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Contemporary Principles and Perspectives

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stances extend even to the protection of these offices from prosecution in relation to such heinous offences.

The specific immunities of heads of state, other senior officials and diplomats are personal and will depend on their status. These are discussed below.

6.5.4.2 Personal status immunity

Heads of states and governments, and senior government officials such as foreign ministers and diplomatic staff, are immune from the exercise of state jurisdiction with regard to the conduct of their official functions as agents of their state, as discussed above. In addition, certain officials enjoy limited immunity with respect to private conduct, the premises where they carry out their official functions and their private residences. The immunity here is based on the need to prevent interference with the official's functions – *ne impediatur officium*.[157] Hence it is necessary to protect the official's private life by rendering private acts and property immune or inviolable. In this way, as the International Court of Justice has unequivocally stated, certain officials of a state (at least heads of state, heads of government and foreign affairs ministers) enjoy complete and inviolable immunity from all acts, public or private, while they are in office:

> The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties. . . .
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> In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'.[158]

This immunity attaches to the person even for acts committed prior to the taking of office, as the purpose of the immunity is to enable a state to exercise its official functions (through the person of the senior government agent) unfettered by the exercise of jurisdiction of foreign courts.[159]

Unlike functional immunities, personal immunities extend even to protection from prosecution for crimes under national and international law. In the *Arrest Warrant* case, the majority of the International Court of Justice held that there was no exception to the personal immunity of a

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157 *Arrest Warrant* case, above note 4, [51].
158 Ibid., [53] and [54].
159 Ibid., [54].

serving foreign minister that would permit a foreign state to prosecute even international crimes, such as crimes against humanity or war crimes.[160] The decision drew considerable criticism (from scholars as well as from judges of the Court who dissented or provided Separate Opinions), both for its lack of legal coherence and for the message that it sent about the impunity of state leaders who commit the most heinous crimes against their own people.[161] The majority considered that immunity did not amount to impunity, as various jurisdictional possibilities existed for his prosecution:

- Yerodia (like others in his position) could still be subject to prosecution at any time by courts in his own state;
- his immunity might be waived by the Congolese government;
- while after leaving office his functional immunity would continue, his personal immunity would lapse permitting prosecution for acts done before or after his term in office; and
- international courts may not be affected by the immunity.[162]

Despite this, as Judges Higgins, Buergenthal and Kooijmans point out, the likelihood of any of these conditions being met was rather remote, and would not prevent impunity in practice.

6.5.4.2.1 Diplomatic and consular immunity The importance of diplomatic relations in international law cannot be overstated. The role of diplomats as representatives of their state is critical to the functioning of international law and relations, whether between friendly or hostile states, in times of peace and in armed conflict.[163] Diplomatic immunities, necessary to ensure the integrity of the foreign state's agents and property, have

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[160] The facts of the case and the story of the Belgian legislation are set out above in the text accompanying notes 100–102.

[161] *Arrest Warrant* case, above note 4, 97–9 [5]–[8] (Judge Al Khasawneh), 87 [78] (Judges Higgins, Buergenthal and Kooijmans); Lorna McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty' (2007) 18(5) *European Journal of International Law* 903; Lee M. Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory' (2003) 97 *American Journal of International Law* 741; Phillippe Sands, 'After Pinochet: the Role for National Courts', in Phillippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003) 68, 95–108.

[162] *Arrest Warrant* case, above note 4, [48].

[163] See generally Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford: Oxford University Press, 2008, 3rd

been codified in the Vienna Convention on Diplomatic Relations 1961.[164] Diplomatic immunity for the most part covers the functions, property and conduct of a state's diplomatic agents. These prevent interference with the private as well as public life of diplomatic staff and so ensure they are able to carry out their mission – *ne impediatur legatio*. As such, the immunities are extended to family members forming part of the household, who are not nationals of the host state.

As in the case of the other forms of immunity discussed, it does not attach to the individual but is rather an extension of the sovereignty of the sending state. That state has the power to waive or maintain that immunity, as it is for that state's benefit, not that of the individual to whom it attaches. Diplomatic personnel are immune, subject to exceptions identified in the Vienna Convention, from criminal jurisdiction and powers of arrest and detention. The host state can, of course, declare a diplomat *persona non grata* and require the sending state remove him or her. This reflects the fact that there is no right of legation and all diplomatic relations are based on consent.[165] If the sending state does not remove its representative within a reasonable time, the host state may cease to recognize the diplomat as part of the mission, and act as though diplomatic immunity has lapsed.[166]

Civil jurisdiction may be exercised over diplomatic staff only to the extent that it is relevant to their private activities. Specifically, jurisdiction may be exercised in matters relating to real property in the host state, not held for an official purpose, succession, and any professional or commercial activities beyond their official role.[167] Also, personnel have the ability to waive their immunity by voluntarily submitting to the jurisdiction by, for example, filing a claim in a court of the host state. The immunity could not then be raised to have a counterclaim struck out.

The premises of foreign diplomatic missions are inviolable. They remain part of the territory of the host state, but the authorities of the host state may not exercise jurisdiction on the premises of a foreign diplomatic mission without the express consent of the head of the mission. Further, Article 22(2) makes it incumbent on the host state to prevent any disturbance of the peace or impairment of the dignity of the

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edn); *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) [1980] ICJ Rep 3, 43.

164 Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 ('VCDR').

165 Brownlie, above note 1, 342.

166 VCDR, above note 164, Art. 9.

167 Ibid., Art. 31.

mission.[168] Similarly, the private residences of individual diplomatic personnel are inviolable, as are any records, papers and correspondence. The property of the foreign mission may not be subject to search, requisition, attachment or execution; the diplomatic bag, courier, coded messages and cipher may not be 'violated'. Finally, diplomatic agents are immune from any requirements to pay taxes, subject to listed exception in Article 34.[169]

Where a diplomat is a permanent resident or national of the receiving state, a number of these immunities do not apply. This is in the interest of ensuring accountability in at least one jurisdiction. The functional immunity element will remain as the official remains an agent of the sending state, but Article 38(1) provides that 'except insofar as privileges and immunities may be granted by the receiving state, a diplomatic agent who is a national of or permanently resident in that state shall enjoy only immunity from jurisdiction and inviolability, in respect of official acts performed in the exercise of his functions'.[170]

6.6 CONCLUSIONS

To what extent does international law preserve or limit the expression of the power and authority of sovereign states? There is inherent tension in the need to protect the sovereign authority of states, yet simultaneously prevent any single state from interfering in the functions of another. The *Arrest Warrant* case is a recent example of these principles coming into conflict. The majority decision in that case has been criticized and seems not to be in line with the trend towards increased accountability for government officials, at least with regard to serious human rights abuses, war crimes and crimes against humanity.

