The question of fault [32]

There are contending theories as to whether responsibility of the state for unlawful acts or omissions is strict or whether it is necessary to show some fault or intention on the part of the officials concerned. 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. To be contrasted with this approach is the subjective responsibility concept (the 'fault' theory) which emphasises that an element of intentional (*dolus*) or negligent (*culpa*) conduct on the part of the person concerned is necessary before his state can be rendered liable for any injury caused.

The relevant cases and academic opinions are divided on this question, although the majority tends towards the strict liability, objective theory of responsibility.

In the *Neer* claim[33] in 1926, an American superintendent of a Mexican mine was shot. The USA, on behalf of his widow and daughter, claimed damages because of the lackadaisical manner in which the Mexican authorities pursued their investigations. The General Claims Commission dealing with the matter disallowed the claim, in applying the objective test.

In the *Caire* claim,[34] the French–Mexican Claims Commission had to consider the case of a French citizen shot by Mexican soldiers for failing to supply them with 5,000 Mexican dollars. Verzijl, the presiding commissioner, held that Mexico was responsible for the injury caused in accordance with the objective responsibility doctrine, that is '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'.[35]

A leading case adopting the subjective approach is the *Home Missionary Society* claim[36] in 1920 between Britain and the United States. In this

[32] See e.g. Crawford, *Articles*, p. 12; H. Lauterpacht, *Private Law Sources and Analogies of International Law*, Cambridge, 1927, pp. 135–43; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 766; Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, pp. 425 ff. and Brownlie, *System*, pp. 38–46, and Aréchaga, 'International Responsibility', pp. 534–40. See also J. G. Starke, 'Imputability in International Delinquencies', 19 BYIL, 1938, p. 104, and Cheng, *General Principles*, pp. 218–32.

[33] 4 RIAA, p. 60 (1926); 3 AD, p. 213. [34] 5 RIAA, p. 516 (1929); 5 AD, p. 146.

[35] 5 RIAA, pp. 529–31. See also *The Jessie*, 6 RIAA, p. 57 (1921); 1 AD, p. 175.

[36] 6 RIAA, p. 42 (1920); 1 AD, p. 173.

case, the imposition of a 'hut tax' in the protectorate of Sierra Leone triggered off a local uprising in which Society property was damaged and missionaries killed. The tribunal dismissed the claim of the Society (presented by the US) and noted that it was established in international law that no government was responsible for the acts of rebels where it itself was guilty of no breach of good faith or negligence in suppressing the revolt. It should, therefore, be noted that the view expressed in this case is concerned with a specific area of the law, viz. the question of state responsibility for the acts of rebels. Whether one can analogise from this generally is open to doubt.

In the *Corfu Channel* case,[37] the International Court appeared to lean towards the fault theory[38] by saying that:

> it cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.[39]

On the other hand, the Court emphasised that the fact of exclusive territorial control had a bearing upon the methods of proof available to establish the knowledge of that state as to the events in question. Because of the difficulties of presenting direct proof of facts giving rise to responsibility, the victim state should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.[40]

However, it must be pointed out that the Court was concerned with Albania's knowledge of the laying of mines,[41] and the question of *prima facie* responsibility for *any* unlawful act committed within the territory of the state concerned, irrespective of attribution, raises different issues. It cannot be taken as proof of the acceptance of the fault theory. It may be concluded that doctrine and practice support the objective theory and that this is right, particularly in view of the proliferation of state organs

[37] ICJ Reports, 1949, p. 4; 16 AD, p. 155.
[38] See e.g. *Oppenheim's International Law*, p. 509.
[39] ICJ Reports, 1949, pp. 4, 18; 16 AD, p. 157. Cf. Judges Krylov and Ecer, *ibid.*, pp. 71–2 and 127–8. See also Judge Azevedo, *ibid.*, p. 85.
[40] ICJ Reports, 1949, pp. 4, 18. [41] See Brownlie, *Principles*, pp. 427–9.

and agencies.[42] The Commentary to the ILC Articles emphasised that the Articles did not take a definitive position on this controversy, but noted that standards as to objective or subjective approaches, fault, negligence or want of due diligence would vary from one context to another depending upon the terms of the primary obligation in question.[43]

Imputability[44]

Imposing upon the state absolute liability wherever an official is involved encourages that state to exercise greater control over its various departments and representatives. It also stimulates moves towards complying with objective standards of conduct in international relations.

State responsibility covers many fields. It includes unlawful acts or omissions directly committed by the state and directly affecting other states: for instance, the breach of a treaty, the violation of the territory of another state, or damage to state property. An example of the latter heading is provided by the incident in 1955 when Bulgarian fighter planes shot down an Israeli civil aircraft of its state airline, El Al.[45] Another example of state responsibility is illustrated by the *Nicaragua* case,[46] where the International Court of Justice found that acts imputable to the US included the laying of mines in Nicaraguan internal or territorial waters and certain attacks on Nicaraguan ports, oil installations and a naval base by its agents.[47] In the *Corfu Channel* case,[48] Albania was held responsible for the consequences of mine-laying in its territorial waters on the basis

[42] The question of intention is to be distinguished from the problem of causality, i.e. whether the act or omission in question actually caused the particular loss or damage: see e.g. the *Lighthouses* case, 23 ILR, p. 352.

[43] ILC Commentary 2001, pp. 69–70.

[44] See e.g. *Yearbook of the ILC*, 1973, vol. II, p. 189. See also Brownlie, *System*, pp. 36–7 and chapter 7; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 773; L. Condorelli, 'L'Imputation à l'État d'un Fait Internationallement Illicite', 188 HR, 1984, p. 9, and R. Higgins, 'The Concept of "the State": A Variable Geometry and Dualist Perceptions' in *Mélanges Abi-Saab*, The Hague, 2001, p. 547.

[45] See the *Aerial Incident* case, ICJ Reports, 1955, pp. 127, 130. See also the incident where a Soviet fighter plane crashed in Belgium. The USSR accepted responsibility for the loss of life and damage that resulted and compensation was paid: see 91 ILR, p. 287, and J. Salmon, 'Chute sur le Territoire Belge d'un Avion Militaire Sovietique de 4 Juillet 1989, Problèmes de Responsabilité', *Revue Belge de Droit International*, 1990, p. 510.

[46] *Nicaragua* v. *United States*, ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

[47] ICJ Reports, 1986, pp. 48–51 and 146–9; 76 ILR, pp. 382, 480.

[48] ICJ Reports, 1949, p. 4; 16 AD, p. 155.

of knowledge possessed by that state as to the presence of such mines, even though there was no finding as to who had actually laid the mines. In the *Rainbow Warrior* incident,[49] the UN Secretary-General mediated a settlement in which New Zealand received *inter alia* a sum of $7 million for the violation of its sovereignty which occurred when that vessel was destroyed by French agents in New Zealand.[50] The state may also incur responsibility with regard to the activity of its officials in injuring a national of another state, and this activity need not be one authorised by the authorities of the state.

The doctrine depends on the link that exists between the state and the person or persons actually committing the unlawful act or omission. The state as an abstract legal entity cannot, of course, in reality 'act' itself. It can only do so through authorised officials and representatives. The state is not responsible under international law for all acts performed by its nationals. Since the state is responsible only for acts of its servants that are imputable or attributable to it, it becomes necessary to examine the concept of imputability (also termed attribution). Imputability is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien.

Article 4 of the ILC Articles provides that the conduct of any state organ (including any person or entity having that status in accordance with the internal law of the state) shall be considered as an act of the state concerned under international law where the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organisation of the state and whatever its character as an organ of the central government or of a territorial unit of the state. This approach reflects customary law. As the International Court noted in *Difference Relating to Immunity from Legal Process of a Special Rapporteur*, 'According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state.'[51] The International Court

[49] See 81 AJIL, 1987, p. 325 and 74 ILR, pp. 241 ff. See also above, p. 778.

[50] Note also the *USS Stark* incident, in which a US guided missile frigate on station in the Persian Gulf was attacked by Iraqi aircraft in May 1987. The Iraqi government agreed to pay compensation of $27 million: see 83 AJIL, 1989, pp. 561–4.

[51] ICJ Reports, 1999, pp. 62, 87; 121 ILR, pp. 405, 432. See also e.g. the *OSPAR (Ireland* v. *UK)* case, Final Award, 2 July 2003, para. 144; 126 ILR, 334, 379, the *Massey* case, 4 RIAA, p. 155 (1927); 4 AD, p. 250 and the *Salvador Commercial Company* case, 15 RIAA, p. 477 (1902). As an example of the state organ concerned being from the judiciary, see the *Sunday Times* case, European Court of Human Rights, Series A, vol. 30, 1979; 58 ILR,

in the *Genocide Convention (Bosnia* v. *Serbia)* case regarded it as 'one of the cornerstones of the law of state responsibility, that the conduct of any state organ is to be considered an act of the state under international law, and therefore gives rise to the responsibility of the state if it constitutes a breach of an obligatrion of the state'. It was a rule of customary international law.[52] It would clearly cover units and sub-units within a state.[53]

Article 5, in reaction to the proliferation of government agencies and parastatal entities, notes that the conduct of a person or of an entity not an organ of the state under article 4 but which is empowered by the law of that state to exercise elements of governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance. This provision is intended *inter alia* to cover the situation of privatised corporations which retain certain public or regulatory functions. Examples of the application of this article might include the conduct of private security firms authorised to act as prison guards or where private or state-owned airlines exercise certain immigration controls[54] or with regard to a railway company to which certain police powers have been granted.[55]

Article 5 issues may also arise where an organ or an agent of a state are placed at the disposal of another international legal entity in a situation where both the state and the entity exercise elements of control over the organ or agent in question. This occurs most clearly where a military contingent is placed by a state at the disposal of the UN for peace-keeping purposes. Both the state and the UN will exercise a certain jurisdiction over the contingent. The question arose in *Behrami* v. *France* before the European Court of Justice as to whether troops from certain NATO states forming part of KFOR and concerned in the particular instance with demining operations in the province of Kosovo could fall under the jurisdiction of the Court or whether the appropriate responsible organ was KFOR operating under the authority of the United Nations, a body not susceptible

p. 491, and from the legislature, see e.g. the *Young, James and Webster* case, European Court of Human Rights, Series A, vol. 44, 1981; 62 ILR, p. 359.

