STATE RESPONSIBILITY

Bríd Ní Ghráinne and David Kosar

Draft- not for circulation or citation

1. INTRODUCTION

Every internationally wrongful act by a subject of international law entails its international responsibility.[1] The law of state responsibility sets out the general framework under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.[2] Thus the focus in the field of state responsibility is on 'second-order issues', that is, the procedural or other consequences flowing from a breach of a substantial rule of law.[3]

As states are the primary subjects of international law, the law of state responsibility is the most fully developed branch of responsibility and is therefore the principal focus of this chapter.[4] As the responsibility of other actors in international law is comparatively underdeveloped, it is considered only in passing.

The structure of this chapter will be as follows. Section two sets out the scope of state responsibility. Section three sets out the basic elements of state responsibility: attribution, breach, and circumstances precluding wrongfulness. Sections four and five set out the invocation and consequences of state responsibility, respectively. Section six applies the principles of State Responsibility to the cybersecurity context, and section seven concludes.

2. THE SCOPE OF STATE RESPONSIBILITY

The rules of state responsibility are set out in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). The Articles are the product of more than forty years' work by the ILC on this topic and they represent both codification and progressive development of the law of state responsibility.[5]

Article 1 of ARSIWA provides the general rule, widely supported in practice,[6] that every internationally wrongful act of a state entails the international responsibility of that state. An internationally wrongful act may consist of one or more actions or omissions or a combination

[1] See the dictum of the *Permanent Court of International Justice in Factory at Chorzow, jurisdiction, judgment No B, 1927, PClj, Ser A, No 9* at p 21: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation'.

[2] International Law Commission, 'Draft articles on the responsibility of international organizations, with commentaries', 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[3] Malcolm Shaw, *International Law* (CUP 2008), 566.

[4] James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm Evans, *International Law* (2003), 445.

[5] Ibid, 448.

[6] International Law Commission, n 2, 63.

of both actions and omissions.[7] It is also important to note that a state that directs and/ or coerces another state to commit an internationally wrongful act may also trigger the responsibility of the directing/coercing state.[8]

Whether there has been an internationally wrongful act depends primarily on the legal obligations of the relevant state. There is no such thing as a uniform code of international law, reflecting all the obligations of states. Each state has its own unique patchwork of legal obligations reflecting, inter alia, the organisations which it has joined and the treaties it has become a party to.[9] The field of state responsibility does not attempt to define the content of the primary international obligations, the breach of which gives rise to responsibility. This is the role of the primary rules.[10] Rather, the field of state responsibility, put simply, amounts to a general international law of wrongs.[11] At a domestic level, it might be likened to the law of torts, or the law of obligations. The international law of state responsibility sets out the general underlying concepts of state responsibility – attribution, breach, excuses, and consequences – which help us to identify under what circumstances a state's actions has given rise to its international legal responsibility. Each of these elements will be analysed in turn below.

3. THE ELEMENTS OF STATE RESPONSIBILITY

In order for there to be an internationally wrongful act, there must be (a) an act that is attributable to a state under international law; (b) that act constitutes a breach of an international obligation of the state; and (c) an absence of any valid justification for the act, also termed 'circumstances precluding wrongfulness (CPW).'

3.1 Attribution

Article 2 of ARSIWA provides that there is an internationally internationally wrongful act of a 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.[12] A State, as an abstract entity, cannot 'act'[13] of itself. Like corporations in national law, states act through organs or agents. Attribution (also sometimes referred to as imputability) is the legal fiction which equates the actions or omissions of individuals to the state.[14] The rules of attribution are also codified in customary international law.[15]

[7] International Law Commission, n 2.
[8] International Law Commission, n 2, Articles 17-19.
[9] Crawford and Olleson, n 4, 447.
[10] International Law Commission, n 2.
[11] Crawford and Olleson, n 4, 447.
[12] International Law Commission, n 2.
[13] International Law Commission, n 2, 35; Crawford and Olleson, n 4, 453; Shaw, n 3, 572.
[14] Shaw, n 3, 572.
[15] *Application of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007*, p 43 [385].

