

# STATE RESPONSIBILITY

**Brid Ni Ghraíne**

**Masaryk University**

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State responsibility functions a bit like the domestic law of wrongs. Many states have a 'law of wrongs' – general rules that determine when there has been a civil wrong, which causes the claimant to suffer loss or harm. In the UK and Ireland we call this the *Law of Torts*. In France it is le *droit des obligations*. Perhaps there is a similar framework in your country.

This is a topic that is quite different from what we have studied before. I suggest you first read the chapter written by me and David Kosar that I have uploaded on the IS. This will give you a general introduction to the topic.

Afterwards it is up to you. If you cannot access the textbooks, the Commentary and the chapter I uploaded will be fine for now. You can access the textbooks later once things return to normal. I have also added some notes here that you can use as a basis for developing your own, more detailed notes.

There are some questions at the end for revision. You can do the questions and send the answers to me but there is no deadline and it is not compulsory. I will give feedback to everyone who sends me their answers.

## **Extra reading**

- Draft article by Ni Ghraíne and Kosar (uploaded on the IS)
- Harris, ch.8
- Evans, ch.18 by White and Abass
- Shaw, ch 14 (particularly recommended)
- Commentary on the Draft Articles on State Responsibility:  
[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

## *Introduction*

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Shaw: It's second order issues. The procedural and other consequences flowing from a breach of a substantial rule of international law.

What is the International Law Commission (ILC)?

- Established by UN General Assembly in 1948 for the promotion of the progressive development of international law and its codification
- It consists of 34 members (originally there were 15) who all must be experts on international law, elected to the position by the General Assembly from a list of candidates nominated by governments of member states in the UN.
- One venue of action for the commission in the codification of principles of international law is when requested to do so by the General Assembly (GA)
- Another venue of action is when the commission is requested either by a government, an inter-governmental organization or a UN agency to draft proposals for international conventions on various issues
- The ILC had a major role in developing the law of state responsibility.

Articles of State Responsibility by the ILC (1996) (ARSIWA)

- The GA by Resolution 56/83 of 12 December 2001 annexed the text and commended them to governments.
- Professor James Crawford was the ILC's special rapporteur on state responsibility. He took the lead on drafting the articles on state responsibility
- The Articles are not a treaty but they are based on hard law obligations (especially case law). Many of the provisions are Customary international law (CIL)

Essential characteristics of state responsibility (Shaw)

1. The existence of an international legal obligation in force as between two particular states.
2. There has occurred an act or omission which violates that obligation which is imputable to the state responsible.
3. Loss or damage that resulted from that act or omission.

## *CHAPTER I: General Principles*

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Article 1: (a) Every internationally wrongful act (IWA) of a state entails the international responsibility of that state

(b) can be an act or omission

(c) characterisation of an internationally wrongful act is governed by international law and is not affected by its characterization as lawful by internal law

Art 2: There is an IWA of state when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.

## CHAPTER II: Attribution

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- This is an essential criterion for international responsibility to arise
- The state, as an abstract entity, cannot 'act' itself. A state is a legal fiction made up of a collection of individuals. Attribution (aka imputability) is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the person or property of an alien.
- The only conduct to be attributed to the state at the international level is that of its organs of government, of others who have acted under the direction, instigation, or control of these organs.
- Rules of attribution are CIL – ICJ, **Genocide Case (2007)**

Art 4: CIL in Genocide case – the conduct of any organ shall be considered an act of state

- This means there is absolute liability wherever an official is involved. Shaw – it encourages that state to exercise greater control over its various departments and representatives.

Art 5: The conduct of a person or entity which is not an entity of the state but which is empowered by the law of that state to exercise elements of governmental authority is an act of that state.

- This provision is intended to cover privatised agencies retaining public or regulatory functions eg private military and security companies, contracting out detention of refugees to private companies, airlines exercising immigration controls.

Art 6: Organ placed at the disposal of a state by another state.