[52] ICJ Reports, 2007, para. 385.

[53] Thus, not only would communes, provinces and regions of a unitary state be concerned, see e.g. the *Heirs of the Duc de Guise* case, 13 RIAA, p. 161 (1951); 18 ILR, p. 423, but also the component states of a federal state, see e.g. the *LaGrand* (*Provisional Measures*) case, ICJ Reports, 1999, pp. 9, 16; 118 ILR, pp. 39, 46, the *Davy* case, 9 RIAA, p. 468 (1903); the *Janes* case, 4 RIAA, p. 86 (1925); 3 AD, p. 218 and the *Pellat* case, 5 AD, p. 145. See also *Yearbook of the ILC*, 1971, vol. II, part I, pp. 257 ff. and ILC Commentary 2001, pp. 84 ff.

[54] ILC Commentary 2001, p. 92.

[55] *Yearbook of the ILC*, 1974, vol. II, pp. 281–2.

to the jurisdiction of the Court. The Court held that the key question was whether the UN Security Council retained ultimate authority and control so that operational command only was delegated and that this was so in the light of resolution 1244. Accordingly, responsibility for the impugned action was attributable to the UN, so that jurisdiction did not exist with regard to the states concerned for the European Court.[56]

Article 6 provides that the conduct of an organ placed at the disposal of a state by another state shall be considered as an act of the former state under international law, if that organ was acting in the exercise of elements of the governmental authority of the former state. This would, for example, cover the UK Privy Council acting as the highest judicial body for certain Commonwealth countries.[57]

Ultra vires acts

An unlawful act may be imputed to the state even where it was beyond the legal capacity of the official involved, providing, as Verzijl noted in the *Caire* case,[58] that the officials 'have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity'.

This was reaffirmed in the *Mossé* case,[59] where it was noted that:

> Even if it were admitted that . . . officials . . . had acted . . . outside the statutory limits of the competence of their service, it should not be deduced, without further ado, that the claim is not well founded. It would still be necessary to consider a question of law . . . namely whether in the international order the state should be acknowledged responsible for acts performed by officials within the apparent limits of their functions, in accordance with a line of conduct which was not entirely contrary to the instructions received.

In *Youman's* claim,[60] militia ordered to protect threatened American citizens in a Mexican town instead joined the riot, during which the Americans were killed. These unlawful acts by the militia were imputed to the state of Mexico, which was found responsible by the General Claims Commission. In the *Union Bridge Company* case,[61] a British official of the Cape

[56] Judgment of 2 May 2007, paras. 134 ff. See also *Bosphorus Airways* v. *Ireland*, European Court of Human Rights, judgment of 30 June 2005. As to the Kosovo situation, see above, chapter 9, p. 452.
[57] *Yearbook of the ILC*, 1974, vol. II, p. 288 and ILC Commentary 2001, p. 98.
[58] 5 RIAA, pp. 516, 530 (1929); 5 AD, pp. 146, 148.
[59] 13 RIAA, p. 494 (1953); 20 ILR, p. 217.
[60] 4 RIAA, p. 110 (1926); 3 AD, p. 223.
[61] 6 RIAA, p. 138 (1924); 2 AD, p. 170.

Government Railway mistakenly appropriated neutral property during the Boer War. It was held that there was still liability despite the honest mistake and the lack of intention on the part of the authorities to appropriate the material in question. The key was that the action was within the general scope of duty of the official. In the *Sandline* case, the Tribunal emphasised that, 'It is a clearly established principle of international law that acts of a state will be regarded as such even if they are *ultra vires* or unlawful under the internal law of the state . . . their [institutions, officials or employees of the state] acts or omissions when they purport to act in their capacity as organs of the state are regarded internationally as those of the state even though they contravene the internal law of the state.'[62]

Article 7 of the ILC Articles provides that 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 or contravenes instructions.[63] This article appears to lay down an absolute rule of liability, one not limited by reference to the apparent exercise of authority and, in the context of the general acceptance of the objective theory of responsibility, is probably the correct approach.[64]

Although private individuals are not regarded as state officials so that the state is not liable for their acts, the state may be responsible for failing to exercise the control necessary to prevent such acts. This was emphasised in the *Zafiro* case[65] between Britain and America in 1925. The Tribunal held the latter responsible for the damage caused by the civilian crew of a naval ship in the Philippines, since the naval officers had not adopted effective preventative measures.

State control and responsibility

Article 8 of the ILC Articles provides that the conduct of a person or group of persons shall be considered as an act of state under international

[62] 117 ILR, pp. 552, 561. See also *Azinian* v. *United Mexican States* 121 ILR, pp. 1, 23; *SPP(ME) Ltd* v. *Egypt* 106 ILR, p. 501 and *Metalclad Corporation* v. *United Mexican States* 119 ILR, pp. 615, 634.

[63] See ILC Commentary 2001, p. 99 and see also *Yearbook of the ILC*, 1975, vol. II, p. 67.

[64] See e.g. the *Caire* case, 5 RIAA, p. 516 (1929); 5 AD, p. 146; the *Velásquez Rodríguez* case, Inter-American Court of Human Rights, Series C, No. 4, 1989, para. 170; 95 ILR, pp. 259, 296 and *Ilaşcu* v. *Moldova and Russia*, European Court of Human Rights, judgment of 8 July 2004, para. 319. See also T. Meron, 'International Responsibility of States for Unauthorised Acts of Their Officials', 33 BYIL, 1957, p. 851.

[65] 6 RIAA, p. 160 (1925); 3 AD, p. 221. See also *Re Gill* 5 RIAA, p. 157 (1931); 6 AD, p. 203.

law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. The first proposition is uncontroversial, but difficulties have arisen in seeking to define the necessary direction or control required for the second proposition. The Commentary to the article emphasises that, 'Such conduct will be attributable to the state only if it directed or controlled the specific operation and the conduct complained of was an integral part of the operation.'[66] Recent case-law has addressed the issue.

In the *Nicaragua* case, the International Court declared that in order for the conduct of the *contra* guerrillas to have been attributable to the US, who financed and equipped the force, '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'.[67] In other words, general overall control would have been insufficient to ground responsibility. However, in the *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia adopted a more flexible approach, noting that the degree of control might vary according to the circumstances and a high threshold might not always be required.[68] In this case, of course, the issue was of individual criminal responsibility. Further, the situation might be different where the state deemed responsible was in clear and uncontested effective control of the territory where the violation occurred. The International Court of Justice in the *Namibia* case stated that, 'Physical control of a territory and not sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states.'[69] This was reaffirmed in *Loizidou* v. *Turkey*, where the European Court of Human Rights noted that, bearing in mind the object and purpose of the European Convention on Human Rights,

> the responsibility of a contracting party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[70]

[66] ILC Commentary 2001, p. 104.
[67] ICJ Reports, 1986, pp. 14, 64–5; 76 ILR, p. 349.
[68] 38 ILM, 1999, pp. 1518, 1541.
[69] ICJ Reports, 1971, pp. 17, 54; 42 ILR, p. 2.
[70] Preliminary Objections, European Court of Human Rights, Series A, No. 310, 1995, pp. 20, 24; 103 ILR, p. 621, and the merits judgment, European Court of Human Rights, Judgment of 18 December 1996, para. 52; 108 ILR, p. 443. See also *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, para. 76; 120 ILR, p. 10.

The International Court returned to the issue in the *Genocide Convention (Bosnia* v. *Serbia)* case and reaffirmed its approach in the *Nicaragua* case. It noted that the Appeal Chamber's judgment in *Tadić* did not concern issues of state responsibility nor a question that was indispensable for the exercise of its jurisdiction. It held that the 'overall control' test was not appropriate for state responsibility and that the test under customary law was that reflected in article 8 whereby the state would be responsible for the acts of persons or groups (neither state organs nor equated with such organs) 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.[71]

Article 9 of the ILC Articles provides that the conduct of a person or a group of persons shall be considered as an act of the state under international law if the person or group was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[72]

Mob violence, insurrections and civil wars

Where the governmental authorities have acted in good faith and without negligence, the general principle is one of non-liability for the actions of rioters or rebels causing loss or damage.[73] The state, however, is under a duty to show due diligence. Quite what is meant by this is difficult to quantify and more easily defined in the negative.[74] It should also be noted that special provisions apply to diplomatic and consular personnel.[75]

Article 10 of the ILC Articles provides that where an insurrectional movement is successful either in becoming the new government of a state or in establishing a new state in part of the territory of the pre-existing

[71] ICJ Reports, 2007, paras. 403–6.

[72] See e.g. the *Yeager* case, 17 Iran–US CTR, 1987, pp. 92, 104.

[73] See e.g. the *Home Missionary Society* case, 6 RIAA, pp. 42, 44 (1920); 1 AD, p. 173; the *Youmans* case, 4 RIAA, p. 110 (1926); 3 AD, p. 223 and the *Herd* case, 4 RIAA, p. 653 (1930). See also P. Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement', 17 EJIL, 2006, p. 605.