Historically, changes in the immunities enjoyed by sovereigns have been forced by the necessities of trade. While the absolute approach to sovereign immunities required the primacy of sovereignty, the growth of state interest and capacity in commerce brought state actors into contact with individuals in pursuit of private and commercial interests. The need for subjects to have the same confidence in transactions with state commercial entities led to the abandonment of absolute sovereign immunity, permitting subject and sovereign to engage, while enjoying confidence in equal legal protection, in their private or commercial capacities. This shift

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168 Ibid., Art. 22(2).
169 Ibid., Art. 34.
170 Ibid., Art. 38(1).

became necessary to protect the rights and interests of subjects from the vast asymmetry of state power.

The current trend towards limiting sovereign immunity with regard to serious international crimes such as genocide, war crimes and crimes against humanity, reflects a similar – although arguably more profound – change in the conception of the role of the state in the international system. The spectrum of competence allocated to states is narrowing, and individuals acting in the state's name beyond that narrowing scope are more frequently being held to account. Similarly, individual responsibility is being imposed on individuals who traditionally would have been shielded by sovereign immunity in cases of serious crimes. States and their rulers are decreasingly able to rely on their sovereign equality for protection.

The mechanism for this change is primarily treaty-driven. Customary international law, as a relatively conservative force, allows governments to cling to the absolutist immunities doctrine, a point reflected in the reductive reasoning of the majority in the *Arrest Warrant* case. However, cases like *Pinochet* (where conventional international law permitted the prosecution of a head of state for very serious crimes), radical legislative and judicial activity like that seen in Belgium around the turn of the century, and an increasingly broad framework of human rights and international criminal law accountability all suggest a potential trend away from strict rules of sovereign protection. The continuing development of international human rights and humanitarian law standards is narrowing the scope of legitimate state behaviour, though the gradual shift towards accountability for senior government officials and heads of state, particularly with respect to serious international crimes, remains contentious. This external restriction on state sovereignty, and a ceding of absolute sovereign control of what goes on within a state's own borders, reflects a broader theme of change in the international legal and political landscape, and is consistent with other areas of international law.

7. State responsibility

A member of the International Law Commission (ILC) recently remarked: 'Responsibility is the corollary of international law, the best proof of its existence and the most credible measure of its effectiveness.'[1] Every legal system allocates responsibility. Norms, or 'secondary rules', operate to hold a person accountable for contravening a 'primary' legal obligation. For example, a primary rule in domestic law might be the obligation not to interfere with another person's property. Whether the interference is attributable to a particular person and, if so, what remedies the victim can seek are determined by the secondary rules. State responsibility for internationally wrongful acts follows the same logic.[2] Secondary rules in international law are no different from primary rules in that they must be shown to derive from a treaty, custom or general principles.[3] As the term suggests, however, secondary rules are the rights and obligations that apply after a primary rule has been violated.

The leading source in this area is the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) ('ILC Articles' or 'Articles').[4] The Articles have undergone a long gestation period and they exert a powerful influence on the development of the law.

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[1] Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 3.

[2] The international responsibility of non-state actors is discussed in Chapter 5.

[3] See Chapter 2.

[4] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Report of the ILC, 53rd sess., [2001] II(2) *Yearbook of the ILC* 26, UN Doc. A/56/10 (2001) ('ILC Articles').

7.1 THE ILC ARTICLES AND THE CHANGING DISCOURSE OF STATE RESPONSIBILITY

7.1.1 The Long Road to Codification

Although initially plagued by a fixation with the law on the treatment of aliens, driven by the third special Rapporteur, Roberto Ago, the ILC moved in the 1960s towards a measure of political acceptance of the Articles by introducing the distinction between 'primary' and 'secondary' rules.[5] Rather than codifying all rules on responsibility, the ILC decided to confine itself to the rules of general application. The ILC Commentaries accompanying the Articles ('Commentaries') describe the work as being concerned with:

> the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The Articles do not attempt to define the content of the international obligations, breach of which gives rise to responsibility.[6]

The high level of abstraction and political neutrality of the Articles was a weakness, but, given the ILC's propensity to postpone the project over time, it was also a strength.[7]

Two topics did not survive to codification as they were considered to be too progressive. First, a dispute settlement mechanism for claims arising out of the Articles was suggested.[8] The mechanism was ultimately dropped given its unpopularity with states and the belief that a state in breach could invoke the (necessarily lengthy) procedures to frustrate genuine countermeasures.[9]

Secondly, Draft Article 19 of the 1996 Draft Articles defined an 'international crime of state' as breach of an obligation 'so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a

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[5] Roberto Ago, 'Report of the Sub-Committee on State Responsibility' [1963] 2 *Yearbook of the ILC* 227, 228 [5], UN Doc. A/CN.4/SER.A/1963/Add.1.

[6] ILC Articles, above note 4, 31; General Commentary, [1].

[7] Robert Rosenstock, 'The ILC and State Responsibility' (2002) 96 *American Journal of International Law* 792, 793.

[8] Willem Riphagen, 'Seventh Report on State Responsibility' [1986] 2 *Yearbook of the ILC* 1, UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 1).