According to Article 4 ARSIWA, a state is generally liable for the conduct of its organs.[16] The ICJ in the *Genocide* case regarded this rule as 'one of the cornerstones of the law of state responsibility'.[17] The scope of state responsibility for acts of its organs or officials is broad. There is no distinction based on the level of seniority of the relevant officials – as long as they are acting in their official capacity, responsibility may be triggered.[18] Thus the concept of organs covers legislative, executive officials, and courts at all levels.[19] Shaw notes that this broad definition encourages states to exercise greater control over its various departments and representatives.[20]

Article 5 ARSIWA provides that the conduct of a person or entity which is not an organ of the state but which is empowered by the law of that state to exercise elements of governmental authority may also be attributed to the state, provided the person or entity is acting in that capacity at the relevant time.[21] This provision is intended to cover public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some states, private security firms may be contracted to act as prison guards and in that capacity, may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. In addition, private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine.[22]

Article 6 ARSIWA provides that the conduct of an organ placed at the disposal of a state by another state shall be considered an act of the former state under international law if the organ is acting in the exercise of elements of the governmental authority of the state at whose disposal it is placed. This would, for example, cover a section of the health service or some other unit 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 such as the UK Privy council acting as the highest judicial body for certain Commonwealth countries.[23]

Ultra vires acts

Article 7 ARSIWA provides the conduct of an organ or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the state under international law if acting in that capacity, even if it exceeds its authority, violates rules, or

[16] *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455 (1902); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p. 62, Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7.*

[17] *Application of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* n 15, [385].

[18] Crawford and Olleson, n 4, 454.

[19] International Law Commission, n 2, 41.

[20] Shaw, n 3, 571.

[21] International Law Commission, n 2, Article 5.

[22] International Law Commission, n 2, 42.

[23] International Law Commission, n 2, 44, 45.

contravenes instructions. Shaw notes that this seems to lay down an absolute rule of liability.[24] The reasoning for this absolute rule is to prohibit abuse, as were it not for this rule there would be no practical way of proving that the agent had or had not acted on orders received.[25] The rule was applied in the *Caire* case, where a French national in Mexico was murdered by two Mexican officers after he refused their demands for money. The French-Mexican Claims Commission stated that even though these officers acted outside their authority, Mexico was responsible because the two officers 'acted in their capacity as officers and used the means placed at their disposition by virtue of that capacity.'[26] This was reaffirmed by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case:

> This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[27]

Attribution of private acts to the state

Private acts are generally not attributable to the state.[28] However, such acts may be attributable to the state if: (i) private persons were acting under the instructions of, or control of that state; (ii) where an insurrectional movement subsequently becomes the government of that state; (iii) if the state adopts private acts as its own.

With regard to situation (i); Article 8 ARSIWA provides that a state is responsible for the acts of private persons who were acting under the instructions of, or control of, that state. The Commentary to ARSIWA emphasizes 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'.[29] Although case law subsequent to the publication of ARSIWA has put forward two different understandings of what 'directed or controlled' the specific operation means, it is generally agreed that Article 8 embodies an 'effective control test.'

The 'effective control' test was set out by the ICJ in *Nicaragua v USA*. The ICJ held that the United States was responsible for the 'planning, direction and support' given by the United States to Nicaraguan operatives. The Court then had to consider the broader claim of whether actions by the guerilla contras in breach of international humanitarian law (killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping) could be attributed to the US, which had financed and equipped the force. The Court answered this question in

[24] Shaw, n 3, 789.
[25] International Law Commission, n 2, 45.
[26] *Caire (France V Mexico) (1929) 5 RIAA 516*, 530.
[27] *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, 1989, Series C, No. 7, pp. 34, 52; 95 ILR,, p. 306.
[28] International Law Commission, n 2, 38.
[29] International Law Commission, n 2, 47.

the negative. It required for such attribution to arise, 'it would in principle have to be proved that that state had effective control of the military or paramilitary operation in the course of which the alleged violations were committed.'[30] 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'.[31] 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.) or (2) the enforcement by the US of each specific operation of the contras, i.e. forcing the rebels to carry out those specific operations.[32]

The second approach -the 'overall control' test – was set out by the ICTY in the *Tadic* case.[33] The Tribunal approved the test of 'overall control going beyond the mere financing and equipping of such forces and also involving the participation in the planning and supervision of military responsibility.'[34] This was a more flexible approach than that of *Nicaragua*, as it accepts that the degree of control might vary according to the circumstances and a high threshold might not always be required.[35]