[74] E.g. Judge Huber, the *Spanish Zone of Morocco* claims, 2 RIAA, pp. 617, 642 (1925); 2 AD, p. 157. See Brownlie, *Principles*, pp. 436 ff. and the *Sambaggio* case, 10 RIAA, p. 499 (1903). See also *Yearbook of the ILC*, 1957, vol. II, pp. 121–3, and G. Schwarzenberger, *International Law*, 3rd edn, London, 1957, pp. 653 ff.

[75] See above, chapter 13, pp. 764 ff.

state, it will be held responsible for its activities prior to its assumption of authority.[76]

The issue of the responsibility of the authorities of a state for activities that occurred prior to its coming to power was raised before the Iran–US Claims Tribunal. In *Short* v. *The Islamic Republic of Iran*,[77] the Tribunal noted that the international responsibility of a state can be engaged where the circumstances or events causing the departure of an alien are attributable to it, but that not all departures of aliens from a country in a period of political turmoil would as such be attributable to that state.[78] In the instant case, it was emphasised that at the relevant time the revolutionary movement had not yet been able to establish control over any part of Iranian territory and the government had demonstrated its loss of control. Additionally, the acts of supporters of a revolution cannot be attributed to the government following the success of the revolution, just as acts of supporters of an existing government are not attributable to the government. Accordingly, and since the claimant was unable to identify any agent of the revolutionary movement the actions of whom forced him to leave Iran, the claim for compensation failed.[79] In *Yeager* v. *The Islamic Republic of Iran*,[80] the Tribunal awarded compensation for expulsion, but in this case it was held that the expulsion was carried out by the Revolutionary Guards after the success of the revolution. Although the Revolutionary Guards were not at the time an official organ of the Iranian state, it was determined that they were exercising governmental authority with the knowledge and acquiescence of the revolutionary state, making Iran liable for their acts.[81]

Falling somewhat between these two cases is *Rankin* v. *The Islamic Republic of Iran*,[82] where the Tribunal held that the claimant had not proved that he had left Iran after the revolution as a result of action by the Iranian government and the Revolutionary Guards as distinct from leaving because of the general difficulties of life in that state during the revolutionary period. Thus Iranian responsibility was not engaged.

Where a state subsequently acknowledges and adopts conduct as its own, then it will be considered as an act of state under international law entailing responsibility, even though such conduct was not attributable

[76] See E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1927, p. 241 and the *Bolivian Railway Company* case, 9 RIAA, p. 445 (1903). See also the ILC Commentary 2001, p. 112.

[77] 16 Iran–US CTR, p. 76; 82 ILR, p. 148.

[78] 16 Iran–US CTR, p. 83; 82 ILR, pp. 159–60.

[79] 16 Iran–US CTR, p. 85; 82 ILR, p. 161.

[80] 17 Iran–US CTR, p. 92; 82 ILR, p. 178.

[81] 17 Iran–US CTR, p. 104; 82 ILR, p. 194.

[82] 17 Iran–US CTR, p. 135; 82 ILR, p. 204.

to the state beforehand.[83] In the *Iranian Hostages* case, for example, the International Court noted that the initial attack on the US Embassy by militants could not be imputable to Iran since they were clearly not agents or organs of the state. However, the subsequent approval of the Ayatollah Khomeini and other organs of Iran to the attack and the decision to maintain the occupation of the Embassy translated that action into a state act. The militants thus became agents of the Iranian state for whose acts the state bore international responsibility.[84]

Circumstances precluding wrongfulness[85]

Where a state consents to an act by another state which would otherwise constitute an unlawful act, wrongfulness is precluded provided that the act is within the limits of the consent given.[86] The most common example of this kind of situation is where troops from one state are sent to another at the request of the latter.[87] Wrongfulness is also precluded where the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the UN.[88] This would also cover force used in self-defence as defined in the customary right as well as under article 51 of the Charter, since that article refers in terms to the 'inherent right' of individual and collective self-defence.[89] Further, the ILC Commentary makes it clear that the fact that an act is taken in self-defence does not necessarily mean that all wrongfulness is precluded, since the principles relating to human rights and humanitarian law have to be respected. The International Court, in particular, noted in its advisory opinion in 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.[90]

[83] Article 11 and see ILC Commentary 2001, p. 118.

[84] ICJ Reports, 1980, pp. 3, 34–5; 61 ILR, pp. 530, 560. See also above, chapter 13, p. 755.

[85] See e.g. M. Whiteman, *Digest of International Law*, Washington, 1970, vol. VII, pp. 837 ff.; *Yearbook of the ILC*, 1979, vol. II, part 1, pp. 21 ff.; *ibid*., 1980, vol. II, pp. 26 ff. and ILC Commentary 2001, p. 169. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 782, and A. V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', 10 EJIL, 1999, p. 405.

[86] See article 20 of the ILC Articles. See further ILC Commentary 2001, p. 173.

[87] See e.g. the dispatch of UK troops to Muscat and Oman in 1957, 574 HC Deb., col. 872, 29 July 1957, and to Jordan in 1958, SCOR, 13th Sess., 831st meeting, para. 28.

[88] Article 21 and see also ILC Commentary 2001, p. 177.

[89] See further below, chapter 20, p. 1131.

[90] ICJ Reports, 1996, pp. 226, 242; 110 ILR, p. 163.

Article 22 of the ILC Articles provides that the wrongfulness of an act is precluded if and to the extent that the act constitutes a countermeasure.[91] International law originally referred in this context to reprisals, whereby an otherwise unlawful act is rendered legitimate by the prior application of unlawful force.[92] The term 'countermeasures' is now the preferred term for reprisals not involving the use of force.[93] Countermeasures may be contrasted with the provisions laid down in article 60 of the Vienna Convention on the Law of Treaties, 1969, which deals with the consequences of a material breach of a treaty in terms of the competence of the other parties to the treaty to terminate or suspend it.[94] While countermeasures do not as such affect the legal validity of the obligation which has been breached by way of reprisal for a prior breach, termination of a treaty under article 60 would under article 70 free the other parties to it from any further obligations under that treaty.

The International Court stated in the *Gabčíkovo–Nagymaros Project* case that,

> 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.[95]

[91] See ILC Commentary 2001, p. 180. See also Crawford, *Articles*, pp. 47 ff.

[92] See e.g. the *Naulilaa* case, 2 RIAA, p. 1025 (1928); 4 AD, p. 466 and the *Cysne* case, 2 RIAA, p. 1056; 5 AD, p. 150.

[93] See e.g. the *US–France Air Services Agreement* case, 54 ILR, pp. 306, 337. See also Report of the International Law Commission, 1989, A/44/10 and *ibid.*, 1992, A/47/10, pp. 39 ff. See also C. Annacker, 'Part Two of the International Law Commission's Draft Articles on State Responsibility', 37 German YIL, 1994, pp. 206, 234 ff.; M. Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council', 77 BYIL, 2006, p. 333; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, New York, 1984, and O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, Oxford, 1988.

[94] See further below, chapter 16, p. 948.

[95] ICJ Reports, 1997, pp. 7, 55–7; 116 ILR, p. 1. Note that the ILC took the view that the duty to choose measures that are reversible is not absolute, ILC Commentary 2001, p. 332. See also the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 102; 76 ILR, p. 1.

In other words, lawful countermeasures must be in response to a prior wrongful act and taken in the light of a refusal to remedy it, directed against the state committing the wrongful act and proportionate. Further, there is no requirement that the countermeasures taken should be with regard to the same obligation breached by the state acting wrongfully. Thus, the response to a breach of one treaty may be action taken with regard to another treaty, provided that the requirements of necessity and proportionality are respected.[96]

The ILC Articles deal further with countermeasures in Chapter II. Article 49 provides that an injured state[97] may only take countermeasures against a state responsible for the wrongful act in order to induce the latter to comply with the obligations consequent upon the wrongful act.[98] Countermeasures are limited to the non-performance for the time being of international obligations of the state taking the measures and shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligation in question.[99] Article 50 makes it clear that countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied by the UN Charter, obligations for the protection of human rights, obligations of a humanitarian character prohibiting reprisals and other obligations of *jus cogens.*[100] By the same token, obligations under any applicable dispute settlement procedure between the two states continue,[101] while the state taking countermeasures must respect the inviolability of diplomatic or consular agents, premises, archives and documents.[102] Article 51 emphasises the requirement for proportionality, noting that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[103] Article 52 provides that before taking countermeasures, the injured state must call upon the responsible

[96] See ILC Commentary 2001, pp. 326–7. [97] See further below, p. 796.
[98] See further below, p. 800. [99] See ILC Commentary 2001, p. 328.
[100] See Eritrea–Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, para. 159, noting that Ethiopia's suspension of prisoner of war exchanges could not be justified as a countermeasure as it affected obligations of a human rights or humanitarian nature.
[101] See e.g. 'Symposium on Counter-Measures and Dispute Settlement,' 5 EJIL, 1994, p. 20, and Report of the International Law Commission, 1995, A/50/10, pp. 173 ff. See also Annacker, 'Part Two', pp. 242 ff.
[102] See further ILC Commentary 2001, p. 333.
[103] See the *US–France Air Services Agreement Arbitration* 54 ILR, pp. 303, 337. See also the ILC Commentary 2001, p. 341 and the Report of the ILC on its 44th Session, 1992, A/47/10, p. 70.

state to fulfil its obligations and notify that state of any decision to take countermeasures while offering to negotiate. However, the injured state may take such countermeasures as are necessary to preserve its rights. Where the wrongful acts have ceased or the matter is pending before a court or tribunal with powers to take binding decisions, then countermeasures should cease (or where relevant, not be taken).[104] Countermeasures shall be terminated as soon as the responsible state has complied with its obligations.[105]

Force majeure has long been accepted as precluding wrongfulness,[106] although the standard of proof is high. In the *Serbian Loans* case,[107] for example, the Court declined to accept the claim that the First World War had made it impossible for Serbia to repay a loan. In 1946, following a number of unauthorised flights of US aircraft over Yugoslavia, both states agreed that only in cases of emergency could such entry be justified in the absence of consent.[108] Article 23 of the ILC Articles provides for the preclusion of wrongfulness where the act was due to the occurrence of an irresistible force or of an unforeseen event beyond the control of the state, making it materially impossible in the circumstances to perform obligation.[109] In the *Gill* case,[110] for example, a British national residing in Mexico had his house destroyed as a result of sudden and unforeseen action by opponents of the Mexican government. The Commission held that failure to prevent the act was due not to negligence but to genuine inability to take action in the face of a sudden situation.

