasures, I am mindful of the fact that they are also being dealt with by another lecturer. This lecture will discuss the issues raised in Part III of the ILC Articles on the responsibility of States.

Meaning of Invocation

Invocation is defined as "taking of measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal".[111] Mere criticism of the responsible State or protest and other informal diplomatic contacts do not constitute invocation. Specific claims by the injured State such as for compensation or the filing of an application before a competent international tribunal is necessary for the invocation of responsibility.

The question of terminology may be confusing. Part III uses the term "the implementation of the international responsibility" of a State. Implementation is the giving effect to the obligation of cessation and reparation which arise for a responsible State under Part Two by virtue of a commission of an internationally wrongful

[111] Commentary to Art. 42, para. 2.

act.[112] Implementation is also invocation. Thus even though the term "invocation" is the title of Chapter I it applies equally to Chapter II which is titled "countermeasures" which are taken in order to induce the responsible State to cease the conduct in question and to provide reparation. Hence although State responsibility arises under international law independently of its invocation by another State, it is necessary to specify what the injured State may do to secure the obligations of cessation and reparation on the part of the responsible State.[113]

The Injured State and Other Interested States

The concept of the injured State is central to the invocation of State responsibility.[114] In its 2001 Articles, the ILC has come up with a fundamental distinction between invocation by an injured State (Article 42) and invocation of responsibility by other States (Article 48). Article 42 codifies the traditional concept of injured State in State responsibility while Article 48 is progressive development of international law. It is a distinction of the traditional bilateralist approach and the multilateralist approach. Both approaches are to be found in the Vienna Convention on the Law of Treaties (VCLT). This distinction is different from the first reading approach by the ILC where it adopted a unitary way to define injured State. This was unwieldly in that "injured State" combined the injured State in the traditional sense and an injured State in the general sense. For example, Article 40(3) of the first reading text states that "injured State" means, if the internationally wrongful act constitutes an international crime, all other States.

The injured State in the traditional sense is in Article 42 of the 2001 ILC Articles on State responsibility. It is the State whose

[112] See general commentary to Part Three.
[113] *Ibid.,* sometimes referred to as the *mise en œuvre* of State responsibility.
[114] See general commentary to Part III, para. 2, and J. Crawford, *supra* note 74.

individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. In this context, a State may be considered injured in three situations. First is where the obligation is owed to it individually under a treaty or under customary law. Second is a multilateral obligation in circumstances where the breach specially affects that State (Article 42(b)(i)). This is said to be the direct parallel and corollary of Article 60(2)(b) of the VCLT where a State is entitled to suspend a multilateral treaty for a material breach. Third case is that where the performance of the obligation by the responsible State is a necessary condition of its performance by other states (Article 42(b)(ii) — the so-called "integral" or "interdependent" obligation developed by Fitzmaurice as Special Rapporteur on the law of treaties. An analogy with the law of treaties is provided by Article 60(2)(c).[115]

Article 48 by contrast with Article 42 makes provision for invocation in the absence of any direct form of injury where the obligation breached is for protecting the collective interests of a group of States. As Article 48 represents a new concept it is worth quoting in full:

> **Article 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; or

[115] Commentary to Art. 42, para. 5, and J. Crawford, *supra* note 74.

(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

The above Article 48 complements Article 42 by providing for the invocation of responsibility by States other than the injured State acting in the collective interest.[116] Article 48 provides for the invocation of responsibility in the absence of any direct form of injury where the obligation breached is one to protect the collective interests of a group of States (Article 48(1)(a) and the obligation owed to the international community as a whole (Article 48(1)(b)). This is a radical innovation by the ILC from the classical approach of State responsibility which was based on injury to individual State's interests. The innovation in Article 48(1)(b) draws from the well-known *dictum* of the *Barcelona Traction* case.[117] The ICJ noted in that case that "all States can be held to have *a legal interest* in the fulfilment of these rights" (emphasis added). It may be here stated that the commentary observes that Article 48 refrains from qualifying the position of States identified in that article

[116] Commentary to Art. 48, para. 1.