[9] David Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 824; Rosenstock, above note 7, 796. See also section 7.6.4.

whole'.[10] The proposal's validity was strongly contested by scholars and states, which is not surprising given that no state practice existed for state criminal responsibility.[11] Also, unlike the area of individual criminal responsibility, the Draft Articles lacked any defined mechanisms for the attribution of responsibility – that is, proper definition of crimes, an investigative process, the right to a fair trial, punitive sanctions and a system of rehabilitation.[12] Indeed, some of these concepts simply do not align with the idea of the responsibility of an entity such as a state. In 2000, Draft Article 19 was deleted and replaced with the concept of *jus cogens*, which is significantly less controversial.[13]

Supporting the logic of the ILC's approach, the International Court of Justice in the *Bosnian Genocide* case[14] considered whether Serbia (successor state to the Federal Republic of Yugoslavia (FRY)) was responsible for the Srebrenica genocide committed by the Bosnian Serb insurrectional movement, Republika Srpska (RS). The Court held that the Genocide Convention impliedly imposed state responsibility for genocide, including complicity in genocide. In its judgment, the Court referred to the ILC's rejection of state crimes and expressly denied that 'obligations and responsibilities under international law' can be 'of a criminal nature'.[15]

7.1.2 Significance of the Articles

There is no overarching multilateral treaty and most responsibility rules are customary in nature. Although the Articles are in the form of a draft convention, the ILC decided not to subject them to a diplomatic conference. At the same time, previous drafts had already been cited

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[10] Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted on first reading, Report of the ILC, 48th sess., [1996] II(2) *Yearbook of the ILC* 58.

[11] See, e.g., Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10(2) *European Journal of International Law* 425; Christian Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations' (1999) 10(2) *European Journal of International Law* 353.

[12] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge; New York: Cambridge University Press, 2002) 18–19, 36; Pellet, above note 11.

[13] ILC Articles, Arts 40 and 41: see further below at section 7.6.2.

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 91 ('*Bosnian Genocide* case'). See generally Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 *Journal of International Criminal Justice* 875.

[15] Ibid., [170].

with approval by the ICJ and various international tribunals[16] and the ILC felt they could exert an influence on the crystallization of custom.[17] Accordingly, the General Assembly did nothing more than 'take note' of the Articles.[18] Since then the Articles have been cited as a key source by courts and tribunals.[19]

While the Articles may, and often are, relied upon to determine the content of rules of state responsibility, there is an argument to be made that this is less than satisfactory. In international law – devoid as it is of a constitution, legislature and a compelling enforcement regime – it is axiomatic that 'subsidiary' sources like the Articles (or the judicial decisions on which the Articles are primarily based) are not interpreted and applied as formal sources of international law. Care must be taken to ensure that the Articles do not become a substitute for an examination of state practice and *opinio juris* in the determination of the content of rules of custom or general principles of international law.[20]

7.2 INTERNATIONALLY WRONGFUL ACTS

An important principle grounded in sovereign equality is that every internationally wrongful act of a state entails the international responsibility of that state (Article 1 of the Articles).[21]

An internationally wrongful act is defined in Article 2 as an action or omission that (1) is attributable to the state, and (2) constitutes a breach

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[16] See, e.g., *Gobčikovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] ICJ Rep 7, 38–41, 46, 54, 55–6 ('*Hungarian Dams* case'); *Loewen Group v United States* (Competence and Jurisdiction), ICSID Case No. ARB(AF)/98/3 (5 January 2001), [46]–[47]; *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of 31 May 1999, WT/DS344/R, [9.42]–[9.43].

[17] James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 *International and Comparative Law Quarterly* 959, 960.

[18] GA Res. 56/83 (12 December 2001).

[19] See, e.g., *Bosnian Genocide* case, above note 14, [170]; *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of 15 February 2002, WT/DS202/AB/R, [259] (WTO); *Ilaşcu and Others v Moldova and Russia* (Merits and Just Satisfaction), Application No. 48787/99, Grand Chamber Judgment, 8 July 2004, [319], [320]–[321] (European Court of Human Rights).

[20] See detailed discussion on the sources of international law in Chapter 2.

[21] *Factory at Chorzów* (*Claim for Indemnity*) (Merits) (1927) PCIJ Rep (Ser. A) No. 9, 4, 29; *Corfu Channel* (*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 23.

of an international obligation of the state. There is no requirement that damage be caused to another state.[22] The Articles also reaffirm the now generally accepted principle of objective responsibility. For example, in the *Caire* case[23] the question arose as to whether Mexico was responsible for the actions of Mexican soldiers who shot a French national after trying to extort money from him. In finding Mexico responsible, the French–Mexican Claims Commission applied the principle of objective responsibility, defining it as 'the responsibility for the acts of the officials or organs of a state, which may devolve upon it even in the absence of any "fault" of its own'.[24] In its Commentary, the ILC considers that fault may form part of the primary obligation, but there is no general (secondary) rule to that effect.[25]

Article 3 of the Articles further provides that the characterization of an act as internationally wrongful is not affected by its characterization in internal law. This reflects the basic principle discussed in Chapter 3 that a state may not legislate away its international obligations or plead insufficiency of its internal law.[26]

7.3 THE RULES OF ATTRIBUTION

A state is internationally responsible if a breach of a primary obligation is attributed it. Attribution, or imputing an act to a state, is thus a necessary prerequisite for responsibility to accrue to that state.

7.3.1 State Organs

The conduct of any state organ shall be considered an act of the state, whether the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the state (Article 4 of the Articles).[27] An organ includes

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[22] ILC Commentary to Article 2, [9]. See also Pellet, above note 1, 9–10.

[23] *Caire* (*France*) *v Mexico* (1929) 5 RIAA 516.

[24] Ibid., 529–31. See also *Union Bridge Company* (*United States*) *v Great Britain* (1924) 4 RIAA 138, 141.

[25] ILC Commentary to Article 2, [3], [10].

[26] See, e.g., *Exchange of Greek and Turkish Populations* case (Advisory Opinion) (1925) PCIJ Rep (Ser. B) No. 10, 20; Draft Declaration on Rights and Duties of States 1949, Art. 13, [1949] *Yearbook of the ILC*, 286. See also ILC Articles, above note 4, Art. 32.