The emphasis, therefore, is upon the happening of 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

[104] See ILC Commentary 2001, p. 345. [105] *Ibid.*, p. 349.

[106] See e.g. *Yearbook of the ILC*, 1961, vol. II, p. 46 and ILC Commentary 2001, p. 183.

[107] PCIJ, Series A, No. 20, 1929, p. 39. See also the *Brazilian Loans* case, PCIJ, Series A, No. 20, 1929, p. 120; 5 AD, p. 466.

[108] *Yearbook of the ILC*, 1979, vol. II, p. 60 and ILC Commentary 2001, pp. 189–90. This example would cover both *force majeure* and distress (discussed below). Note also that article 18(2) provides that stopping and anchoring by ships during their passage through the territorial sea of another state is permissible where rendered necessary by distress or *force majeure.* See also article 14(3) of the Convention on the Territorial Sea and Contiguous Zone, 1958.

[109] However, this principle does not apply if the situation of *force majeure* is due wholly or partly to the conduct of the state invoking it or the state has assumed the risk of that situation occurring, article 23(2). See also *Libyan Arab Foreign Investment Company* v. *Republic of Burundi* 96 ILR, pp. 279, 318.

[110] 5 RIAA, p. 159 (1931); 6 AD, p. 203.

unable to avoid or to oppose by its own power.[111] In other words, the conduct of the state is involuntary or at least involves no element of free choice.[112]

The issue of *force majeure* was raised by France in the *Rainbow Warrior* arbitration in 1990.[113] It was argued that one of the French agents repatriated to France without the consent of New Zealand had to be so moved as a result of medical factors which amounted to *force majeure.* The Tribunal, however, stressed that the test of applicability of this doctrine was one of 'absolute and material impossibility' and a circumstance rendering performance of an obligation more difficult or burdensome did not constitute a case of *force majeure.*[114]

Article 24 provides that wrongfulness is precluded if the author of the conduct concerned had no other reasonable way in a situation of distress of saving the author's life or the lives of other persons entrusted to his care.[115] This would cover, for example, the agreement in the 1946 US–Yugoslav correspondence that only in an emergency would unauthorised entry into foreign airspace be justified,[116] or the seeking of refuge in a foreign port without authorisation by a ship's captain in storm conditions.[117]

The difference between distress and *force majeure* is that in the former case there is an element of choice. This is often illusory since in both cases extreme peril exists and whether or not the situation provides an opportunity for real choice is a matter of some difficulty.[118] The Tribunal in the *Rainbow Warrior* arbitration[119] noted that three conditions were required to be satisfied in order for this defence to be applicable to the French action in repatriating its two agents: first, the existence of exceptional circumstances of extreme urgency involving medical and other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated; secondly, the re-establishment of the original situation as soon as the reasons of emergency invoked to justify the breach of the obligation (i.e. the repatriation) had disappeared; thirdly, the existence of a good faith effort to try to

[111] *Yearbook of the ILC*, 1979, vol. II, p. 133. [112] ILC Commentary 2001, p. 183.
[113] 82 ILR, pp. 499, 551. [114] *Ibid.*, p. 553.
[115] ILC Commentary 2001, p. 189. This would not apply if the situation of distress is due wholly or partly to the conduct of the state invoking it or the act in question is likely to create a comparable or greater peril, article 24(2).
[116] See above, p. 541.
[117] *Yearbook of the ILC*, 1979, vol. II, p. 134 and ILC Commentary 2001, pp. 189–90.
[118] *Yearbook of the ILC*, 1979, vol. II, pp. 133–5. [119] 82 ILR, pp. 499, 555.

obtain the consent of New Zealand according to the terms of the 1986 Agreement.[120] It was concluded that France had failed to observe these conditions (except as far as the removal of one of the agents on medical grounds was concerned).

Article 25 provides that necessity may not be invoked unless the act was the only means for the state to safeguard an essential interest against a 'grave and imminent peril' and the act does not seriously impair an essential interest of the other state or states or of the international community as a whole. Further, necessity may not be invoked if the international obligation in question excludes the possibility or the state has itself contributed to the situation of necessity.[121] An example of this kind of situation is provided by the *Torrey Canyon*,[122] where a Liberian oil tanker went aground off the UK coast but outside territorial waters, spilling large quantities of oil. After salvage attempts, the UK bombed the ship. The ILC took the view that this action was legitimate in the circumstances because of a state of necessity.[123] It was only after the incident that international agreements were concluded dealing with this kind of situation.[124]

The Tribunal in the *Rainbow Warrior* case took the view that the defence of state necessity was 'controversial'.[125] However, the International Court in the *Gabčíkovo–Nagymaros Project* case considered that it was 'a ground recognised in customary international law for precluding the wrongfulness of an act not in conformity with an international obligation', although it could only be accepted 'on an exceptional basis'.[126] The Court referred to the conditions laid down in an earlier version of, and essentially reproduced in, article 25 and stated that such conditions must be cumulatively satisfied.[127] In *M/V Saiga* (*No. 2*), the International

[120] See above, p. 779. [121] See ILC Commentary 2001, p. 194.

[122] Cmnd 3246, 1967. See also below, chapter 15, p. 900, note 322.

[123] *Yearbook of the ILC*, 1980, vol. II, p. 39. See also the *Company General of the Orinoco* case, 10 RIAA, p. 280.

[124] See e.g. the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.

[125] 82 ILR, pp. 499, 554–5. The doctrine has also been controversial in academic writings: see *Yearbook of the ILC*, 1980, vol. II, part 1, pp. 47–9. See also J. Barboza, 'Necessity (Revisited) in International Law' in *Essays in Honour of Judge Manfred Lachs* (ed. J. Makarczyk), The Hague, 1984, p. 27, and R. Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct', 3 *Yale Human Rights and Development Journal*, 2000, p. 1.

[126] ICJ Reports, 1997, pp. 7, 40; 116 ILR, p. 1. See also *R* v. *Director of the Serious Fraud Office and BAE Systems* [2008] EWHC 714 (Admin), paras. 143 ff.

[127] ICJ Reports, 1997, p. 41. In addition, the state could not be the sole judge of whether these strictly defined conditions had been met. See also the *Construction of a Wall* advisory opinion, ICJ Reports, 2004, pp. 136, 194–5; 129 ILR, pp. 37, 113–15.

Tribunal for the Law of the Sea discussed the doctrine on the basis of the ILC draft as approved by the International Court, but found that it did not apply as no evidence had been produced by Guinea to show that its essential interests were in grave and imminent peril and, in any event, Guinea's interests in maximising its tax revenue from the sale of gas oil to fishing vessels could be safeguarded by means other than extending its customs law to parts of the exclusive economic zone.[128]

Invocation of state responsibility[129]

Article 42 of the ILC Articles stipulates that a state is entitled as an injured state[130] to invoke[131] the responsibility of another state if the obligation breached is owed to that state individually or to a group of states, including that state or the international community as a whole, and the breach of the obligation specially affects that state or is of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation. Responsibility may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.[132] Any waiver would need to be clear and unequivocal,[133] while the question of acquiescence would have to be judged carefully in the light of the particular circumstances.[134] Where several states are injured by the same wrongful act, each state may separately invoke responsibility,[135] and where several states are responsible, the responsibility of each may be invoked.[136]

[128] 120 ILR, pp. 143, 191–2.

[129] See e.g. Annacker, 'Part Two', pp. 214 ff. See also ILC Commentary 2001, p. 294.

[130] The provisions concerning the injured state were particularly complex in earlier formulations: see e.g. article 40 of Part II of the ILC Draft Articles of 1996. See also Crawford, *Articles*, pp. 23 ff.

[131] I.e. taking measures of a formal kind, such as presenting a claim against another state or commencing proceedings before an international court or tribunal but not simply protesting: see ILC Commentary 2001, p. 294.

[132] Article 45. See also ILC Commentary 2001, p. 307.

[133] See the *Nauru* (*Preliminary Objection*) case, ICJ Reports, 1992, pp. 240, 247; 97 ILR, p. 1.

[134] ICJ Reports, 1992, pp. 253–4.

[135] Article 46. See also ILC Commentary 2001, p. 311.

[136] Article 47. See also ILC Commentary 2001, p. 313, noting that the general rule in international law is that of separate responsibility of a state for its own wrongful acts. There is neither a rule of joint and separate responsibility nor a prohibition of this. It will depend on the circumstances. See the *Eurotunnel* case, 132 ILR, pp. 1, 59–60. Note that the UK has taken the position that with regard to combined operations in Iraq, 'each nation

In the *Barcelona Traction* case, the International Court referred to the obligations of a state towards the international community as a whole as distinct from those owed to another state.[137] Article 48 builds upon this principle and provides that a state other than an injured state may invoke the responsibility of another state if either the obligation is owed to a group of states including that state, and is established for the protection of a collective interest of the group, or the obligation breached is owed to the international community as a whole. In such cases, cessation of the wrongful act and assurances and guarantees of non-repetition may be claimed,[138] as well as reparation.[139]

The consequences of internationally wrongful acts

Cessation

The state responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require.[140] The Tribunal in the *Rainbow Warrior* case held that in order for cessation to arise, the wrongful act had to have a continuing character and the violated rule must still be in force at the date the order is given.[141] The obligation to offer assurances of non-repetition was raised by Germany and discussed by the Court in the *LaGrand* case.[142] The Court held that a US commitment to ensure implementation of specific measures was sufficient to meet Germany's request for a general assurance of non-repetition,[143] while with regard to Germany's request for specific assurances, the Court noted that should the US fail in its obligation of consular notification, it would then be incumbent upon that state to allow the review and reconsideration of any conviction and sentence of a German

would be directly liable for the consequences of actions taken by its own forces', HC Deb., vol. 436, col. 862W, 12 July 2005, UKMIL, 76 BYIL, 2005, p. 875.