[117] *Barcelona Traction, Light and Power Company, Limited*, supra note 71, at p. 32, para. 33.

by referring to them as "interested States" as the term would not permit a distinction between Articles 42 and 48, as injured States in the sense of Article 42 also have legal interests.[118]

On this question of legal interest, as already stated, in the *Barcelona Traction* case the ICJ drew attention to "an essential distinction" between obligations owed to particular States and those "owed towards the international community as a whole". By this position, the Court corrected the error of the earlier *South West Africa*[119] cases. The term "legal interest", in my view, should have been included in Article 48 rather than a mere reference to collective interest. A cross-reference to Article 42 to ensure injured States there having legal interests would have clarified the situation.

Through treaty making the international community has managed to overcome the earlier legal conundrum created by case law. For example, the Permanent Court in the *Lotus* case[120] held that France as the flag State and Turkey as the injured State had jurisdiction over the officers of the *Lotus* for a fatal collision on the high seas between two vessels. This ruling was "reversed" by paragraph 1 of Article 97 of the UN Convention on the Law of the Sea (UNCLOS). The UNCLOS provision states that in case of a collision on the high seas, no penal proceedings may be instituted against the crew except by the flag State or the State of nationality of the persons concerned. I am citing this UNCLOS provision to illustrate how an international legal instrument can erase the negative effects of a long-standing international judicial ruling. This was also the case in the *South West Africa* cases which situation was reversed by the Court itself in the *Barcelona Traction* case and through the ARSIWA in 2001 ILC Articles. In my view, it would have been better if the "legal interest" aspect had been included in Article 48.

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[118] Commentary to Art. 42, para. 2.
[119] *South West Africa Cases, (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment*, ICJ Reports 1962, p. 319; *South West Africa*, *supra* note 73.
[120] S.S. "*Lotus*" (*France* v. *Turkey), Judgment*, 1927 PCIJ (Ser. A) No. 10.

The commentary to Article 48 has clarified the dictum in the *Barcelona Traction* case by avoiding the term obligations *erga omnes* which is less clear than the Court's reference to the international community as a whole.[121] In this regard, there is some lack of clarity in the terminology of "international community as a whole". The commentary notes that the phrase "international community as a whole" is sufficient rather than "international community of States as a whole" which was used in Article 53 of the VCLT "in order to stress the paramountcy that States have over the making of international law, including especially the establishment of a peremptory character".[122]

Whereas Articles 42 and 48 are the anchors of Chapter I of Part Three of the articles on the invocation of State responsibility, in between there are related questions of the requirement of notice (Article 43), admissibility of claims (Article 44), loss of the right to invoke responsibility (Article 45), plurality of States entitled to invoke responsibility (Article 46), and plurality of responsible States (Article 47). These articles generally codify international law and are relatively straight forward.[123] I shall consider each article in turn.

Article 43 is on notice of claim by the injured State. It applies to the injured State defined in Article 42 and to States invoking responsibility under Article 43. It is analogous to Article 65 of the VCLT which is on procedures for the invalidity, termination, withdrawal from or suspension of the operation of a treaty. Notice under Article 43 need not be in writing. Importantly the articles do not specify the form in which an invocation on State responsibility should take. In *Certain Phosphate Lands in Nauru*,[124] the evidence of the communications from the claimant State took the form of

[121] Commentary to Art. 48, para. 9.
[122] Commentary to Art. 25, para. 18.
[123] E.B. Weiss, "Invoking State Responsibility in the Twenty-First Century", 96 *American Journal of International Law* (2002), p. 798.
[124] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment*, ICJ Reports 1992, p. 240, at p. 253, para. 31.

press reports of speeches or meetings rather than formal diplomatic correspondence.

Article 44 is on admissibility of claims. This is a matter more suited to diplomatic protection. But the commentary to the article specifies that the Articles on State responsibility do not deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings.[125] Two requirements are dealt with in Article 44: the requirements of nationality of claims and exhaustion of local remedies. The commentary points out that the present articles are not concerned with jurisdiction or with conditions for admissibility of cases. Rather they define the conditions for establishing international responsibility of a State and for the invocation of that responsibility by another State or States. In the case of Article 44, the local remedies must be available and effective. The article leaves details on the topic of exhaustion of local remedies to the applicable rules of international law. In this regard, it would be interesting to test the ITLOS concept of a ship as a unit concerning the rights and obligations of the flag State which regards "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[126]