By the time the *Genocide* case came before the ICJ in 2007, the Court was faced with two possible applicable tests in determining whether the conduct of the Bosnian Serb forces and paramiltary groups was attributable to the FRY. The Court held that the 'overall control' test proposed by the ICTY in *Tadic* was unpersuasive and maintained the 'effective control' test adopted in *Nicaragua*. It noted that *Tadic* did not concern issues of state responsibility as it was before a criminal tribunal, and that the 'overall control' test was inappropriate in such contexts:

> [The 'overall control' test has the major drawback of broadening the scope of Stat responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf… [T]he overall control test stretches too far, almost to breaking point, the connection with which must exist between the conduct of a State's organs and its international responsibility.[36]

The ICJ thus held that the test under customary law was that reflected in Article 8 ARSIWA whereby the state would be responsible for the acts of private persons or groups where an organ of the state gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed.

---

[30] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment (Nicaragua v United States of America)*, ICJ Reports 1986, p 14, [115].
[31] Ibid, [109]; [115].
[32] Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18(4) European Journal of International Law 649, 653.
[33] Case No IT-94-1-A, *Prosecutor v Tadic*, *Judgment of 15 July 1999*, (1999) 38 ILM 1518.
[34] Ibid [145].
[35] *Ibid,* [117].
[36] *Ibid,* [406].

Situation (ii) as set out above is dealt with in Article 10 ARSIWA. This provision provides that conduct of a movement which becomes the new government or establishes a new state will be attributed to the respective state under international law. Crawford and Olleson describe this rule as 'anomalous' as it determines the 'attribution of conduct not by events at the time of that conduct but by reference to later contingencies, i.e. the success or failure of the revolt or secession.'[37] It was applied in the *Yeager* case,[38] which concerned the period immediately after the revolution in Iran in 1979. The claimant in this case had been detained for several days by 'revolutionary guards' and then evacuated from the country. The Tribunal held that, although the guards were not recognized under internal law as part of the State, they were in fact exercising public functions in the absence of the previous State apparatus: Iran was thus held responsible for their acts.

Finally, a state's responsibility may also become engaged as per situation (iii) above where it subsequently adopts the actions of private actors as its own. In the *Tehran Hostages* case, the ICJ held that although the students who initially took control of the US embassy in Tehran were not acting as agents of Iraq, the subsequent statement of Ayatollah Khomeini endorsing the occupation of the embassy translated the occupation of the Embassy and detention of the hostages into acts of Iran:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[39]

The Court also found that Iran was responsible for its omission of failure to protect the embassy from the mob.

3.2 Breach of an International Obligation of the State

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.[40] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary international law obligation concerned.[41] A 'breach' of international law may include 'non-execution of international obligations', 'acts incompatible with international obligations', 'violation of an international obligation', 'breach of an engagement' or acts 'contrary to the treaty right[s] of

[37] Crawford and Olleson, n 4, 457.
[38] *Yeager* (1987), 82 ILR 178.
[39] *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p. 35, [74].
[40] International Law Commission, n 2, Article 12.
[41] International Law Commission, n 2, 54.

another state.'[42] A breach may arise of any provision of international law, regardless of its source.[43] Finally, it is important to note that it is international law that determines what constitutes an internationally wrongful act, regardless of any provisions of domestic law.[44] Thus a state cannot invoke domestic law as justification for an internationally wrongful act.[45]

Whether the state needs to be at fault in order to give rise to responsibility in international law is not so clear-cut. The principle of objective responsibility (the so-called 'risk' theory) maintains that the liability of the state is strict. Once an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, that state will be responsible in international law to the state suffering the damage irrespective of good or bad faith.[46] This approach can be contrasted with the subjective responsibility concept (the 'fault' theory) which emphasises that an element of intentional or negligent conduct on the part of the person concerned is necessary before his state can be rendered responsible for the breach of international law.[47] The relevant cases and academic opinions are divided on this question, although the majority tends towards the strict liability, objective theory of responsibility.[48]