137 ICJ Reports, 1970, pp. 3, 32; 46 ILR, p. 178.

138 As per article 30. 139 See ILC Commentary 2001, p. 318.

140 Article 30 and see ILC Commentary 2001, p. 216. See also C. Derman, 'La Cessation de l'Acte Illicite', *Revue Belge de Droit International Public*, 1990 I, p. 477.

141 82 ILR, pp. 499, 573.

142 ICJ Reports, 2001, p. 466; 134 ILR, p. 1. Cf. the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 68; 134 ILR, pp. 120, 171.

143 ICJ Reports, 2001, pp. 466, 512–13, 134 ILR, pp. 1, 50–1. This was reaffirmed in the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 69; 134 ILR, pp. 120, 172.

national taking place in these circumstances by taking account of the violation of the rights contained in the Vienna Convention on Consular Relations.[144]

Reparation[145]

The basic principle with regard to reparation, or the remedying of a breach of an international obligation for which the state concerned is responsible,[146] was laid down in the *Chorzów Factory* case, where the Permanent Court of International Justice emphasised that,

> The essential principle contained in the actual notion of an illegal act is that 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.[147]

This principle was reaffirmed in a number of cases, including, for example, by the International Court in the *Gabčíkovo–Nagymaros Project* case[148] and in the *Genocide Convention (Bosnia* v. *Serbia)* case,[149] and by the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)*.[150]

[144] ICJ Reports, 2001, pp. 466, 513–41; 134 ILR, pp. 1, 51–2. See, as to consular notification, above, chapter 13, p. 773.

[145] See e.g. M. Whiteman, *Damages in International Law*, Washington, 3 vols., 1937–43; F. A. Mann, 'The Consequences of an International Wrong in International and National Law', 48 BYIL, 1978, p. 1; de Aréchaga, 'International Responsibility', pp. 564 ff., and de Aréchaga,'International Law in the Past Third of the Century', 159 HR, 1978, pp. 1, 285–7. See also Cheng, *General Principles*, pp. 233 ff.; Brownlie, *System*, part VIII, and C. Gray, *Judicial Remedies in International Law*, Oxford, 1987.

[146] See e.g. C. Dominicé, 'Observations sur les Droits de l'État Victime d'un Fiat Internationalement Illicite' in *Droit International* (ed. P. Weil), Paris, 1982, vol. I, p. 25, and B. Graefrath, 'Responsibility and Damage Caused: Relationship between Responsibility and Damage', HR, 1984 II, pp. 19, 73 ff.

[147] PCIJ, Series A, No. 17, 1928, pp. 47–8. In an earlier phase of the case, the Court stated that, 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention', PCIJ, Series A, No. 9, 1927, p. 21. See also the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 45; 61 ILR, pp. 530, 571, where the Court held that Iran was under a duty to make reparation to the US.

[148] ICJ Reports, 1997, pp. 7, 80; 116 ILR, p. 1.

[149] ICJ Reports, 2007, para. 460. See also the *Construction of a Wall* advisory opinion, ICJ Reports, 2004, pp. 136, 198; 129 ILR, pp. 37, 117–18 and *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 257.

[150] 120 ILR, pp. 143, 199. See also *S.D. Myers* v. *Canada* 121 ILR, pp. 72, 127–8; *Aloeboetoe* v. *Suriname*, Inter-American Court of Human Rights, 1993, Series C, No. 15 at para. 43; 116 ILR, p. 260; *Loayza Tamayo* v. *Peru* (*Reparations*), Inter-American Court of Human

Article 31 of the Articles on State Responsibility provides that the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act and that injury includes any damage, whether material or moral, caused by the internationally wrongful act of a state. The obligation to make reparation is governed in all its aspects by international law, irrespective of domestic law provisions.[151] Article 34 provides that full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.[152]

Restitution in kind is the obvious method of performing the reparation, since it aims to re-establish the situation which existed before the wrongful act was committed.[153] While restitution has occurred in the past,[154] it is more rare today, if only because the nature of such disputes has changed. A large number of cases now involve expropriation disputes, where it is politically difficult for the state concerned to return expropriated property to multinational companies.[155] Recognising some of these problems, article 35 provides for restitution as long as and to the extent that it is not

Rights, 1998, Series C, No. 42 at para. 84; 116 ILR, p. 388, and *Suarez-Rosero* v. *Ecuador* (*Reparations*), Inter-American Court of Human Rights, 1999, Series C, No. 44 at para. 39; 118 ILR, p. 92, regarding this as 'one of the fundamental principles of general international law, repeatedly elaborated upon by the jurisprudence'. See also the decision of 14 March 2003 of an UNCITRAL Arbitral Tribunal in *CME Czech Republic BV* v. *The Czech Republic*, Final Award.

151 See e.g. *Suarez-Rosero* v. *Ecuador* (*Reparations*), Inter-American Court of Human Rights, 1999, Series C, No. 44 at para. 42; 118 ILR, p. 92. See also article 32 of the ILC Articles.

152 See also ILC Commentary 2001, p. 235 and *Suarez-Rosero* v. *Ecuador* (*Reparations*), Inter-American Court of Human Rights, 1999, Series C, No. 44 at para. 42; 118 ILR, p. 92. Note further that interest is payable on any principal sum payable when necessary to achieve full reparation and will run from the date the principal sum should have been paid until the date it is paid, article 38 and see ILC Commentary 2001, p. 268. Article 39 provides that in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought: see also ILC Commentary 2001, p. 275 and the *LaGrand* case, ICJ Reports, 2001, pp. 466, 487 and 508; 134 ILR, pp. 1, 26 and 46.

153 See e.g. Annacker, 'Part Two', pp. 221 ff.

154 See e.g. the post-1945 Peace Treaties with Hungary, Romania and Italy. See also the *Spanish Zone of Morocco* case, 2 RIAA, p. 617 (1925); 2 AD, p. 157; the *Martini* case, 2 RIAA, p. 977 (1930); 5 AD, p. 153; the *Palmagero Gold Fields* case, 5 RIAA, p. 298 (1931) and the *Russian Indemnity* case, 11 RIAA, p. 431 (1912). Brownlie notes that in certain cases, such as the illegal possession of territory or acquisition of objects of special cultural, historical or religious significance, restitution may be the only legal remedy, *System*, p. 210, and the *Temple* case, ICJ Reports, 1962, pp. 6, 36–7; 33 ILR, pp. 48, 73.

155 See e.g. the *Aminoil* case, 66 ILR, pp. 529, 533.

materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[156] In the *Rainbow Warrior* arbitration,[157] New Zealand sought *inter alia* an Order that the French Government return its agents from France to their previous place of confinement in the Pacific as required by the original agreement of 9 July 1986. New Zealand termed this request '*restitutio in integrum*'. France argued that 'cessation' of the denounced behaviour was the appropriate terminology and remedy, although in the circumstances barred by time.[158] The Tribunal pointed to the debate in the International Law Commission on the differences between the two concepts[159] and held that the French approach was correct.[160] The obligation to end an illegal situation was not reparation but a return to the original obligation, that is cessation of the illegal conduct. However, it was held that since the primary obligation was no longer in force (in the sense that the obligation to keep the agents in the Pacific island concerned expired under the initial agreement on 22 July 1989), an order for cessation of the illegal conduct could serve no purpose.[161]

The question of the appropriate reparation for expropriation was discussed in several cases. In the *BP* case,[162] the tribunal emphasised that there was

> no explicit support for the proposition that specific performance, and even less so *restitutio in integrum*, are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party . . . the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages . . . the concept of *restitutio in integrum* has been employed merely as a vehicle for establishing the amount of damages.[163]

However, in the *Texaco* case,[164] which similarly involved Libyan nationalisation of oil concessions, the arbitrator held that restitution in kind under international law (and indeed under Libyan law) constituted

[156] See also ILC Commentary 2001, p. 237.
[157] 82 ILR, p. 499. [158] *Ibid.*, p. 571.
[159] See e.g. *Yearbook of the ILC*, 1981, vol. II, part 1, pp. 79 ff. [160] 82 ILR, p. 572.
[161] *Ibid.*, p. 573. Note that article 30 of the ILC Articles provides that the injured state is entitled, where appropriate, to obtain assurances or guarantees of non-repetition of the wrongful act.
[162] 53 ILR, p. 297. This concerned the expropriation by Libya of BP oil concessions.
[163] *Ibid.*, p. 347. [164] 17 ILM, 1978, p. 1; 53 ILR, p. 389.