Article 45 concerns the loss of the right to invoke responsibility. It is analogous to Article 45 of the VCLT. The right to invoke responsibility may be lost by waiver and acquiescence in the lapse of the claim. Waiver must be validly given for it to be effective. For waiver to be inferred from the conduct of a State it must be unequivocal. As for acquiescence, the article emphasizes the State's conduct validly acquiescing in the lapse of the claim. Mere lapse of time is not enough to amount to acquiescence. The

[125] Commentary to Art. 44, para. 1.
[126] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment*, ITLOS Reports 1999, p. 10, at p. 48, para. 106.

relevant tribunal must determine the circumstances of each case. But generally, lapse of time is not a ground for inadmissibility of the claim. In the *Norstar* case between Panama and Italy, a lapse of 20 years had taken place before the claimant State commenced proceedings.

Concerning the plurality of injured States in Article 46 each injured State may seek cessation of the wrongful act if it is continuing and claim reparation in respect of the injury to itself.[127] Where there is more than one injured State each State will be limited to damage actually suffered. In Article 47 where there is a plurality of responsible States each State is separately responsible for the conduct attributable to it. Under the principle of independent responsibility each State is responsible for conduct attributable to it in the sense of Article 2 of the ILC Articles on State responsibility. Article 47(2) addresses the question of double recovery by the injured State. The provision protects the responsible States to compensation to the damage actually suffered.

Countermeasures

I now address the question of countermeasures which is in Chapter II of Part Three. Countermeasures, as already stated above, are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing[128] and to provide reparation to the injured State.[129] Countermeasures are not meant to be a punishment for wrongful conduct. The aim is to induce the restoration of a condition of legality between the injured State and the responsible State.[130]

[127] Commentary to Art. 46, para. 2.
[128] Article 30 in Chapter I of Part Two. See commentary to Art. 49, para. 1.
[129] Article 31 in Chapter I of Part Two.
[130] Commentary to Art. 49, para. 7.

Legitimacy of Countermeasures

By their nature countermeasures, in general, can be taken by the powerful States which have political, economic and military might to pressurize the less powerful. This point is clearly stated in the general commentary to Chapter II of Part Three where it is stated that "[l]ike other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequality between States".[131] In order to complete the picture, it must be also stated that even the weak States at times are tempted to take countermeasures against their weak counterparts. This may happen, for example, in the context of access of landlocked developing States to and from the sea under Part X of UNCLOS.

Because of the countermeasures' controversial background, their exceptional and temporary nature needs to be underscored. In order to curb the propensity for the abuse of countermeasures, certain limitations have been put on them (Article 49); certain obligations are not affected by countermeasures (Article 50); countermeasures are subject to the proportionality principle (Article 51); they are subject to certain conditions (Article 52); and they must be terminated at the appropriate time (Article 53).

Countermeasures have to be distinguished from some related concepts such as reprisals. The commentary adopts that part of reprisals not associated with armed conflict. Here, I am of the view that given the controversial nature of countermeasures the term "reprisals" should not have been associated with countermeasures. This is despite Article 50(1)(c) providing that countermeasures shall not affect obligations of a humanitarian character prohibiting reprisals. The commentary states that Article 50(1)(c) is modeled on the VCLT Article 60(5) which prohibits reprisals against individuals. In other words, reprisals associated with armed conflict are left open. This is an unfortunate situation in the context of countermeasures.

[131] *Ibid.*, para. 2.

Crawford poses questions after describing countermeasures as measures otherwise unlawful, taken against another State by way of response to an unlawful act by that State. He asks why an injured State should be able to ignore international law obligations towards another State because it has been wronged. He suggests that the injured State should be required to pursue remedies "including retorsion, otherwise unfriendly but lawful conduct such as suspension of trade or diplomatic relations, economic boycotts etc."[132] Indeed what Professor Crawford states is what those who were opposed to countermeasures argued in the Commission. They argued that countermeasures provided a superficial legitimacy for bullying small States, creating a "do-it-yourself" sanctions system which threatens the security system based on the UN Charter.[133] They added that the wrongfulness of countermeasures having been excluded by Article 22 of the ARSIWA there should have been no elaboration of a separate chapter in Part Three for these measures. The safeguards against the misuse of countermeasures were deemed inadequate.