ARISWA takes a more nuanced approach.[49] Under Articles 2 and 12, State responsibility does not require fault before an act or omission may be characterized as internationally wrongful. However, the interpretation of the relevant primary obligation in a given case may well lead to the conclusion that fault is a necessary condition for responsibility in relation to that obligation, having regard to the conduct alleged.[50]

Similarly, there has been a debate concerning the role of harm or damage in the law of State responsibility. Some authors have claimed that the State must have suffered some form of actual harm or damage before responsibility can be engaged.[51] Once more, the ILC Articles leave the question to be determined by the relevant primary obligation: there is no general requirement of harm or damage before the consequences of responsibility come into being.[52] In some circumstances, the mere breach of an obligation will be sufficient to give rise to responsibility; for instance, even a minor infringement of the inviolability of an embassy or consular mission will give rise to responsibility. On the other hand, in the context for example of pollution of rivers, it is necessary to show some substantial impact on the environment or on other uses of the watercourse before responsibility will arise.[53]

---

[42] International Law Commission, n 2, 35.
[43] International Law Commission, n 2, 55.
[44] International Law Commission, n 2, Article 3, 54-55.
[45] International Law Commission, n 2, Article 3; Bríd Ní Ghráinne and Aisling McMahon, 'Abortion in Northern Ireland and the European Convention of Human Rights: Reflections from the UK Supreme Court,' 68(2) International and Comparative Law Quarterly 477; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 VCLT 331.
[46] Shaw, n 3, 570.
[47] Shaw, n 3, 570.
[48] Crawford and Olleson, n 4, 462.
[49] Crawford and Olleson , n 4, 462.
[50] International Law Commission, n 2, 34.
[51] Brigitte Bollecker- Stern, *Le prejudice dans la theorie de la responsibilite internationale* (Pedone 1973), as cited in Crawford and Olleson, n 4, 460.
[52] International Law Commission, n 2, 36.
[53] Crawford and Olleson, n 4, 460.

A corollary of this position is that there may have been a breach of international law but no material harm may have been suffered by another State or person in whose interest the obligation was created. In such cases courts frequently award merely declaratory relief on the ground that nothing more is required. The aim of asserting responsibility in such cases may be for the future, to avoid repetition of the problem, rather than to obtain compensation for the past.[54]

3.3 Circumstances Precluding Wrongfulness

Even where conduct may be attributable to a state, and in breach of that state's obligation, the state will not necessarily incur responsibility under international law. The State may be able to rely on some defence or excuse: in the ILC's Articles these are collected under the heading of 'Circumstances precluding wrongfulness'.[55] CPWs do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.[56]

Before turning to the CPWs, three preliminary points should be made. First, none of the CPWs can operate to excuse conduct which violates a peremptory norm.[57] Second, the wrongfulness of the act will only be precluded so long as the CPW continues to exist.[58] Third, the invocation of CPW is without prejudice to the question of compensation for any material loss caused by the act in question.[59]

Consent

If state A consents to what would otherwise be a breach of state B's obligations, the act of state B is not wrongful.[60] For example, a state might consent to transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operation, the arrest or detention of someone on foreign territory.[61] In each case, the consent would preclude the wrongfulness of the act. However, State A's consent is not unlimited: it cannot consent to the violation of peremptory norms of international law, such as the prohibition of genocide.[62]

Self-defence

[54] Crawford and Olleson, n 4, 463.
[55] Crawford and Olleson, n 4, 465.
[56] International Law Commission, n 2, 71.
[57] International Law Commission, n 2, 26.
[58] International Law Commission, n 2, Article 27(b).
[59] International Law Commission, n 2, Article 27.
[60] International Law Commission, n 2, Article 20.
[61] International Law Commission, n 2, 72-73.
[62] International Law Commission, n 2, Article 26.