> the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible.[165]

This is an approach that in political terms, particularly in international contract cases, is unlikely to prove acceptable to states since it appears a violation of sovereignty. The problems, indeed, of enforcing such restitution awards against a recalcitrant state may be imagined.[166]

The International Court noted in the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* case that it was a 'well-established rule of international law that an injured state is entitled to obtain compensation from the state which has committed an internationally wrongful act for the damage caused by it'.[167] Article 36(1) provides that in so far as damage caused by an internationally wrongful act is not made good by restitution, the state responsible is under an obligation to give compensation.[168] Article 36(2) states that the compensation to be provided shall cover any financially assessable damage including loss of profits in so far as this is established.[169] The aim is to deal with economic losses actually caused. Punitive or exemplary damages go beyond the concept of reparation as such[170] and were indeed held in *Velásquez Rodriguéz* v. *Honduras*

[165] 17 ILM, 1978, p. 36; 53 ILR, pp. 507–8. In fact the parties settled the dispute by Libya supplying $152 million worth of crude oil, 17 ILM, 1998, p. 2.

[166] These points were explained by the arbitrator in the *Liamco* case, 20 ILM, 1981, pp. 1, 63–4; 62 ILR, pp. 141, 198. See also the *Aminoil* case, 21 ILM, 1982, p. 976; 66 ILR, p. 519. See further e.g. A. Fatouros, 'International Law and the International Contract', 74 AJIL, 1980, p. 134. The issue of compensation for expropriated property is discussed further below, p. 827.

[167] ICJ Reports, 1997, pp. 7, 81; 116 ILR, p. 1. See also the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 198; 129 ILR, pp. 37, 117–18, and the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 460. In the latter case, the Court referred to article 36.

[168] In the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 81; 116 ILR, p. 1, the Court held that both states were entitled to claim and obliged to provide compensation. Accordingly, the parties were called upon to renounce or cancel all financial claims and counter-claims. See more generally D. Shelton, *Remedies in International Human Rights Law*, 2nd edn, Oxford, 2005, and C. N. Brower and J. D. Brueschke, *The Iran–United States Claims Tribunal*, The Hague, 1998, chapters 14–18.

[169] See ILC Commentary 2001, p. 243. See also the Report of the International Law Commission on the Work of its Forty-Fifth Session, A/48/10, p. 185.

[170] See generally Whiteman, *Damages*, and Aréchaga, 'International Responsibility', p. 571. See also N. Jorgensen, 'A Reappraisal of Punitive Damages in International Law', 68 BYIL, 1997, p. 247; *Yearbook of the ILC*, 1956, vol. II, pp. 211–12, and Annacker, 'Part Two', pp. 225 ff.

(*Compensation*) to be a principle 'not applicable in international law at this time'.[171]

Compensation is usually assessed on the basis of the 'fair market value' of the property lost, although the method used to calculate this may depend upon the type of property involved.[172] Loss of profits may also be claimed where, for example, there has been interference with use and enjoyment or unlawful taking of income-producing property or in some cases with regard to loss of future income.[173]

Damage includes both material and non-material (or moral) damage.[174] Monetary compensation may thus be paid for individual pain and suffering and insults. In the *I'm Alone*[175] case, for example, a sum of $25,000 was suggested as recompense for the indignity suffered by Canada, in having a ship registered in Montreal unlawfully sunk. A further example of this is provided by the France–New Zealand Agreement of 9 July 1986, concerning the sinking of the vessel *Rainbow Warrior* by French agents in New Zealand, the second paragraph of which provided for France to pay the sum of $7 million as compensation to New Zealand for 'all the damage which it has suffered'.[176] It is clear from the context that it covered more than material damage.[177] In the subsequent arbitration in 1990, the Tribunal declared that

> an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving . . . serious moral and legal damage, even though there is no material damage.[178]

However, the Tribunal declined to make an order for monetary compensation, primarily since New Zealand was seeking alternative remedies.[179]

Satisfaction constitutes a third form of reparation. This relates to non-monetary compensation and would include official apologies, the punishment of guilty minor officials or the formal acknowledgement of the unlawful character of an act.[180] The Tribunal in the *Rainbow Warrior*

[171] Inter-American Court of Human Rights, 1989, Series C, No. 7, pp. 34, 52; 95 ILR, p. 306.

[172] See on this the analysis in the ILC Commentary 2001, pp. 255 ff. See also the UNCITRAL Arbitral Tribunal decision of 14 March 2003 in *CME Czech Republic BV* v. *The Czech Republic*, Final Award.

[173] *Ibid.*, pp. 260 ff. [174] See article 31(2).

[175] 3 RIAA, p. 1609 (1935); 7 AD, p. 203. [176] 74 ILR, pp. 241, 274.

[177] See the Arbitral Tribunal in the *Rainbow Warrior* case, 82 ILR, pp. 499, 574.

[178] 82 ILR, pp. 499, 575. [179] *Ibid.*

[180] See Annacker, 'Part Two', pp. 230 ff.; C. Barthe, 'Réflexions sur la Satisfaction en Droit International', 49 AFDI, 2003, p. 105; de Aréchaga, 'International Responsibility', p. 572;

arbitration[181] pointed to the long-established practice of states and international courts of using satisfaction as a remedy for the breach of an international obligation, particularly where moral or legal damage had been done directly to the state. In the circumstances of the case, it concluded that the public condemnation of France for its breaches of treaty obligations to New Zealand made by the Tribunal constituted 'appropriate satisfaction'.[182] The Tribunal also made an interesting 'Recommendation' that the two states concerned establish a fund to promote close relations between their respective citizens and additionally recommended that the French government 'make an initial contribution equivalent to $2 million to that fund'.[183]

In some cases, a party to a dispute will simply seek a declaration that the activity complained of is illegal.[184] In territorial disputes, for example, such declarations may be of particular significance. The International Court, however, adopted a narrow view of the Australian submissions in the *Nuclear Tests* case,[185] an approach that was the subject of a vigorous dissenting opinion.[186] Article 37 of the ILC Articles provides that a state responsible for a wrongful act is obliged to give satisfaction for the injury thereby caused in so far as it cannot be made good by restitution or compensation. Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.[187] An example of such another modality might be an assurance or guarantee of non-repetition.[188]

D. W. Bowett, 'Treaties and State Responsibility' in *Mélanges Virally*, Paris, 1991, pp. 137, 144; and Schwarzenberger, *International Law*, p. 653. See also the *I'm Alone* case, 3 RIAA, pp. 1609, 1618 (1935); 7 AD, p. 206 and the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 35; 16 AD, pp. 155, 167.

[181] 82 ILR, p. 499. [182] 82 ILR, p. 577.

[183] *Ibid.*, p. 578. See also the *Genocide Convention (Bosnia* v. *Serbia)*, ICJ Reports, 2007, para. 463.

[184] See e.g. *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7, p. 18 (1926) and the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 35; 16 AD, p. 155. Note also that under article 41 of the European Convention on Human Rights, 1950, the European Court of Human Rights may award 'just satisfaction', which often takes the form of a declaration by the Court that a violation of the Convention has taken place: see e.g. the *Neumeister* case, European Court of Human Rights, Series A, No. 17 (1974); 41 ILR, p. 316. See also the *Pauwels* case, *ibid.*, No. 135 (1989); the *Lamy* case, *ibid.*, No. 151 (1989) and the *Huber* case, *ibid.*, No. 188 (1990).

[185] ICJ Reports, 1974, p. 253; 57 ILR, p. 398.

[186] ICJ Reports, 1974, pp. 312–19; 57 ILR, p. 457.

[187] See ILC Commentary 2001, p. 263. Satisfaction is not to be disproportionate to the injury and not in a form which is humiliating to the responsible state, article 37(3).

[188] See above, p. 800.

Serious breaches of peremptory norms (jus cogens)

One of the major debates taking place with regard to state responsibility concerns the question of international crimes. A distinction was drawn in article 19 of the ILC Draft Articles 1996 between international crimes and international delicts within the context of internationally unlawful acts. It was provided that an internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognised as a crime by that community as a whole constitutes an international crime. All other internationally wrongful acts were termed international delicts.[189] Examples of such international crimes provided were aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas. However, the question as to whether states can be criminally responsible has been highly controversial.[190] Some have argued that the concept is of no legal value and cannot be justified in principle, not least because the problem of exacting penal sanctions from states, while in principle possible, could only be creative of instability.[191] Others argued that, particularly since 1945, the attitude towards certain crimes by states has altered so as to bring them within the realm of international law.[192] The Rapporteur in his commentary to draft article 19 pointed to three specific changes since 1945 in this context to justify its inclusion: first, the development of the concept of *jus cogens* as a set of principles from which no derogation is permitted;[193] secondly, the rise of individual criminal responsibility directly under international law; and thirdly, the UN Charter and its provision for enforcement action against a state in the event of threats to or breaches of the peace or acts of

[189] See M. Mohr, 'The ILC's Distinction between "International Crimes" and "International Delicts" and Its Implications' in Spinedi and Simma, *UN Codification*, p. 115, and K. Marek, 'Criminalising State Responsibility', 14 *Revue Belge de Droit International*, 1978–9, p. 460.

[190] See e.g. *Oppenheim's International Law*, pp. 533 ff. See also G. Gilbert, 'The Criminal Responsibility of States', 39 ICLQ, 1990, p. 345, and N. Jorgensen, *The Responsibility of States for International Crimes*, Oxford, 2000. As to individual criminal responsibility, see above, chapter 8.

[191] See e.g. I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963, pp. 150–4.

[192] See e.g. de Aréchaga, 'International Law'.