What was put in place such as in Article 50 on obligations not affected by countermeasures was criticized by opponents of these measures. Article 50 concerns non-forcible countermeasures. The article is formulated in a "neutral" manner. It states that:

"Countermeasures shall not affect:

(a) the obligations 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;

[132] J. Crawford, *supra* note 74, at para. 53.
[133] Report of the ILC, *supra* note 8, at p. 23, para. 54.

(d) other obligations under peremptory norms of general international law".

During consideration of the countermeasures in the ILC, proposals by some members for inclusion of specific provisions to protect potential victims of countermeasures were not accepted. For example, a proposal for the prohibition of extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act was rejected. A positive formulation along the lines of these proposals would have been helpful in alleviating the negative effects of countermeasures. However, even a mere reference to the prohibition of conduct which would undermine the sovereignty, independence, or territorial integrity of States was not accepted.

In the ILC it was suggested that the proportionality provision in Article 51 would cover the situation of concern against abuse of countermeasures. Article 51 provides that countermeasures must be commensurate with the injury suffered. This principle was stated in the *Gabčíkovo-Nagymaros* case where the ICJ held that Czechoslovakia failed to respect the proportionality which is required by international law by diverting the Danube to the detriment of Hungary.[134] In my opinion, one has to be wary with concepts such as proportionality or necessity which have a subjective element when they are applied to countermeasures.

The procedural conditions in Article 52 point in the right direction. The first requirement is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. They should not be taken before the other State is given notice of a claim and some opportunity to present a response. In this regard, the reference to "provisional countermeasures" was deleted by the ILC drafting committee. This eliminated unnecessary confusion in an already

[134] *Gabčíkovo-Nagymaros Project*, *supra* note 84, at pp. 56–57, paras. 85, 87.

complex field of countermeasure. As for Article 52(2) reference to "urgent" countermeasures, the Special Rapporteur observed that the distinction between "urgent" and "definitive" countermeasures "does not correspond with existing international law".[135]

In the spirit of the Crawford musings above,[136] the question may be asked why the ILC 2001 Articles provide for countermeasures by States which are not directly affected. Article 54 provides for "measures" by States other than an injured State. In an effort to ameliorate the effect of countermeasures Article 54 uses the phrase "lawful measures" which is explained in the commentary.[137] It is stated that the article speaks of "lawful measures" rather than "countermeasures" so as not prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole. In the process the ILC creates confusion with measures envisaged by Chapter VII of the UN Charter in Articles 39–42.[138] Stating in the commentary that the situation envisaged by the UN Charter's Chapter VII is not covered by the Articles in view of the Article 59 saving clause is not helpful. As if this confusion was not bad enough, commentary to Article 54 elaborates on a practice by States that may amount to a breach of treaties. For example, in the case of collective measure against Yugoslavia in 1998 the UK explained its breach of bilateral agreements as a fundamental change of circumstances which gave rise to the suspension of the treaty due to the humanitarian crisis in Kosovo. The same reasoning was used by the Netherlands in 1982 for suspending a bilateral treaty due to the violations in Suriname of human rights.

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[135] UN Doc. A/CN.4/517 (2 April 2001), para. 69.
[136] *Supra* note 22.
[137] Commentary to Art. 54, para. 7.
[138] Article 39 states that the Security Council may decide what measures shall be taken in accordance with Arts. 41 and 42. If the measures envisaged in Art. 41 prove inadequate, it may take action.

My last point on countermeasures concerns their link to compulsory dispute settlement. Some members of the ILC suggested the retention of Part Three from the first reading text on dispute settlement in order to tone down the complex nature of countermeasures.[139] Those opposed to the linkage of countermeasures to compulsory dispute settlement seized the provision in the 1996 first reading Articles which allowed the responsible State to unilaterally submit the dispute to an arbitral tribunal. If the logic of the argument I made above that countermeasures will be taken by the powerful States against the weak States — and the commentary acknowledges this possibility — holds true, I do not see what is wrong with the State against which countermeasures are taken unilaterally submitting the dispute to an arbitral tribunal. The ILC missed the opportunity to rectify its rejection of dispute settlement in general in respect of the whole text of the ILC. It should have been accepted for dispute settlement for countermeasures.