A state may disregard its obligations while exercising the right of self-defence under the UN Charter,[63] Article 51 of which preserves a State's 'inherent right' of self-defence in the circumstances of an armed attack. However, the right of self-defence does not entail a blank cheque for the acting state to do as it pleases. For example, its actions are limited by principles relating to human rights and humanitarian law.[64] Moreover, the ICJ noted in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* that 'respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality' and thus in accordance with the right to self-defence.[65]

*Countermeasure*s

Article 22 provide that the wrongfulness of an act is precluded if that act constitutes a countermeasure. Countermeasures generally refer to reprisals not involving the use of force. They may take the form of suspension or temporary non-performance of a treaty obligation, or the freezing of the assets of a state.[66] As the ICJ affirmed in the *Gabcikovo-Nagymaros Project* case, countermeasures taken by a State in response to an internationally wrongful act of another State are not wrongful acts, but are recognized as a valid means of self-help as long as certain conditions are respected.[67] Countermeasures may only be applied in limited circumstances:

> 'In order to be justifiable, a countermeasure must meet certain conditions . . . In the first place it must be taken in response to a previous international wrongful act of another state and must be directed against that state . . . Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it . . . In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question . . . [and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and . . . the measure must therefore be reversible.'[68]

The nature and scope of countermeasures are further constrained by the requirement to refrain from the use of force, to respect proportionality, and not to violate peremptory norms.[69] Moreover, the state invoking countermeasures cannot use the threat or use of force or severe political or economic political coercion designed to threaten the territorial integrity or political independence of the state. Countermeasures must be terminated as soon as the responsible state has complied with its obligations.[70]

---

[63] International Law Commission, n 2, Article 21.
[64] International Law Commission, n 2, 74.
[65] International Law Commission, n 2, 75.
[66] Nigel White and Ademola Abass, 'Countermeasures and Sanctions' in Malcolm Evans, *International Law* (2003), 540.
[67] International Law Commission, n 2, 22.
[68] *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment, ICJ Reports 1997, p. 7; [83]-[87].
[69] Crawford and Olleson, n 4, 464.
[70] International Law Commission, n 2, 75.

Force majeure

Similar to many domestic legal systems,[71] international law precludes responsibility where the relevant act is due to circumstances outside the control of the acting state.[72] This justification only applies in very limited circumstances, when three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the State concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation.[73] The adjective 'irresistible' qualifying the word 'force' emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been 'unforeseen' the event must have been neither foreseen nor of an easily foreseeable kind. Further the 'irresistible force' or 'unforeseen event' must be causally linked to the situation of material impossibility, as indicated by the words 'due to *force majeure* ... making it materially impossible.'[74]

The event giving rise to force majeure may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two.[75]

The CPW of *force majeure* is further constrained by the fact that it is inapplicable if the force majeure is due to the conduct of the state invoking it or it assumed the risk of it occurring.[76] In addition, the threshold to trigger the justification of force majeure is very high. It does not does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the default of the state concerned, even if the resulting injury itself was accidental and unintended.[77] For example, in the *Rainbow Warrior* arbitration,[78] France tried to invoked force majeure as a justification for repatriating French agents to France in breach of an agreement with New Zealand. This case involved the destruction by French agents of a Greenpeace vessel named 'Rainbow Warrior' in Auckland harbour. The UN Secretary-General was asked to mediate, and his ruling in 1986 provided that the French agents concerned would spend three years in French base in Pacific. France tried to argue that its repatriation of the agents before the three-year period had expired was justified by *force majeure* in the form of a medical emergency. However, this argument was rejected by the arbitration tribunal, which 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. A similarly high

[71] Crawford and Olleson, n 4, 465.
[72] International Law Commission, n 2, Article 23.
[73] International Law Commission, n 2, 76.
[74] Shaw, n 3, 796.
[75] International Law Commission, n 2, 77.
[76] International Law Commission, n 2, 78.
[77] International Law Commission, n 2, 76, 77.
[78] *Rainbow Warrior Arbitration (New Zealand v France) (1990)* 82 ILR 499; (1986) 74 ILR 256.

threshold was applied by the PCIJ in the *Serbian Loans* case, in which the Court did not accept that WWI made it impossible for Serbia to repay a loan.[79]

For force majeure to apply, therefore, there must be an event that takes place without the state being able to do anything to rectify the event or avert its consequences. There had to be a constraint which the state was unable to avoid or to oppose by its own power. In other words, the conduct of the state is involuntary or at least involves no element of free choice.[80]

Distress

According to Article 24 ARSIWA, distress operates to excuse conduct where the author of the act 'had no other reasonable way ... of saving the author's life or the lives of other persons entrusted to the author's care.' This would cover, for example, aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[81]