[27] See, e.g., *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62, 87.

any person or entity which has that status in accordance with the internal law of the state,[28] although this definition is not exhaustive. An international court will consider all the circumstances to determine whether a person not classified as an organ under internal law is, in truth, part of the state apparatus.[29]

The fact that an organ of an autonomous government in a federation commits the wrongful act does not absolve the state of responsibility.[30] An example of breach by the judiciary is where it commits a denial of justice in relation to a foreign national.[31] Further, a breach by the legislature may occur if it fails to honour the state's treaty commitment to pass certain legislation. In the absence of a specific commitment, legislation must typically be acted upon for state responsibility to arise.[32] However, in *Prosecutor v Furundžija*, the ICTY stated:

> In the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture.[33]

Whether legislation gives rise to state responsibility will therefore depend upon the object and purpose of the primary rule in question.

7.3.2 Governmental Authority

Actions of persons who are not state organs will be attributed to the state if they are empowered to exercise elements of governmental authority

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[28] ILC Articles, above note 4, Art. 4(2).

[29] ILC Commentary to Article 4, [11]; *Church of Scientology* case, Bundesgerichtshof Judgment of 26 September 1978, VI ZR 267/76, NJW 1979, 1101.

[30] *Heirs of the Duc de Guise* (1951) 8 RIAA 150, 161. See ILC Commentary to Article 4, [8]–[10].

[31] See, e.g., *Massey* (*United States*) *v Mexico* (1927) 4 RIAA 155. A non-denial of justice example is the *Special Rapporteur* case, above note 27. Denial of justice will be discussed in more detail at section 7.6.1.

[32] *Mariposa Development Company and Others* (*United States*) *v Panama* (1933) 4 RIAA 338, 340–41. See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 451.

[33] *Prosecutor v Furundžija* (Trial Chamber Judgment) IT-95-17/1-T (10 December 1998), [150] (footnote omitted). Torture is a *jus cogens* norm: see discussion in Chapter 2.

and they act in that capacity in the particular instance (Article 5 of the Articles).

Two elements must be satisfied: that the power exercised is of a governmental nature, and that the entity was empowered to exercise it. As to the former, international case law suggests that two enquiries again are relevant.[34] The first enquiry is whether there is a high level of government control of the entity. In the case of a company, a rebuttable presumption of governmental authority arises where the state controls the voting power of the company.[35] The second enquiry is whether the functions being exercised are 'typically' or 'essentially' state functions.[36] In *Oil Field of Texas, Inc. v Iran*,[37] the Iran-United States Claims Tribunal had to decide whether the National Iranian Oil Company (NIOC) was exercising governmental functions in the context of breaches by an associated company of agreements with an American company for the lease of petroleum exploration and drilling equipment. The Tribunal found NIOC's breaches attributable to Iran as Iran was the company's sole shareholder and NIOC was established in order to exercise the ownership right of the Iranian nation in the oil and gas resources.[38]

The second element of Article 5 is that the entity was 'empowered by law' to exercise those functions. This requirement shields the state from responsibility where it has not appointed the entity to the functions it is purportedly exercising.

Acts of an organ or an entity empowered to exercise governmental authority that exceed their authority or contravene their instructions will still be considered an act of the state if the entity acts in the capacity of a state entity (Article 7). In the *Union Bridge Company* case[39] a British railway official confiscated neutral property believing it to belong to a belligerent. The Tribunal held that:

> liability is not affected either by the fact that he did so under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact . . . that there was no intention on the part of the British authorities to appropriate the material in question.[40]

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[34] See, e.g., *Maffezini v Spain* (2000) 16 ICSID (W. Bank) 212.

[35] Ibid., 239.

[36] Ibid., 241; *Ceskoslovenska Obchodni Banka, AS v Slovakia* (1999) 14 ICSID Rev 251, 257.

[37] *Oil Field of Texas, Inc. v Iran* (1982) 1 Iran-US Cl Trib Rep 347.

[38] Ibid., 351. The fact that a company is for profit does not preclude it from exercising governmental functions: *Maffezini v Spain* (2000), above note 34, 241.

[39] *Union Bridge Company* (*United States*) *v Great Britain*, above note 24.

[40] Ibid., 141.

A fine distinction is, however, drawn as to when an entity acts in a governmental or private capacity.[41] A person may still act in a governmental capacity if acting within the apparent limits of his or her functions.[42] Thus, in the *Caire* case discussed above, Mexico could not escape responsibility for the actions of uniformed Mexican police officers who extorted and shot a French national, even though they were acting in excess of their authority under Mexican law. The Commission held that the officers 'acted at least to all appearances as competent officials or organs'.[43] Conversely, the 2011 incident involving allegations of sexual assault by the then leader of the International Monetary Fund would have occurred in an exclusively private setting and thus would not be attributable to that international organization.[44]

Exceptionally, in the context of international humanitarian law, acts of members of the armed forces during an armed conflict are always attributable to the state, even though they may not have been acting in that capacity.[45]

Article 9 of the Articles restates the rare situation where a person or group of persons is in fact exercising governmental authority in the absence or default of the official authorities and in circumstances that call for its exercise. This has relevance to failed states or the situation immediately after a successful revolution.[46]

7.3.3 Instructions, Direction or Control

The conduct of a person or group of persons who are neither an organ of the state nor an entity vested with governmental authority may still be attributed to the state where they are in fact acting on the instructions, or under the direction or control of, the state (Article 8). This restates what under customary international law are two distinct elements: (1) persons

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[41] This distinction also bedevils the area of state immunity *ratione materiae*: see Chapter 6.

[42] *Mossé* case (1953) 13 RIAA 494.

[43] *Caire* (*France*) *v Mexico*, above note 23, 530.

[44] Note that the responsibility of international organizations and states on this issue are the same under international law: Article 7 of the ILC Draft Articles on Responsibility of International Organisations adopted on first reading, Report of the ILC, 61st sess., 2009, UN Doc. A/64/10, 23.

[45] Recently applied in *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168, 242.

[46] *Yeager v Iran* (1987) 17 Iran-US Cl Trib Rep 92, 104 [43]; ILC Commentary to Article 9.

acting on the instructions of the state; or (2) under the direction or control of the state.