Conclusion

Invocation of State responsibility is a crucial aspect in the scheme of the topic. Equally, countermeasures are a prominent chapter and may be the most controversial part of the whole subject of State responsibility. It is still a developing subject. And, as the commentary notes, "the current state of international law on countermeasures taken in the general or collective interest is uncertain".[140] State practice is sparse and involves a limited number of States. The commentary adds: "At present, there appears to be no clearly recognized entitlement of States referred to in Article 48 to take countermeasures in the collective interest".[141]

[139] Article 58 of the first reading Articles. The dispute settlement system envisaged negotiation, mediation, conciliation and arbitration (Arts. 54–60 and Annexes 1 and 20).
[140] Commentary to Art. 54, para. 6.
[141] *Ibid.* It concludes that the saving clause in Art. 54 reserves the position and leaves the resolution of the matter to the further development of international law.

LECTURE 5:

Principles of Cessation and Reparation and the Forms of Reparation

Introduction

This lecture deals with the principles of cessation and reparation and the forms of reparation. These issues form the subject-matter of Part Two of the 2001 ILC Articles on State responsibility. Part Two comprises three chapters, two of which are on general principles (Articles 28–33) and reparation for injury (Articles 34–39). Chapter III on serious breaches of obligations under peremptory norms of general international law is dealt with elsewhere as a full lecture.

General Principles

Certain consequences flow as a matter of law on the commission of an internationally wrongful act:[142]

(a) cessation and non-repetition (Article 30)

(b) the obligation to make reparation (Article 31).

Many responsibility claims are more concerned with continued performance than with reparation. A State under a specific obligation does not have an option to pay damage instead of performance. For example, under the WTO dispute settlement system compensation plays a lesser role than cessation of the breach.[143]

The articles on general principles were uncontroversial. The responsible State is under a duty to continue to perform the obligation

[142] J. Crawford, *supra* note 57, at p. 28.
[143] *Id., supra* note 74, at para. 23.

breached (Article 29) and to cease the wrongful act (article 30). That State is also under an obligation to make full reparation for the injury caused, whether material or moral, caused by its wrongful conduct (Article 31). It may not plead its internal law as an excuse for failure to comply with these obligations (Article 32).

Two controversies arose. The first concerned the concept of assurances and guarantees of non-repetition. On first reading they were included among the forms of reparation but on second reading they were considered as an aspect of cessation rather than reparation. Crawford[144] writes that like cessation, but unlike reparation, assurances and guarantees can only be demanded if the obligation is still in force. He cites the *LaGrand* case between the USA and Germany.[145] The case concerned the breach by the US of Article 36 of the Vienna Convention on Consular Relations (VCCR). The ICJ held that the offered apology by the US was insufficient but that it had done enough to satisfy Germany's request of a general assurance of non-repetition.[146]

The second controversy concerned the definition of "damage" for the purposes of reparation. In the ILC debate, Special Rapporteur Arangio-Ruiz had argued for a distinction between moral damage to individuals and moral damage to the State, the latter being an aspect of satisfaction. This was problematic. In the end, the ILC settled for an inclusive approach to the term. Thus "injury" in Article 31(2) includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[147] Material damage is damage to property or other interests of a State and its nationals which is assessable in financial terms. Moral damage includes such things as individual pain and suffering, loss of loved ones, or personal affront associated with intrusion on one's home or private life.[148]

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[144] *Ibid.*, para. 25.
[145] *LaGrand Case (Germany* v. *USA), Judgment*, ICJ Reports 2001, p. 466, at pp. 512–513, paras. 124, p. 516, para. 128.
[146] See commentary to Art. 30, para. 9.
[147] See commentary to Art. 31, para. 6.
[148] Commentary to Art. 31(2), para. 5. See also paras. 6 and 7 of the commentary.

Forms of Reparation

Chapter II of Part Two elaborates the forms which reparation by the responsible State may take. Article 34 states that full reparation for the injury caused by the internationally wrongful act "shall take the form of restitution, compensation and satisfaction". Restitution is the primary form of reparation. In accordance with Article 34, restitution is the first form of reparation available for a State injured by an internationally wrongful act.[149] If restitution is materially impossible or would involve a burden out of all proportion to the benefit deriving from restitution there is no obligation to make restitution (Article 35). If restitution is unavailable or insufficient to ensure full reparation, compensation is payable for financially assessable loss (Article 36). The responsible State is under obligation to give satisfaction where injury cannot be made good by either restitution or compensation (Article 37).

Article 38 on interest was added on the second reading. The article does not mention compound interest but the commentary refers to the debate on this matter in the Commission. In practice international courts and tribunals award compound interest. A case in point is the ITLOS cases of *Virginia G* and the *Norstar*.