Shaw notes that the difference between distress and force majeure is that in the former, there is an element of choice.[82] In cases of distress, the violation of the obligation in question is theoretically avoidable, although absolute compliance of the State with its international obligations is not required. In other words, a State is not required to sacrifice human life or to suffer inordinate damage to its interests in order to fulfil its international obligations. However, the justification of distress does not apply is the situation of distress was because of the conduct of the sate invoking it or if the act in question is likely to create a comparable or greater peril.[83]

Necessity

Necessity operates to excuse an act which was the only means of safeguarding an essential interest of the state against grave and imminent peril provided that the essential interest of a second state or the international community is not seriously impaired by the act.[84] The invocation of a state of necessity is further precluded if (i) the obligation in question excludes the possibility of evoking necessity; or (iii) if state has contributed to the situation of necessity.[85] The plea of necessity is special in a number of respects. Unlike consent, self-defence, or countermeasures, it does not rely on the prior conduct of the injured State. Unlike *force majeure,* it does not involve conduct which is coerced or involuntary. Unlike distress, necessity applies where there is a grave danger either to the essential interests of the State or of the international community as a whole, rather than in circumstances where there is a

[79] *Serbian Loans,* Judgment No 14 (1929) PCIJ Ser A No 20.
[80] International Law Commission, n 2, 76.
[81] International Law Commission, n 2, 78, 79.
[82] International Law Commission, n 2, 78.
[83] International Law Commission, n 2, 81.
[84] International Law Commission, n 2, Article 25.
[85] Shaw, n 3, 798.

danger to the lives of individuals in the charge of a State official. It arises where there is an incompatible conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to protect against possible abuse.[86]

According to the commentaries on the Article, the claim of necessity was applicable in respect of the Torrey Canyon incident. A Liberian oil tanker went aground off the UK coast but outside territorial waters, spilling large quantities of oil and endangering the UK coastline. After salvage attempts, the UK bombed the ship to burn the remaining oil. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed. No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[87]

4. Invocation of Responsibility

An injured state is entitled to invoke the responsibility of the state which committed an internationally wrongful act towards it.[88] However, Article 48(1) provides that a state other than the injured state are also entitled to invoke the responsibility of the acting state if (a) the obligation breached is owed to a group of states including that state and it established for the protection of a collective interest of the group (sometimes called '*erga omnes partes'*) or ; (b) the obligation breached is owed to the international community as a whole (sometimes called '*erga omnes')*.

Article 48(1)(a) may include obligations under multilateral treaties protecting 'community' interests such as obligations under human rights or environmental law. The states falling within situations covered in Article 48(1) will not normally have suffered any injury. Such states should be limited to claiming cessation of continuing wrongful acts and assurances and guarantees of non-repetition, as well as performance of the obligation of reparation 'in the interest of the injured state or the beneficiaries of the obligation breached.'[89] Obligations *erga omnes partes* were addressed by the ICJ in *Questions Relation to the Obligation to Prosecute or Extradite*, a dispute relating to the Convention Against Torture:

> The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of the alleged breach by another State party. If a special interest were required for that purposes, in many cases no Stat would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party

[86] International Law Commission, n 2, 81.
[87] International Law Commission, n 2, 82.
[88] International Law Commission, n 2, 42.
[89] International Law Commission, n 2, Articles 48(2)(a) and (b).

> with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes […] and to bring that failure to an end.[90]

Article 48(1)(b) encompasses the concept of *erga omnes*, which refers to obligations owed to the international community as a whole. These 'are the concern of all States. In the view of the importance of the rights involved, all States can be held to have a legal interest in their protection.'[91] Such obligations might include the acts of aggression and genocide, 'the principles and rules concerning the basic rights of the human person, including protection from slavery and discrimination', the right of self-determination, obligations of international humanitarian law which form 'intransgressible principles of customary international law' as well as the prohibition of torture.[92]

5. The Consequences of International Responsibility

Upon the commission of an internationally wrongful act, two main secondary obligations arise: the obligations of cessation and reparation.[93] These dual obligations arise because state responsibility is both backward-looking (aimed at providing compensation for things past) and forward-looking (aimed at restoring the legal relationship which has been threatened or impaired by the breach).[94]