[193] See e.g. article 53 of the Vienna Convention on the Law of Treaties, 1969 and below, p. 944.

aggression.[194] However, the ILC changed its approach[195] in the light of the controversial nature of the suggestion and the Articles as finally approved in 2001 omit any mention of international crimes of states, but rather seek to focus upon the particular consequences flowing from a breach of obligations *erga omnes* and of peremptory norms (*jus cogens*).[196]

Article 41 provides that states are under a duty to co-operate to bring to an end, through lawful means, any serious breach[197] by a state of an obligation arising under a peremptory norm of international law[198] and not to recognise as lawful any such situation.[199]

Diplomatic protection and nationality of claims[200]

The doctrine of state responsibility with regard to injuries to nationals rests upon twin pillars, the attribution to one state of the unlawful acts and omissions of its officials and its organs (legislative, judicial and executive) and the capacity of the other state to adopt the claim of the injured party. Indeed article 44 of the ILC Articles provides that the responsibility of a state may not be invoked if the claim is not brought in accordance with any applicable rule relating to nationality of claims.[201]

Nationality is the link between the individual and his or her state as regards particular benefits and obligations. It is also the vital link between the

[194] *Yearbook of the ILC*, 1976, vol. II, pp. 102–5. Note also the Report of the International Law Commission, 1994, A/49/10, pp. 329 ff. and *ibid.*, 1995, A/50/10, pp. 93 ff.

[195] See Crawford, *Articles*, pp. 17 ff. for a critical analysis of draft article 19 and a discussion of subsequent developments.

[196] See above, chapter 3, p. 123.

[197] Article 40(2) describes a breach as serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation.

[198] Examples given of peremptory norms are the prohibitions of aggression, slavery and the slave trade, genocide, racial discrimination and apartheid, and torture, and the principle of self-determination: see ILC Commentary 2001, pp. 283–4.

[199] See, as to examples of non-recognition, above, chapter 9, p. 468. Article 41(3) is in the form of a saving clause, providing that the article is without prejudice to other consequences referred to in Part Two of the Articles and to such further consequences that such a breach may have under international law.

[200] See e.g. *Oppenheim's International Law*, p. 511; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 808; Brownlie, *Principles*, pp. 459 ff., and A. Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*', 56 ICLQ, 2007, p. 553. See also F. Orrego Vicuña, 'Interim Report on the Changing Law of Nationality of Claims', International Law Association, Report of the Sixty-Ninth Conference, London, 2000, p. 631.

[201] See ILC Commentary 2001, p. 304.

individual and the benefits of international law. Although international law is now moving to a stage whereby individuals may acquire rights free from the interposition of the state, the basic proposition remains that in a state-oriented world system, it is only through the medium of the state that the individual may obtain the full range of benefits available under international law, and nationality is the key.[202]

The principle of diplomatic protection originally developed in the context of the treatment by a state of foreign nationals. However, the International Court has pointed out that, 'Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'.[203]

The International Law Commission adopted Draft Articles on Diplomatic Protection in 2006.[204] Article 1 provides that, for the purposes of the draft articles,

> diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility.[205]

A state is under a duty to protect its nationals and it may take up their claims against other states. Diplomatic protection includes, in a broad sense, consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, a retort, severance of diplomatic relations, and economic pressures.[206] There is under international law, however, no obligation for states to provide diplomatic protection for their nationals

[202] See further on nationality, above, chapter 12, p. 659. Note also the claim for reparations made by Croatia in its application of 2 July 1999 to the International Court against Yugoslavia in the *Application of the Genocide Convention* case both on behalf of the state and 'as *parens patriae* for its citizens', Application, pp. 20–1.

[203] *Diallo (Guinea* v. *Democratic Republic of the Congo)*, ICJ Reports, 2007, para. 39.

[204] See Report of the ILC on its 58th Session, A/61/10, 2006, p. 13.

[205] See the *Diallo (Guinea* v. *Democratic Republic of the Congo)* case, ICJ Reports, 2007, para. 39, where the Court noted that article 1 reflected customary law.

[206] *Kaunda* v. *President of South Africa* CCT 23/04, [2004] ZACC 5, paras. 26–7 and *Van Zyl* v. *Government of RSA* [2007] SCA 109 (RSA), para. 1.

abroad,[207] although it can be said that nationals have a right to request their government to consider diplomatic protection and that government is under a duty to consider that request rationally.[208]

In addition, once a state does this, the claim then becomes that of the state. This is a result of the historical reluctance to permit individuals the right in international law to prosecute claims against foreign countries, for reasons relating to state sovereignty and non-interference in internal affairs.

This basic principle was elaborated in the *Mavrommatis Palestine Concessions* case.[209] The Permanent Court of International Justice pointed out that:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law . . .

Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant.[210] It follows that the exercise of diplomatic protection cannot be regarded as intervention contrary to international law by the state concerned. Coupled with this right of the state is the constraint that a state may in principle adopt the claims only of its own nationals. Diplomatic protection may not extend to the adoption of claims of foreign subjects,[211] although it has been suggested 'as an exercise in progressive development of the law' that a state

[207] See e.g. *HMHK* v. *Netherlands* 94 ILR, p. 342 and *Comercial F SA* v. *Council of Ministers* 88 ILR, p. 691. See also *Kaunda* v. *President of South Africa* CCT 23/04, [2004] ZACC 5, paras. 29 and 34, noting that diplomatic protection is not recognised in international law as a human right, but a prerogative of the state to be exercised at its discretion (per Chief Justice Chaskalson).

[208] See *Van Zyl* v. *Government of RSA* [2007] SCA 109 (RSA), para. 6.

[209] PCIJ, Series A, No. 2, 1924, p. 12. See the *Panevezys–Saldutiskis* case, PCIJ, Series A/B, No. 76; 9 AD, p. 308. See also Vattel, who noted that 'whoever ill-treats a citizen indirectly injures the state, which must protect that citizen', *The Law of Nations*, 1916 trans., p. 136.

[210] See e.g. *Lonrho Exports Ltd* v. *ECGD* [1996] 4 All ER 673, 687; 108 ILR, p. 596.

[211] However, note article 20 of the European Community Treaty, under which every person holding the nationality of a member state (and thus a citizen of the European Union under article 17) is entitled to receive diplomatic protection by the diplomatic or consular authority of any member state on the same conditions as nationals of that state when in the territory of a third state where the country of his or her nationality is not represented.

may adopt the claim of a stateless person or refugee who at the dates of the injury and presentation of the claim is lawfully and habitually resident in that state.[212] Such diplomatic protection is not a right of the national concerned, but a right of the state which it may or may not choose to exercise.[213] It is not a duty incumbent upon the state under international law. As the Court noted in the *Barcelona Traction* case,

> within the limits prescribed by international law, a state may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.[214]

The UK takes the view that the taking up of a claim against a foreign state is a matter within the prerogative of the Crown, but various principles are outlined in its publication, 'Rules regarding the Taking up of International Claims by Her Majesty's Government', stated to be based on international law.[215] This distinguishes between formal claims and informal representations. In the former case, Rule VIII provides that, 'If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG [Her Majesty's Government] may intervene on his behalf in order to secure justice.' In the latter case, the UK will consider making representations if, when all legal remedies have been exhausted, the British national has evidence of a miscarriage or denial of justice. This may apply to cases where fundamental violations of the national's human rights had demonstrably altered the course of justice. The UK has also stated that it would consider making

[212] See article 8 of the Draft Articles on Diplomatic Protection. In *R* v. *Al-Rawi* [2006] EWCA Civ 1279, para. 89, the Court of Appeal held that there was no basis for accepting that non-British nationals enjoyed an *Abbasi* expectation that the UK government would consider making representations to a foreign state on their behalf. Article 8 was not regarded as part of customary international law, *ibid*., paras. 118–20. Note the special position of a national working for an international organisation, where there may be a danger to the independence of the official where diplomatic protection is exercised: see e.g. the *Reparation* case, ICJ Reports, 1949, pp. 174, 183.

[213] See e.g. the *Interhandel* case, ICJ Reports, 1957, pp. 6, 27; *Administrative Decision No. V* 7 RIAA, p. 119; 2 AD, pp. 185, 191 and *US* v. *Dulles* 222 F.2d 390. See also DUSPIL, 1973, pp. 332–4.

[214] ICJ Reports, 1970, pp. 3, 44; 46 ILR, p. 178.

[215] See 37 ICLQ, 1988, p. 1006 and UKMIL, 70 BYIL, 1999, p. 526.

direct representations to third governments where it is believed that they were in breach of their international obligations.[216]

The issue was discussed by the Court of Appeal in *Abbasi* v. *Secretary of State*.[217] It was noted that there was no authority which supported the imposition of an enforceable duty on the UK authorities to protect its citizens; however, the Foreign Office had a discretion whether to exercise the right it had to protect British citizens and had indicated what a citizen may expect of it through, for example, the Rules regarding the Taking up of International Claims. The Court concluded that, in view of the Rules and official statements made,[218] there was a 'clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice'.[219] While the expectations raised by such Rules and statements were limited and the discretion wide, there was no reason why any decision or inaction by the government should not be judicially reviewable under English law, if it could be shown that such decision or inaction were irrational or contrary to legitimate expectation. It might thus be said that there existed an obligation to consider the position of any particular British citizen and consider the extent to which some action might be taken on his behalf.[220] This legitimate expectation of the citizen was that his or her request would be 'considered', and that in that consideration 'all relevant factors will be thrown into the balance'.[221] The Court held that the 'extreme case' where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth Office were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated.[222]

The scope of a state to extend its nationality[223] to whomsoever it wishes is unlimited, except perhaps in so far as it affects other states. Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, for example, provides that,

[216] UKMIL, 70 BYIL, 1999, pp. 528–9.
[217] [2002] EWCA Civ. 1598; 126 ILR, p. 685.
[218] See UKMIL, 70 BYIL, 1999, pp. 528–9.
[219] [2002] EWCA Civ. 1598, para. 92.
[220] *Ibid.*, para. 106.
[221] *Ibid.*, paras. 98–9.
[222] *Ibid.*, para. 104. The Court noted that, 'In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case', *ibid*.
[223] Whether acquired by birth, descent, succession of states, naturalisation, or in another manner not inconsistent with international law: see article 4 of the ILC Draft Articles on Diplomatic Protection.