Article 39 deals with contribution to the injury by the injured State. This may be taken into account in determining reparation. It is also implicated in some cases by the duty to mitigate one's loss.[150] An example is the *LaGrand* case — already mentioned above — where the ICJ noted that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting the breach of Article 36 of the VCCR and in instituting proceedings. The Court observed that Germany could be criticized for the manner and timing of the submission of the proceedings. This factor would have been taken into account if Germany had claimed indemnification.

[149] Commentary to Art. 35, para. 1.
[150] J. Crawford, *supra* note 2.

It is to be noted that mitigation concerns conduct after damage has occurred while contribution concerns conduct which occurs at the time of the breach or the original infliction of damage.

The above is a nutshell presentation of the gist of cessation and reparation aspects of State responsibility. I shall now expand on some of the issues raised above.

The Basic Principle

The Permanent Court classic statement in the *Chorzów Factory* case of the consequences of an internationally wrongful act has become a standard principle which is quoted often in jurisprudence. The Permanent Court said:

> "It is a principle of international law that a breach of an engagement involves an obligation to make reparation in an adequate form".[151]

This Chorzów *Factory* case by Germany against Poland developed the essence of the obligation in a subsequent phase:

> "The essential principle ... is that 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".[152]

The above obligation to make reparation with emphasis on restoring the status *quo ante* has been reaffirmed many times by the ICJ.[153] It has also been adopted by the International Tribunal for the Law of the Sea (ITLOS) in its jurisprudence starting with its

[151] *Factory at Chorzów, Jurisdiction, Judgment*, 1927 PCIJ (Ser. A) No. 9, at p. 21.
[152] *Factory at Chorzow*, Merits, Judgment, 1928 PCIJ (Ser. A) No. 17, at p. 47.
[153] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 40, at p. 232; *Ahmadou Sadio Diallo (Guinea* v. *DRC), Merits, Judgment*, ICJ Reports 2010, p. 639, at p. 691, para. 161.

first merits case of the *M/V "Saiga" (No. 2)* case[154] and in subsequent cases of *M/V "Virginia G"*[155] and the *M/V "Norstar"*.[156]

"Full" Reparation

Crawford, the last Special Rapporteur on the topic of State responsibility, has written extensively on the topic. He is the eminent authority on the subject. In his book[157] he analyses the issue of full reparation in detail.

On the question of "full" reparation, during the ILC debate of the ARSIWA, some members raised concern about the obligation to pay "full" reparation. It was contended that what was required was not "full" but "as much reparation as possible". It was also contended that in determining reparation due, a responsible State's ability to pay should be taken into account. It was decided by the Drafting Committee of the ILC not to add the qualifier "full" to reparation although it was understood that the obligation to provide "full reparation" only requires the elimination of the consequences of the wrongful act "as far as possible" as stated in the *Chorzów Factory* case.

In spite of the "neutral" drafting by the Commission's Drafting Committee, members of the ILC continued to express their concern on the question of ability to pay reparation. Some members who were concerned about the developing countries' ability referred to an earlier ILC draft which stated that reparation should not result in depriving the population of a State of its own means of subsistence.[158] The main concern was the potentially crippling

[154] *Supra* n. 126, at p. 65, para. 170.
[155] *M/V "Virginia G"* (*Panama* v. *Guinea-Bissau*), Judgment, ITLOS Reports 2014, at p. 4, at p. 116, para. 428.
[156] *M/V "Norstar"* (*Panama* v. *Italy*), ITLOS Judgment of 10 April 2019, para. 319.
[157] J. Crawford, *supra* note 81.
[158] Article 42(3) of the first reading Draft Articles (1996) states: "In no case shall reparation result in depriving the population of a State of its own means of subsistence".

effect of compensation payments.[159] The commentary to Article 50 (obligations not affected by countermeasures) of the ARSIWA (paragraph 7) cites common Article 1(2) of the 1966 UN Covenants on Human Rights[160] which states that "[i]n no case may a people be deprived of its own means of subsistence".