The obligation to cease wrongful conduct also incorporates an obligation, under certain circumstances, to offer appropriate assurances and guarantees of non-repetition. This issue was dealt with in the *LaGrand* case before the ICJ, which concerned the USA's non-observance of obligations of consular notification under Article 36 of the Vienna Convention on Consular Relations. Germany complained that the US had failed to notify it that two German nationals were death-row inmates, and there was a broader concern as to the USA's compliance with its continuing obligations of performance under the Consular Relations Convention. The USA accepted this contention, and set out the measures it had taken to ensure compliance for the future. The Court held:

> [That the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), must be regarded as meeting Germany's request for a general assurance of non-repetition.[95]

As aforementioned, the obligation of reparation also arises where actual harm or damage has occurred. International law obliges the responsible state to make full reparation for the consequences of its breach, provided it is not too remote or indirect. As noted in the *Chorzow Factory* case:

---

[90] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, ICJ Reports 2012*, p. 422, [69].
[91] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3 [33].
[92] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,* p. 226 [79].
[93] Crawford and Olleson, n 4, 465.
[94] Crawford and Olleson, n 4.
[95] *LaGrand (Germany v United States of America), Merits, judgment,* (2001)40 1LM 1069, [24].

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[96]

Reparation may be in forms other than compensation, such as an acknowledgment of the breach, an expression of regret, an apology, or other appropriate form.[97] In many cases before international courts, an authoritative finding of the breach may be held to be sufficient satisfaction.[98]

6. State Responsibility and Cybersecurity

General principles of state responsibility apply also in the cybersecurity context. However, the application of the state responsibility paradigm to cybersecurity attacks is complicated by several factors.

First, it is often difficult to identify an international obligation that has been breached.[99] The law of cyberspace is still a relatively nascent field that has not been codified[100] and where customary law has not emerged yet. Therefore, it is necessary to resort to principles of general international law. Three typical international obligations that are particularly relevant in the cybersecurity context are respect for the target State sovereignty, the duty of non-intervention in the internal or external affairs of the target State, and the principle of due diligence.[101]

However, the application of each of these three principles faces numerous challenges in the cybersecurity context. In order to invoke the violation of State sovereignty, it is necessary to prove the infringement of a target State's territorial integrity or the interference with or usurpation of inherently governmental functions.[102] This might be doable when cyber

[96] *Factory at Chorzow*, Merits, 1928, PCIJ, Series A, No 17, p 27, pp 47-48.
[97] Crawford and Olleson, n 4, 467.
[98] Crawford and Olleson, n 4, 468; *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 23.

[99] See Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 17-26.
[100] But see the Michael N. Schmitt (ed.), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017) (hereinafter only 'Tallinn Manual 2.0'). See also Dan Efrony and Yuval Shany, A Rule Book on The Shelf? Tallinn 2.0 on Cyber Operations and Subsequent State Practice, 112 American Journal of International Law (2018).
[101] Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 17-26.
[102] Tallinn Manual 2.0, 20.

operations result in "physical damage or injury" or the "loss of functionality" of cyber infrastructure in the target State.[103] But the application of these requirements to the cyber influence operations such as election meddling or cyberespionage will be far more challenging.[104] Similarly, the intervention is unlawful only if it meets two cumulative conditions– if it "bear[s] on matters in which each State is permitted, by the principle of State sovereignty to decide freely"[105] and "when it uses methods of coercion".[106] That is again challenging in the cybersecurity context as the boundaries of the *domaine reservé* have been vague and the coercion has traditionally been understood narrowly in kinetic conflicts.[107] Finally, claiming the breach of the duty of due diligence faces even greater challenges as the status of the principle of due diligence in contested both in the general international law[108] as well as in the cyber context[109] and the scope of this principle is unclear.[110]

Second, even if the international norm breached by a cyber operation has been identified, it is not always easy to attribute this international wrongful act to a State.[111] In fact, the attribution of cyber operations to a State faces not only legal but also technical and political challenges.[112] In order to satisfy the attribution requirements, it is necessary to identify both "location and identity of the cyber infrastructure from which an operation originates ("technical attribution")"[113] and "the person who was operating the infrastructure("political attribution")".[114] This tracing is still slow and cumbersome. But even if this is done, it is still necessary to prove a sufficient link between a breach of international law and a State ("legal