- Military contingent placed by a state at the disposal of the UN for peace-keeping purposes
- **Behrami v France** (ECHR). The Court held the UN retained ultimate authority and control so that operational control only was delegated. Responsibility attributed to the UN.

Art 7: Attributes the state to persons or entities empowered to exercise elements of governmental authority even if it acts ultra vires.

- **Caire** case – two Mexican officers murdered a French national after he refused to pay them money. Commission stated that even though these officers acted outside their authority, Mexico was responsible because the two officers acted under the cover of their status and used means (arms) at their disposal because of their status.

Article 8: Person or group acting under the instructions of, or control of, that state.

- Commentary on the Draft Article emphasises that 'such conduct will be attributable to the state only if it directed or controlled the specific operation and the conduct complained of was an integral part of the operation.'
- **Nicaragua case (ICJ)**– With regard to military actions and operations by contras involving the use of military force in Nicaragua against the territorial sovereignty and political independence of that state, the Court found that the US bore responsibility as a result of its 'training, arming, equipping, financing, supplying or otherwise encouraging, supporting and

aiding' the contra forces. Such responsibility followed from the violation by the US of the obligation not to intervene in the affairs of other states as well as the obligation not to use force in breach of the customary rule of international law corresponding to Article 2(4) of the UN Charter.

- The Court had then to consider whether some actions by contras in breach of international humanitarian law (killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping) could be attributed to the US. It answered this question in the negative. It required for such attribution a very exacting test, namely that of 'effective control' by the US over contras' actions in breach of international humanitarian law, a test the Court held had not been met in the case at bar. By such 'effective control', the Court meant that the US should have 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (para. 115; emphasis added).
- It seems clear from these words that by 'effective control' the Court intended either (1) the issuance of directions to the contras by the US concerning specific operations (indiscriminate killing of civilians, etc.), that is to say, the ordering of those operations by the US, or (2) the enforcement by the US of each specific operation of the contras, namely forcefully making the rebels carry out those specific operations.

**Genocide case.** Court was unable to attribute to Serbia the activities of those who caused the massacre at Srebrenica. Court held that the 'overall control' test proposed by the ICTY in *Tadic* was unpersuasive (overall control by the state over the group was sufficient, hence specific instructions were not required for each individual operation) and maintained Nicaragua.

Art 9 – the conduct of a person or group of persons shall be considered an act of a state if the person or group of persons is in fact exercising elements of governmental authority.

Art 10: Deals with conduct of insurrectional movements, whether seeking to form a new government of the existing state or a new state altogether

Art 11: Act will be considered an act of state under international law if and to the extent that the state acknowledges and adopts the conduct of its own

- **Tehran Hostages.** Ayatollah Khomeini announced a policy of maintaining the hostage situation, thereby accepting the conduct of the students as Iranian conduct.

### **CHAPTER III – breach**

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Art 12 – what is a breach? When an act is not in conformity with what is required of a state by an obligation

Art 13 – state is only responsible for breach of an obligation if the relevant obligation is in force for that state at the time of the breach

Art 14 – continuing breaches

Art 15 – composite of acts

## Chapter IV

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Art 16 – aid or assistance with a view to assisting in the commission of a wrongful act by another state

Art 17 – where one state exercises power and direction and control of the commission of a wrongful act by another state

Art 18 – coercion

Art 19 – does not preclude responsibility of coerced, assisted etc state

## CHAPTER V CPW

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A 20 – consent.

21 – self-defence

- Must be in conformity with UN Charter
- Includes reporting to Security Council.
- Self-defence is subject to the CIL limitations of necessity and proportionality.

22- countermeasures (CMs)

- Reprisals not involving the use of force.
- CMs must be proportional.

23 – force majeure.

- Irresistible force or unforeseen event beyond the control of the state which had made it materially impossible for the state concerned to conform with the obligations in question.
- Not applicable if the FM is due to the conduct of the state invoking it or it assumed the risk of it occurring.
- Burden of proof is very high. **Serbian Loans** case – PCIJ didn't accept that WWI made it impossible for Serbia to repay loans.
- In **Rainbow Warrior** case, Force Majeure was claimed by France when it argued that French agents were repatriated to France without the consent of New Zealand due to medical emergency. (French agents destroyed the vessel Rainbow Warrior in harbour in NZ. Part of mediation ruling was that French agents would spend three years in French base in Pacific) The tribunal stressed that the test of the applicability of the doctrine was one of absolute and material impossibility (not that it was more difficult or burdensome).