The leading ICJ decision is the *Nicaragua* case,[47] in which Nicaragua alleged that the United States had violated the prohibition against the use of force by mining Nicaraguan waters and providing vital assistance to an insurrectional movement against the Nicaraguan government. Although the mine laying was clearly attributable to the United States as acts of state organs (that state's armed forces), the ICJ found that breaches of international humanitarian law by the rebel *contras* were not attributable. First, despite finding that the United States largely financed, trained, equipped, armed and organized the *contras*, the Court found that the *contras* were not in fact organs of the United States[48] or acting under the instructions of the United States.[49] The Court then considered direction and control. What would have to be proved is that the United States had 'effective control' of the military and paramilitary operations 'in the course of which the alleged violations occurred' and that it 'directed and enforced' those violations.[50]

This test for direction and control was subsequently challenged by the ICTY Appeals Chamber in *Prosecutor v Tadić*,[51] which concerned an appeal against conviction for breaches of international humanitarian law committed during the Bosnian War. The ICTY had to decide whether the 'grave breaches' regime in the Geneva Conventions applied – that is, whether the Bosnian Serb insurrection movement, RS, 'belonged to' the Federal Republic of Yugoslavia.[52] Instead of applying the 'effective control' test, the Tribunal considered that the test was at variance with judicial and state practice[53] and was not consonant with the logic of state responsibility.[54] The Tribunal formulated its own test. Where unorganized individuals are concerned, the 'effective control' test would apply, but where individuals make up an organized and hierarchically structured group, such as a military unit or armed bands of rebels, the test is one of 'overall control'.[55] Mere financing, training, equipping or providing

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47 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) (Merits) [1986] ICJ Rep 14.

48 See also the *Bosnian Genocide* case, supra note 14, 140 [391]–[392], discussed above at section 7.1.1.

49 *Nicaragua* case, above note 47 [109]–[112].

50 Ibid., [115].

51 *Prosecutor v Tadić* (Appeals Chamber Judgment) IT-94-1-A (15 July 1999).

52 Ibid., [93].

53 Ibid., [124]–[145].

54 Ibid., [116]–[123].

55 Ibid., [120].

operational support to the group would not suffice, but the conduct will be attributable if the state 'has a role in organizing, coordinating or planning the military actions of the military group'.[56]

The ILC in its Commentary to the Articles took the view that *Tadić* should be confined to the threshold question in international humanitarian law of whether an international armed conflict exists.[57] This view was vindicated, as far as the ICJ is concerned, by the *Bosnian Genocide* case, which expressly reaffirmed the *Nicaragua* test.[58] However, the *Bosnian Genocide* case failed to grapple convincingly with the issue of direction or control. The ICJ made no effort to engage with the considerable state practice and judicial decisions cited by the ICTY.[59] It also arguably turned the clock back to Cold War-era international law. *Nicaragua* was, as Travalio and Altenburg put it:

> decided in the context of a largely bipolar world, in which the United States and the former Soviet Union had fought and were fighting 'proxy wars' of varying intensities throughout the world. To hold that both the United States and the Soviet Union had engaged in armed attacks whenever groups that they supported did so would have obviously created a far more dangerous world.[60]

One of the contemporary implications of the ICJ's 'effective control' test is to make it much more difficult to hold states accountable for the use of mercenaries and private military firms.[61]

7.3.4 Adoption and Insurrection Movements

Another avenue of attribution is where a state acknowledges and adopts conduct as its own (Article 11 of the Articles). In the *Tehran Hostages* case,[62] Iranian militants seized the United States Embassy in Tehran and held the consular and diplomatic staff hostage. The Iranian government's failure to protect the United States mission, and its passive acceptance of the situation after the attack, violated diplomatic law.[63] It was only

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56 Ibid., [137]. This would apply *mutatis mutandis* to non-military groups.
57 ILC Commentary to Article 8, [5].
58 *Bosnian Genocide* case, above note 14, [396]–[407].
59 See Cassese, above note 14.
60 Greg Travalio and John Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 *Chicago Journal of International Law* 97, 105.
61 See Chapter 5.
62 *United States Diplomatic and Consular Staff in Tehran* (*United States v Iran*) (Judgment) [1980] ICJ Rep 3.
63 Ibid., [63], [66]–[67].

after the Iranian government eventually publicly adopted the militants' activities as official policy that this 'translated continuing occupation of the Embassy and detention of the hostages into acts of that State', as the militants 'had now become agents of the Iranian State for whose acts the State itself was internationally responsible'.[64] It should be noted that mere support or endorsement will not suffice – the conduct must be adopted as the state's own.[65]

The situation of insurrection movements is more complicated. The conduct of rebels, for example in destroying alien property, is not attributed to the state if the state is not negligent in suppressing the rebellion.[66] This amounts to a kind of *force majeure*.[67] However, if the insurrection is successful and the group eventually becomes the government of the state (or a new breakaway state), actions of members of that group carried out in that capacity during the insurrection will be attributed to the state (Article 10).[68]

7.3.5 Derived Responsibility

Under Article 16 of the Articles, conduct will be attributed to a state where it 'aids or assists' another state in the commission of an internationally wrongful act and where the former knew of the circumstances of the internationally wrongful act.[69] The physical element of 'aid or assist' is broad and would include conduct that makes it materially easier for another state to commit a wrongful act. The mental element of 'knowledge' is, however, narrow and often difficult to prove.[70] What is required is knowledge of the 'specific intent' of the other state.[71] For example, a state must not supply arms to another state where the supplying state knows that the receiving state will use them to commit acts of aggression.