Here one may refer to the ITLOS Advisory Opinion of 2011.[161] The Seabed Disputes Chamber rejected the notion of different treatment between developed and developing countries with respect to the obligations of sponsoring States for contractors in deep seabed mining. It was held that the notion of differentiated treatment could be abused by relocation of seabed mining contractors to the developing countries. It is only in the case of the precautionary approach — which has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration — where there could be differentiated treatment according to the country's ability.[162]

Confusion in Terminology

We have seen the importance of Article 30's cessation of an internationally wrongful act — according to Article 2 of ARSIWA the word "act" covers both acts and omissions — and the linked question of assurances and guarantees. The duty of restitution as a form of reparation under Article 35 often overlaps with the obligation of the wrongdoing State to stop its unlawful action on cessation and non-repetition under Article 30. This leads to confusion between

[159] J. Crawford, *supra* note 81, at p. 482.
[160] See International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.
[161] *Responsibilities and Obligations of States with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion*, ITLOS Reports 2011, p. 10.
[162] *Ibid.*, para. 135.

restitution and cessation, both legal consequences of a wrongful act. And, as Gray writes, the duty of cessation and restitution are inextricably intertwined.[163]

The difficulty of differentiating between restitution and cessation is illustrated by the *Rainbow Warrior* arbitration.[164] France and New Zealand had agreed that two French agents responsible for blowing up the Greenpeace vessel, the Rainbow Warrior, in a New Zealand harbour should serve a three-year sentence on the French Pacific Island of Hao. New Zealand accused France of violating this agreement because of its connivance in the premature repatriation of the two agents to France and New Zealand expressly sought restitution for this breach of international law. The arbitral tribunal interpreted New Zealand's request for restitution as in effect a request for the cessation of an illegal act. It rejected the request because the obligation of France to detain the two agents in custody was limited in time and had expired. According to the ILC commentary, a return to the status quo ante may be of little or no value if the obligation breached no longer exists.[165]

Another type of confusion is caused by the application of the relationship between the different forms of reparation. According to Crawford, the ARSIWA appear to establish a hierarchy between different forms of reparation, with restitution at the pinnacle as the primary form of reparation.[166] The primacy of restitution was retained by the ILC in spite of the predominance of compensation in State practice and that of international tribunals. This pre-eminence of restitution was justified on the grounds of the dictum in the *Chorzów Factory* case that the appropriate remedy would be restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.

[163] Chr. Gray, "The different forms of Reparation: Restitution", in *The Law of International Responsibility*, *supra* note 5, p. 589, at p. 590.
[164] *Supra* note 106.
[165] Commentary to Art. 30, para. 8.
[166] J. Crawford, *supra* note 81, at p. 507.

Another reason advanced for primacy of restitution was that States would otherwise be able to avoid their international obligations by offering payment in lieu.[167]

Here it may be observed that an injured State has the right to elect the form that reparation should take. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Chorzów Factory* case[168] or as Finland eventually chose to do in the *Settlement of the Passage through the Great Belt* case.[169] However, the right of the injured State to choose the form of reparation is subject to some factors. As in Article 46 ARSIWA on a plurality of injured States, the article restricts the choice where one injured State chooses restitution and the other seeks compensation, then compensation prevails. Gray finds it difficult to reconcile this with the theoretical primacy of restitution.[170]

It bears stressing that reparation takes the form of restitution, compensation and satisfaction, as stated in Article 34 ARSIWA. Thus full reparation may be achieved separately or by a combination of the different forms of reparation.

As restitution is given prominence by the ARSIWA it warrants a further word. Restitution takes two forms: material and legal. Material restitution is more common in State practice. For example, the release of illegally detained people; the restoration of property, and the release of a seized vessel. It includes the return or restoration of territory as in the *Temple of Preah Vihear* case[171]

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[167] UN Doc. A/CN.4/507 (18 July 2000), p. 45; A/55/10: Report of the ILC, 52nd Session (1 May — 9 June and 10 July — 18 August 2000), *Yearbook of the ILC 2000*, Vol. II(2), p. 34.

[168] *Supra* note 152.

[169] *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order*, ICJ Reports 1991, p. 12. See para. 6 of the commentary to Art. 43 on notice of claim by an injured State.

[170] *Supra* note 163.

[171] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment*, ICJ Reports 1962, p. 6, at p. 38.

where the ICJ ordered Thailand to restore to Cambodia objects belonging to the latter. In the *Wall* Advisory Opinion,[172] the Court stated that Israel was obliged by way of restitution to return the land and other properties seized from natural or legal persons for purposes of construction of the wall in the Occupied Palestinian Territory, to the extent that it would not be materially impossible.