[103] Tallinn Manual 2.0, 20-21.
[104] Tallinn Manual 2.0, 21-22. See also Jens D. Ohlin, Did Russian Cyber Interference in the 2016 Election Violate International Law, 95 Texas Law Review (2017), 1588 and 1593-1594; Michael N. Schmitt, "Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law, 19 Chicago Journal of International Law, 39-42; and Ido Kilovaty, Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information, 9 Harvard National Security Journal (2018).
[105] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment (Nicaragua v United States of America)*, ICJ Reports 1986, p 14, [205].
[106] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment (Nicaragua v United States of America)*, ICJ Reports 1986, p 14, [205].
[107] See Tallinn Manual 2.0, 315-319; and Robert Jennings and Arthur Watts (eds.), Oppenheim's International Law (9th ed., 2008), 432. But see the recent works that argue for a broader understanding of coercion, in particular Michael N. Schmitt, Grey Zones in the International Law of Cyberspace, 42 Yale Journal of International Law (2017); Russell Buchan, The International Legal Regulation of State- Sponsored Cyber Espionage, in: Anna-Maria Osula and Henry Rogias (eds.), International Cyber Norms: Legal, Policy & Industry Perspectives (2016), 78; and Sean Watts, Low-Intensity Cyber Operations and the Principle of Non-Intervention, in Jens D. Ohlin et al. (eds.), Cyber War: Law and Ethics for Virtual Conflicts (2015), 257
[108] See e.g. McDonald, N. (2019). The Role of Due Diligence In International Law. *International and Comparative Law Quarterly, 68*(4), 1041-1054.
[109] See Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 24.
[110] See Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 25-26.
[111] See Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 26-28.
[112] Nicholas Tsagourias, Cyber Attacks, Self-Defence and the Problem of Attribution, 17 Journal of Conflict & Security Law (2012).
[113] Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 26.
[114] Ibid (citation omitted).

attribution"). Given the fact that cyberoperations can be easily outsourced to non-State actors, this element presents a daunting challenge.[115]

Finally, it is also important to bear in mind the contextual factors. Cybertechnology has been advancing quickly and international law has been somewhat lagging behind,[116] partly also due to the private internet governance.[117] At the same time, the States have been creative in employing cyber tools to advance their interests. The cyber-attacks thus do not entail only attacks on infrastructure, but also election meddling, cyberespionage and other influence operations that are difficult to classify under the standard state responsibility paradigm. The rise of artificial intelligence will make this even more complicated. We thus need to "think infrastructally"[118] and carefully watch the emerging State practice in this vibrant area of international law.

7. Conclusion

Every internationally wrongful act by a subject of international law entails its international responsibility.[119] The ILC has done an admirable job in clarifying how this overarching principle of state responsibility operates in terms of attribution, breach of an obligation, circumstances precluding wrongfulness, as well as the invocation and consequences of state responsibility. International and domestic case law has laid the foundation for and - in some cases - progressively developed these rules. However, state responsibility remains an amorphous area of law as is illustrated by its application to the cybersecurity context. The rapid development of cybertechnology, the corresponding underdevelopment of cybersecurity law, as well as the difficulty in identifying where there has been a violation of state sovereignty and/or attribution of the respective act to the state all pose challenges when applying the rules of state responsibility in the cybersecurity sphere.

[115] See Barrie Sander, Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections, *Chinese Journal of International Law*, Volume 18, Issue 1, March 2019, 1, at 27-28.

[116] See Eyal Benvenisti, 'Upholding DemocracyAmid the Challenges of New Technology: What Role for the Law of Global Governance?' (2018) 29(1) European Journal of International Law 9.

[117] See Menashe, M., & Kikarea, E. (2019). The global governance of cyberspace: reimagining private actors' accountability: introduction. Cambridge International Law Journal, 8 (2), 153-170. See also Roxana Radu, *Negotiating Internet Governance*, OUP, 2019.

[118] Benedict Kingsbury, Infrastructure and InfraReg: on rousing the international law 'Wizards of Is', Cambridge International Law Journal, Vol. 8 No. 2, pp. 171–186.

[119] See the dictum of the *Permanent Court of International Justice in Factory at Chorzow, jurisdiction, judgment No B, 1927, PClj, Ser A, No 9* at p 21: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation'.