24- Distress saving his life or that of the person entrusted to his care.

- Eg entering foreign ports/ airspace because of bad weather.
- Does not apply if the situation of distress was because of the conduct of the state invoking it or if the act in question is likely to create a comparable or greater peril.

Difference between distress and force majeure is that there is an element of choice in distress (Shaw).

Art 25 – Necessity.

- The act concerned was the only means of safeguarding an essential interest of the state against grave and imminent peril provided that the essential interest of the second state or the international community is not seriously impaired by the act. Exceptions are where the obligation in question excludes the possibility of evoking necessity or where the state has contributed to the situation of necessity.

***Torrey Canyon*** – Libyan oil tanker ran aground off UK coastal waters and UK bombed it to prevent a massive oil spill. This was an acceptable exercise of necessity.

***Gabcikovo Nagymaros Project*** – ICJ held that the state of necessity is a ground recognised by CIL but that the conditions set out for necessity must be cumulatively satisfied.

## Revision questions

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1. In what circumstances would the following acts committed against Ruritania give rise to legal responsibility on the part of Arcadia:

- (i) While on holiday in Ruritania, Chip, an Arcadian secret agent, stabs to death a member of the Ruritanian government;
- (ii) Students from the Arcadian National University forcefully enter the Ruritanian embassy in the capital of Arcadia and hold the Ruritanian ambassador hostage, demanding that Ruritania cease discriminatory educational policies against women in its universities.

2. Butonia and Pastaria are neighbouring states. Over the years since their independence in 1961 both states have publicly and, on several occasions, jointly acknowledged that Lake Tranquil that lies between them at one point is an area of special scientific interest that shall not be appropriated or exploited by either state.

In 2005 the Butonian Oil Corporation (BOC), a state owned company has set up an exploratory oil well towards the middle of Lake Tranquil. In response, the government of Pastaria has sent a diplomatic note of protest to the government of Butonia requesting that it cease its „violation of an international legal obligation owed towards Pastaria, make good any damage caused to the environment of Lake Tranquil, and undertake not to engage in any such activities in the future“.

The government of Butonia does not respond to this note.

Advise the government of Pastaria on its options under international law.

3. After the victory of the Extremist Party, the State of Esperya heavily modified its legislation and policies in order to make them conform to the religious dictates of the party. Among the many changes, the legislation established the subordination of all women to the men figure of their households, including the suppression of working and political rights of all women, as well as the expulsion from the country of every person that did not profess the now State religion.

The drastic changes to past policies were faced with the strong opposition of many groups. However, when political parties that opposed the new regime were abolished, an armed group, the Liberal Revolutionary Front (LRF) started engaging in armed attacks. These attacks took place against government facilities, as well as civilian population that supported the new regime. The several attacks carried out by the LRF caused numerous deaths and considerable property damage, which clearly amounted to the violation of several international norms.

After in-depth investigations carried out by its intelligence agency, the God's sent Spies (GSS), Esperya identified the location of the LRF operation centre in the neighbouring State of Ionia. It has been proved that the LRF was financially supported by Ionia, and their weapons were provided by different Ionian government agencies. In addition to this, it was Ionia's secret services that provided intelligence to the LRF as to what governmental buildings were easier to attack.

This information was ratified by the president of Ionia himself, who argued that since Esperya's policies were in breach of international norms, the LRF was justified in also violating international law in its attempt at overthrowing the regime.

The case came before the ICJ, and you are asked to advise one of the Judges on the following specific issue:

- a) Can Ionia be held legally responsible for the violations of international law carried out by the LRF? Explain your advice with reference to both the appropriate provisions of ARSIWA and the relevant international case-law.