Legal restitution denotes the alteration or revocation of a legal measure taken in violation of international law, whether a judicial or an act of legislation or even a constitutional provision.[173] The best-known case is *Martini*,[174] where the tribunal decided that Venezuela was under an obligation to annul the judgment of a domestic court passed in violation of international law obligations owed to Italy. In the *LaGrand* case already cited above, Germany sought legal restitution in the form of revocation of a national court judgment.

Interest

As stated above, the question of interest in reparation was added at the second reading of ARSIWA. The ILC commentary to Article 38 ARSIWA acknowledges that there is no uniform approach to questions of quantification and assessment of amounts of interest payable (paragraph 10). The lack of uniformity in decisions by international courts and tribunals has led to an unclear situation of these tribunals exercising their discretion to apply different rates without explaining the reason for doing so.

This was done recently in the *M/V "Norstar"* case where the International Tribunal for the Law of the Sea (ITLOS) stated:

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[172] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136, at p. 198, cited by J. Crawford, *supra* note 81, at p. 481.
[173] Chr. Gray, *supra* note 163, at p. 591.
[174] *Reports of International Arbitral Awards*, vol. II (1949), p. 975, cited by Chr. Gray.

> "The Tribunal considers it generally fair and reasonable that interest is paid in respect of monetary losses, property damage and other economic losses. However, it is not necessary to apply a uniform rate of interest in all instances".[175]

The *M/V "Norstar"* case refers to the *M/V "Saiga" (No. 2)* case where the issue first arose before ITLOS[176] and the subsequent case of the *M/V "Virginia G"*.[177] No reasons are given for the choice of different rates of interest.

The situation is complicated by the award of compound interest. Some tribunals including ITLOS have awarded compound interest. In the *M/V "Norstar"* case, the Tribunal decided to give interest based on LIBOR (London Interbank Offered Rate) "compounded annually" (paragraph 456) with no explanation for doing so.

Historically compound interest was not awarded. The Permanent Court in the *SS "Wimbledon"* case[178] awarded simple interest of 6% from the date of judgment. A noted commentator of the time, Whiteman stated in 1943 that compound interest was not allowable.[179] The ILC commentary to Article 38 in the same vein states that "[t]he general view of courts and tribunals has been against the award of compound interest…". It is only recently that a tendency has developed for international courts and tribunals to award compound interest. This trend is influenced by the fact that commercial bank loans involve compound interest. In my view, there is need for caution before awarding compound interest. The trend to award compound interest has some way to go before it becomes accepted by the international community.

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[175] *Supra* note 156, at para. 455.
[176] *Supra* note 126, at p. 66, para. 173.
[177] *Supra* note 155.
[178] 1923 PCIJ (Ser. A) No. 1, p. 32.
[179] M. Whiteman, *Damages in International Law* (US Government Press, 1943), vol. III, p. 1997, quoted by E. Lauterpacht and P. Nevill, "The Different Forms of Reparation: Interest", in *The Law of International Responsibility*, *supra* note 5, p. 613, at p. 618.

Conclusion

Reparation is a crucial aspect of the topic of State responsibility. The forms of reparation discussed show that even though restitution is given primacy in practice it is not often invoked by international courts and tribunals. And as stated at the beginning, continued performance of the obligation in question is of great importance.

Научно-практическое издание

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ
ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

COURSES OF THE SUMMER SCHOOL
ON PUBLIC INTERNATIONAL LAW

ТОМ VI / VOL. VI

Джеймс Катека / James L. Kateka

Ответственность государств

Responsibility of States

На английском языке

Корректор *Н. А. Самуэльян*
Вёрстка *В. В. Котов*
Дизайн обложки *Д. Кравец*

ISSN 2687-105X

Подписано в печать 30.11.2021. Формат 60 × 90 1/16.
Гарнитура «PT Serif». Печать цифровая. Усл. печ. л. 5,0.
Тираж 100 экз.

АНО «Центр международных и сравнительно-правовых исследований»
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Отпечатано в типографии «Onebook.ru»
ООО «Сам Полиграфист»
129090, Москва, Волгоградский проспект, д. 42, к. 5
E-mail: info@onebook.ru
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