Less common is the scenario where one state 'directs and controls'

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64 Ibid., [72]–[74].
65 ILC Commentary to Article 11, [6].
66 *Solis* (1951) 4 RIAA 358, 361; ILC Commentary to Article 10, [3].
67 Brownlie, above note 32, 455.
68 *Short v Iran* (1987) 16 Iran-US Cl Trib Rep 76; *Yeager v Iran* (1987), above note 46; *Rankin v Iran* (1987) 17 Iran-US Cl Trib Rep 135; Commentary to Article 10, [4].
69 *Bosnian Genocide* case, supra note 14, [420].
70 Jessica Howard, 'Invoking State Responsibility for Aiding the Commission of International Crimes – Australia, the United States and the Question of East Timor' (2001) 2 *Melbourne Journal of International Law* 1.
71 *Bosnian Genocide* case, supra note 14, [421]–[422].

another state in the commission of an internationally wrongful act. This may occur, for instance, during belligerent occupation.[72] Here, the dominant state is responsible not because it has power to direct and control, but because of direction and control actually exercised, with knowledge of the circumstances of the wrongful act (Article 17 of the Articles).[73] Similarly, a state is responsible where it coerces another state to commit a wrongful act, with knowledge of the circumstances of the wrongful act (Article 18).[74] Coercion amounts to *force majeure* for the coerced state as a result of the use of force, severe economic pressure or other measures forcing the coerced state to commit the wrongful act.[75]

7.3.6 *Lex Specialis*

These general rules of attribution can be displaced by *lex specialis*.[76] Currently a very topical issue is whether a new norm of customary *lex specialis* has emerged that engages state responsibility for 'harbouring' or 'supporting' terrorists.[77] The attitude of the international community has become extremely assertive, culminating in a series of unanimous General Assembly and Security Council resolutions following the 11 September 2001 attacks on the United States, condemning those who provide 'active or passive' support to terrorists.[78] Of course, one of the major stumbling blocks to such a categorization is the fact that the international community has still, after decades of negotiation, failed to agree on a definition of terrorism that excludes (legitimate) freedom fighters.[79]

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[72] ILC Commentary to Article 17, [5].

[73] *Brown* (*United States*) *v Great Britain* (1923) 6 RIAA 120; ILC Commentary to Article 17, [6]–[7].

[74] See Dominicé, above note 11, 288–9.

[75] ILC Commentary to Article 18, [3].

[76] ILC Articles, above note 4, Art. 55.

[77] See, e.g., Scott Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility' (2002) 26 *Hastings International and Comparative Law Review* 83.

[78] See, e.g., 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States', GA Res. 2625, UN GAOR, 25th sess., Supp. No. 28, UN Doc. A/8028 (1970), 123. For a complete list of resolutions, see Malzahn, above note 78, 88, fnn 18 and 19.

[79] See Ben Saul, *Defining Terrorism in International Law* (Oxford; New York: Oxford University Press, 2006); John Murphy, 'Defining International Terrorism: A Way out of the Quagmire' (1989) 19 *Israel Year Book of Human Rights* 13, 14. On the continuing struggle with the distinction, see Chapter 5.

7.4 CIRCUMSTANCES PRECLUDING WRONGFULNESS

Chapter V of Part 1 of the Articles sets out general rules for circumstances that preclude responsibility for what would otherwise be an internationally wrongful act. There is some doctrinal dispute about whether the circumstances precluding wrongfulness are primary or secondary rules, although their status as generally applicable rules is settled.[80] The circumstances precluding wrongfulness are, by their nature, temporary – when the circumstance ceases to operate, the obligation to perform the primary rule is restored.[81]

Article 26 states that nothing in Chapter V precludes the wrongfulness of an act that is not in conformity with a *jus cogens* norm. This carefully worded savings clause avoids the doctrinal anomaly presented by the fact that a state can consent to the use of force by, for example, allowing another state to station troops on its territory.[82] The law on the use of force is discussed in Chapter 8.

7.4.1 Consent

Valid consent by a state to the commission of an 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 that consent (Article 20). Consent can be express or implied. The *Russian Indemnity* case[83] concerned a claim by Russia against Turkey for interest on a long-standing indemnity. The Permanent Court of Arbitration held:

> In the relations between the Imperial Russian Government and [Turkey], Russia therefore renounced its right to interest, since its Embassy repeatedly accepted without discussion or reservation and mentioned again and again in its own diplomatic correspondence the amount of the balance of the indemnity as identical with the amount of the balance of the principal.[84]

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[80] See discussion above at section 7.1.

[81] ILC Articles, above note 4, Art. 27(a).

[82] ILC Commentary to Article 26, [6]; Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53 *International and Comparative Law Quarterly* 211, 211–13, 223–4.

[83] *Russian Claim for Interest on Indemnities* (*Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured during the War of 1877–78*) (1912) 11 RIAA 421.

[84] Ibid., [9]. See also *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) , above note 45, 211 [99]; *Savarkar* (*Great Britain v France*) (1911) 11 RIAA 243.

Consent should emanate from authorities competent to give such consent under the internal law of the state, although ostensible authority might suffice in an appropriate case.[85]

The *Savarkar* arbitration[86] illustrates the flexibility of this rule. The case concerned the transportation of a prisoner by ship to British India where he was to face trial. While the ship was docked in Marseilles harbour, the prisoner escaped and swam ashore, where he was seized by a French *gendarme* who, with the assistance of members of the British crew, brought the fugitive back. The Permanent Court of Arbitration held that French sovereignty had not been violated, as all parties had acted in good faith and the British officials were entitled to regard the behaviour of the *gendarme* as valid consent to their actions in the circumstances.[87]

7.4.2 Self-defence

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 UN Charter (Article 21). Self-defence is discussed in Chapter 8.

7.4.3 *Force majeure*

Force majeure applies when an act is carried out in response to the occurrence of irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation. A state cannot invoke *force majeure* if the situation was caused, either alone or in combination with other factors, by the conduct of the state or if it has assumed the risk (Article 23 of the Articles).

Force majeure can arise from purely natural causes, such as bad weather forcing the diversion of an aircraft onto another state's territory, or from human causes outside the state's control, such as the conduct of insurrection movements.[88] Similar to the cognate concept of supervening

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[85] Abass, above note 82, 215; ILC Commentary to Article 20, [4]–[8]; Affef Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent', in Crawford et al., above note 1, 439, 443.

[86] *Savarkar* arbitration, above note 84.

[87] Ibid., 254.

[88] ILC Commentary to Article 23, [3]; *Gould Marketing, Inc. v Ministry of National Defense of Iran,* Interlocutory Award No. ITL 24-49-2, (1983) 3 Iran-US Cl Trib Rep 147, 153; *Ottoman Empire Lighthouses Concession* (1956) 7 RIAA 155, 219–20.

impossibility of performance in the law of treaties, the fact that performance is rendered more difficult – because of an economic crisis, for example – does not excuse non-performance.[89]

7.4.4 Distress

The wrongfulness of an act of a state is precluded if the author of the act has no other reasonable way, in a situation of distress, of saving the author's life or the lives of those entrusted to the author's care. Distress cannot be invoked if the situation is caused, either alone or in combination with other factors, by the conduct of the invoking state, or if the act is likely to create a comparable or greater peril (Article 24). It is sufficient that the author reasonably believed that the danger existed.[90]

In the *Rainbow Warrior* incident,[91] two French agents had destroyed a ship in the port of Auckland. By treaty, France agreed to make the prisoners serve out their sentences on the island of Hao. However, before their sentences had expired, France repatriated them to their homeland in contravention of its undertakings to New Zealand. The Permanent Court of Arbitration accepted France's argument of distress in relation to one of the agents, who had to be repatriated to receive treatment for a serious medical condition that could threaten his life. The Court held that France had demonstrated an 'extreme urgency involving medical or other considerations of an elementary nature'.[92] By requiring a threat to life, the ILC deliberately departed from the arbitral body's formulation in the *Rainbow Warrior* case that distress had to be tightly circumscribed to avoid abuse.[93] It thus remains unclear whether distress is available for situations falling short of threat to life.

7.4.5 Necessity

Necessity is an exceptional excuse for non-performance.[94] Necessity cannot be invoked unless it is the only means to safeguard an essential

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89 *Russian Indemnity* case, above note 83, [6].

90 James Crawford, 'Second Report on State Responsibility' (1999), UN Doc. A/CN.4/498, [271].

91 *Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements, concluded on 9 July 1986 between the Two States and which related to the Problems Arising from the Rainbow Warrior Affair* (1990) 20 RIAA 215.

92 Ibid., 255 [79].

93 ILC Commentary to Article 24, [6].

94 *Hungarian Dams* case, above note 16, [51]–[52]; ILC Commentary to Article 25, [2], [14].

interest of the state against a grave and imminent peril, and it does not impair an essential interest of the state towards which the obligation exists, or of the international community as a whole.

It is only interests of a similar gravity to preservation of the natural environment, economic survival or the subsistence of the population that would be 'essential'.[95] For example, when the Liberian supertanker Torrey Canyon ran onto submerged rocks, Britain was justified in bombing the ship to burn up the oil that would otherwise have threatened the British coastline.[96] What is 'essential' and whether a 'grave and imminent peril' existed is judged objectively, rather than from the subjective intent of the invoking state,[97] and breaching the primary obligation must be the only means of preventing that peril.[98]

Furthermore, necessity may not be invoked if the primary rule excludes the possibility of its invocation, even if implicitly.[99] For example, in the *Israeli Wall* case,[100] the ICJ held that the course chosen by Israel for the wall was 'necessary to obtain its security objectives'.[101] However, in doing so Israel would be 'gravely infringing' international human rights and humanitarian law, and those infringements 'cannot be justified by military exigencies or by the requirements of national security or public order'.[102]

Necessity cannot be invoked if the state has contributed to the situation of necessity. In the *Hungarian Dams* case,[103] necessity was closed to Hungary as it had 'helped' to bring about any situation of necessity.[104] However, on the point of 'grave and imminent peril', *Hungarian Dams*

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[95] *Hungarian Dams* case, ibid., [53]; Roberto Ago, 'Addendum to the Eighth Report on State Responsibility' [1980] II(1) *Yearbook of the ILC* 12, [78]; *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/08), award of 12 May 2005, 14 ICSID Rep 152, [322]–[329] (economic crisis where other means, albeit more onerous, could be used and the state contributed to the crisis).

[96] *The 'Torrey Canyon'*, Cmnd 3246 (1967).

[97] *Hungarian Dams* case, above note 16 [51]; ILC Commentary to Article 25, [15]–[16].

[98] *The M/V Saiga (No. 2)* (*Saint Vincent and the Grenadines v Guinea*) (1999) 38 ILM 1323, [135]–[136]; *Hungarian Dams* case, above note 16, [54].

[99] ILC Articles, above note 4, Art. 25(2)(a); ILC Commentary to Article 25, [19].

[100] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.

[101] Ibid., [136].

[102] Ibid., [135]–[136].

[103] *Hungarian Dams* case, above note 16.

[104] Ibid., [57].

considered that a peril appearing in the long term might be 'imminent' if its occurrence was nevertheless inevitable.[105]

7.5 CONSEQUENCES OF BREACH

Once it is established that an international obligation has been breached and that the breach is attributable to a state that cannot avail itself of any circumstances precluding wrongfulness, new secondary obligations descend upon that state to make good the injury caused to the injured state or the international community as a whole.[106]

7.5.1 Cessation

The obligation of cessation is crucial to the international rule of law and the underlying principle of *pacta sunt servanda*.[107] As a wrongful act does not affect the state's continued duty to perform the obligation,[108] a state is under a duty to cease its act, if it is continuing (Article 30(a) of the Articles). In practice, cessation is often the primary remedy sought.[109] In some cases cessation can be indistinguishable from restitution, especially where the wrongful conduct is an omission,[110] such as the obligation on Iran to free the hostages in *Tehran Hostages* case.[111] Cessation was inapplicable in *Rainbow Warrior*[112] as the violated treaty obligation was no longer in force.[113]

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105 Ibid., [55].

106 ILC Articles, above note 4, Art. 28. See *LaGrand* (*Germany v United States*) [2001] ICJ Rep 466, [48].

107 Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 *American Journal of International Law* 833, 839. On efficient breach, see, e.g., Lewis Kornhauser, 'An Introduction to the Economic Analysis of Contract Remedies' (1986) 57 *University of Colorado Law Review* 683, 686; cf Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA; London: Harvard University Press, 1981), 9.

108 ILC Articles, above note 4, Art. 29.

109 ILC Commentary to Article 30, [4].

110 ILC Articles, above note 4, Art. 2.

111 *Tehran Hostages* case, above note 62.

112 *Rainbow Warrior* case, supra note 91.

113 Ibid., [114].

7.5.2 Assurances and Guarantees of Non-repetition

A state is also under an obligation to offer appropriate assurances and guarantees of non-repetition, if the circumstances so require (Article 30(b)). In *LaGrand*,[114] the ICJ found the United States to be in breach of diplomatic law in its failure to inform two condemned German prisoners of their right to communicate with the German consulate.[115] The Court considered that the apology by the United States did not suffice in the circumstances.[116] The Court noted that the United States' commitment to implement a 'vast and detailed programme' to ensure future compliance was met with 'Germany's request for a *general* assurance of non-repetition'.[117] As to *specific* assurances, the ICJ intimated that if the United States again breached the rule to the detriment of German nationals, and if the individuals concerned were subjected to prolonged detention or sentenced to severe penalties, 'it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence'.[118]

The circumstances in which a state should offer guarantees or assurances are exceptional, and the area is still developing.[119] The rule is likely to apply only if there is a real risk that a serious breach causing substantial injury to another state may be repeated.[120] The choice of means of compliance will usually be left to the discretion of the responsible state.[121]

7.5.3 Reparations

In *Chorzów Factory*,[122] the Permanent Court of International Justice ordered Poland to pay reparations to Germany for wrongfully appropriating land owned by German companies in Polish Upper Silesia. Under treaty, Poland could only apply state, and not private, property in payment of German war reparations. The following statement is

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114 *LaGrand* case, above note 106.
115 Vienna Convention on Consular Relations 1963, Art. 36(1)(b).
116 *LaGrand* case, above note 106, [123].
117 Ibid., [123]–[124] (emphasis added).
118 Ibid., [125]. See also *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v Nigeria: Equatorial Guinea Intervening*) [2002] ICJ Rep 303, [318].
119 ILC Commentary to Article 30, [13].
120 James R. Crawford, 'State Responsibility', in *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut, 2010), [26]
121 *LaGrand* case, above note 106, [125].
122 *Chorzów Factory* case, above note 21.

canonical:[123] 'Reparation must, as 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'.[124]

This is reflected in Article 31 of the Articles, which provides for an obligation of full reparation for the injury caused by the internationally wrongful act.[125] The concept of 'injury' is broad and includes any damage, material or moral. Insults to a state and pain and suffering are the main examples of 'moral' damage. In the *I'm Alone* case,[126] the US-Canadian Claims Commission held that the sinking of a Canadian registered private vessel by the United States did not cause any material damage to Canada as it was owned and operated by American citizens. Nevertheless, the act caused moral damage to Canada, for which the Commission recommended that the United States apologise and pay $25,000 compensation.[127]

The Articles only partly elaborate on the principle of causation. The Commentary takes the view that questions of 'directness' and 'remoteness of damage' are too flexible to be reduced to a 'single verbal formula'.[128] However, under the mitigation rule in Article 39, account shall be taken of the contribution to the injury by wilful or negligent conduct of the injured state or person (for example, a national) in relation to whom the injured state seeks reparation.[129] The Articles do not address the situation where the injury is partly caused by a lawful act of a third party, or questions of contribution as between two responsible states.[130] The way in which these general principles apply in international law is largely unexplored.[131]

Reparation takes the form of, singly or in combination, restitution, compensation and satisfaction.[132]

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123 See, e.g., *Hungarian Dams* case, above note 16, [149]–[150].
124 *Chorzów Factory* case, above note 21, 47.
125 See also *'Lusitania'* case (*United States, Germany*) (1923) 7 RIAA 32, 39.
126 *SS 'I'm Alone'* case (*Canada, United States*) (1935) 3 RIAA 1609.
127 Ibid., 1618.
128 ILC Commentary to Article 31, [10], quoting with approval Patrick Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 1995, 5th edn), 466.
129 See also *Hungarian Dams* case, above note 16, [80].
130 ILC Articles, above note 4, Art. 47(2)(b); ILC Commentary to Article 47, [10].
131 See Shelton, above note 107, 846–7.
132 ILC Articles, above note 4, Art. 34.

7.5.4 Restitution

Article 35 of the Articles restates the orthodoxy that restitution is the primary remedy for injury caused by an internationally wrongful act.[133] Restitution can take the form of restoration of territory, persons or property or reversal of a juridical act.[134] For example, in the *Temple of Preah Vihear* case,[135] the ICJ required Thailand to withdraw its detachment of armed forces and restore any objects it removed from a Cambodian temple.[136] In the *Arrest Warrant* case,[137] Belgium was obliged to cancel an arrest warrant in breach of state immunity.

Restitution is not available to the extent that it is materially impossible (for example, if appropriated property has been destroyed or sold to a third party), or if it involves a burden out of all proportion to the benefit being sought from restitution, especially if compensation would be a sufficient remedy.[138] These limitations mean that in some areas, such as trade or investment, restitution is rarely ordered.[139] Despite these reservations, retaining restitution as a primary remedy is justified to discourage rich states from paying for illegally obtained advantages that cannot be so obtained by poorer states.[140]

7.5.5 Compensation

To the extent that damage is not made good by restitution, the responsible state must pay compensation for any financially assessable damage, including loss of profits (Article 36 of the Articles).

A common and flexible remedy, compensation usually comprises the 'fair market value' of property (appropriately valued), an award of lost profits if not too speculative, and incidental expenses

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[133] *Chorzów Factory* case, above note 21, 47; ILC Commentary to Article 35, [3].

[134] ILC Commentary to Article 35, [5].

[135] *Case concerning the Temple of Preah Vihear* (*Cambodia v Thailand*) (Merits) [1962] ICJ Rep 6.

[136] Ibid., 36.

[137] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) [2002] ICJ Rep 3.

[138] ILC Articles, above note 4, Arts 35(a) and (b); ILC Commentary to Article 35, [9]; *Chorzów Factory* case, above note 21, 47; *Forests of Central Rhodope* (1933) 3 RIAA 1405, 1432.

[139] See, e.g., Bruno Simma and Dirk Pulkowski, '*Leges Speciales* and Self-Contained Regimes', in Crawford, above note 12, 139, 156.

[140] Brownlie, above note 32, 463; Shelton, above note 108, 844.