> It is for each state to determine under its own law who are its nationals. This law shall be recognised by other states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality . . . [224]

In the *Nottebohm* case,[225] the International Court of Justice decided that only where there existed a genuine link between the claimant state and its national could the right of diplomatic protection arise. However, the facts of that case are critical to understanding the pertinent legal proposition. The Government of Liechtenstein instituted proceedings claiming restitution and compensation for Nottebohm against Guatemala for acts of the latter which were alleged to be contrary to international law. Guatemala replied that Nottebohm's right to Liechtenstein nationality and thus its diplomatic protection was questionable. The person in question was born in Germany in 1881 and, still a German national, applied for naturalisation in Liechtenstein in 1939. The point was, however, that since 1905 (and until 1943 when he was deported as a result of war measures) Nottebohm had been permanently resident in Guatemala and had carried on his business from there. The Court noted that Liechtenstein was entirely free, as was every state, to establish the rules necessary for the acquisition of its nationality, but the crux of the matter was whether Guatemala was obliged to recognise the grant of Liechtenstein nationality. The exercise of diplomatic protection by a state regarding one of its nationals brought the whole issue of nationality out of the sphere of domestic jurisdiction and onto the plane of international law.[226] The Court emphasised that, according to state practice, nationality was a legal manifestation of the link between the person and the state granting nationality and the recognition

[224] See *Nationality Decrees in Tunis and Morocco*, PCIJ Reports, 1923, Series B, No. 4, p. 24. See also article 3(2) of the European Convention on Nationality, 1997. This would include the rules of international human rights law: see e.g. *Proposed Amendments to the Naturalisation Provision of the Political Constitution of Costa Rica*, Inter-American Court of Human Rights, 1984, Series A, No. 4, para. 38; 79 ILR, p. 282.

[225] ICJ Reports, 1955, p. 4; 22 ILR, p. 349. The Court emphasised that to exercise protection, e.g. by applying to the Court, was to place oneself on the plane of international law, *ibid.*, p. 16. See the *Nationality Decrees in Tunis and Morocco* case, PCIJ, Series B, No. 4, 1923, pp. 7, 21; 2 AD, p. 349, where it was noted that while questions of nationality were in principle within the domestic jurisdiction of states, the right of a state to use its discretion was limited by obligations undertaken towards other states. See also the *Flegenheimer* claim, 14 RIAA, p. 327 (1958); 25 ILR, p. 91, and article 1 of the 1930 Hague Convention on Nationality. See further on nationality and international law, above, chapter 12, p. 659.

[226] ICJ Reports, 1955, pp. 20–1; 22 ILR, p. 357.

that the person was more closely connected with that state than with any other.[227]

Having brought out these concepts, the Court emphasised the tenuous nature of Nottebohm's links with Liechtenstein and the strength of his connection with Guatemala. Nottebohm had spent only a very short period of time in Liechtenstein and one of his brothers lived in Vaduz. Beyond that and the formal naturalisation process, there were no other links with that state. On the other hand, he had lived in Guatemala for some thirty years and had returned there upon obtaining his papers from Vaduz. Since the Liechtenstein nationality 'was granted without regard to the concept . . . adopted in international relations' in the absence of any genuine connection, the Court held that Liechtenstein was not able to extend its diplomatic protection to Nottebohm as regards Guatemala.[228] The case has been subject to criticism relating to the use of the doctrine of 'genuine connection' by the Court. The doctrine had until then been utilised with regard to the problems of dual nationality, so as to enable a decision to be made on whether one national state may sue the other on behalf of the particular national. Its extension to the issue of diplomatic protection appeared to be a new move altogether.[229]

The ILC in its Draft Articles on Diplomatic Protection adopted in 2006 did not require establishment of a genuine link as a requirement of nationality[230] and the Commentary argues that the *Nottebohm* case should be limited to its facts alone.[231]

The nationality must exist at the date of the injury, and should continue until at least the date of the formal presentation of the claim, although this latter point may depend upon a variety of other facts, for example any agreement between the contending states as regards the claim.[232]

[227] ICJ Reports, 1955, p. 23; 22 ILR, p. 359.

[228] ICJ Reports, 1955, pp. 25–6; 22 ILR, p. 362.

[229] See generally, Brownlie, *Principles*, chapter 19, and R. Y. Jennings, 'General Course on Principles of International Law', 121 HR, 1967, pp. 323, 459.

[230] Article 4 provides that a state of nationality means a state whose nationality that person has acquired, in accordance with the law of that state, by birth, descent, naturalisation, succession of states or in any other manner, not inconsistent with international law.

[231] Report of the ILC on its 58th Session, A/61/10, 2006, pp. 32–3. See also the *Flegenheimer* claim, 14 RIAA, p. 327 (1958); 25 ILR, p. 91.

[232] See e.g. Borchard, *Diplomatic Protection*, pp. 660 ff.; Whiteman, *Digest*, vol. VIII, 1967, pp. 1243–7, and the *Nottebohm* case, ICJ Reports, 1955, p. 4; 22 ILR, p. 349. See also the view of the US State Department that it has consistently declined to espouse claims which have not been continuously owned by US nationals: see 76 AJIL, 1982, pp. 836–9, and the Rules regarding International Claims issued by the UK Foreign and Commonwealth Office, 1985, to the same effect: see 37 ICLQ, 1988, p. 1006. See also I. Sinclair, 'Nationality

Where an individual possesses dual or multiple nationality, any state of which he is a national may adopt a claim of his against a third state[233] and there appears no need to establish a genuine link between the state of nationality and the dual or multiple national.[234] In the case of more than one state of nationality, the rule appears to be that the state with which he has the more effective connection may be able to espouse his claim as against the other state. In the *Mergé* case,[235] it was emphasised that the principle based on the sovereign equality of states, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claimant state. However, where such predominance is not proved, there would be no such yielding. In other words, the test for permitting protection by a state of a national against another state of which he is also a national is the test of effectiveness. This approach was reaffirmed by the Iran–US Claims Tribunal, where the Full Tribunal held that it had jurisdiction over claims against Iran by a dual national when the 'dominant and effective nationality' at the relevant time was American.[236] Article 7 of the ILC Draft Articles on Diplomatic Protection provides that a state of nationality may not exercise diplomatic protection in respect of a person against a state of which the person is also a national unless the nationality of the former state is predominant, both at the time of the injury and at the date of the official presentation of the claim.

As far as a corporation is concerned, it appears that there must be some tangible link between it and the state seeking to espouse its claim. Different

of Claims: British Practice', 27 BYIL, 1950, p. 125. Note that article 5(2) of the ILC Draft Articles provides that protection may be offered even where the person was not a national at the date of the injury, provided that the person had the nationality of a predecessor state or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former state in a manner not inconsistent with international law.

233 14 RIAA, p. 236 (1955); 22 ILR, p. 443. See also the *Canevaro* case, 11 RIAA, p. 397 (1912). See article 6(1) of the ILC Draft Articles on Diplomatic Protection. See also article 3 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

234 See e.g. the *Salem* case, 2 RIAA, p. 1161 (1932); 6 AD, p. 188; the *Mergé* claim, 14 RIAA, p. 236 (1955); 22 ILR, p. 443 and *Dallal* v. *Iran* 3 Iran–US CTR, 1983, p. 23.

235 14 RIAA, p. 236 (1955); 22 ILR, p. 443. See also the *Canevaro* case, 11 RIAA, p. 397 (1912). Cf. the *Salem* case, 2 RIAA, p. 1161 (1932); 6 AD, p. 188.

236 *Islamic Republic of Iran* v. *USA*, Case No. A/18, 5 Iran–US CTR, p. 251; 75 ILR, p. 176; *Esphahanian* v. *Bank Tejarat* 2 Iran–US CTR, p. 157; 72 ILR, p. 478, and *Malek* v. *Islamic Republic of Iran* 19 Iran–US CTR, p. 48. See also *Saghi* v. *Islamic Republic of Iran* 87 AJIL, 1993, p. 447 and the decision of the Canadian Supreme Court in *Schavernoch* v. *Foreign Claims Commission* 1 SCR 1092 (1982); 90 ILR, p. 220.

cases have pointed to various factors, ranging from incorporation of the company in the particular state to the maintenance of the administrative centre of the company in the state and the existence of substantial holdings by nationals in the company.[237]

The Court in the *Barcelona Traction* case[238] remarked that the traditional rule gave the right of diplomatic protection of a corporation to the state under the laws of which it is incorporated and in whose territory it has its registered office. Any application of the *Nottebohm* doctrine of the 'genuine connection' was rejected as having no general acceptance. Nevertheless, it remains true that some meaningful link must bind the state to the company which seeks its protection. The position as regards the shareholders in a company was discussed in that case. It concerned a dispute between Belgium and Spain relating to a company established in 1911 in Canada, which was involved in the production of electricity in Spain and the majority of whose shares were owned by Belgian nationals. After the Second World War, the Spanish authorities took a number of financial measures which resulted in harm to the company, and in 1948 it was declared bankrupt. The case concerned a Belgian claim in respect of injury to the shareholders, who were Belgian nationals, because of the steps that Spain had adopted. Spain replied by denying that Belgium had any standing in the case since the injury had been suffered by the company and not the shareholders.

The Court rejected the Belgian claim on the grounds that it did not have a legal interest in the matter. Although shareholders may suffer if wrong is done to a company, it is only the rights of the latter that have been infringed and thus entitle it to institute action. If, on the other hand (as did not happen here), the direct rights of the shareholders were affected, for example as regards dividends, then they would have an independent right of action; but otherwise, only if the company legally ceased to exist. The Court emphasised that the general rule of international law stated that where an unlawful act was committed against a company representing foreign capital, only the national state of the company could sue. In this case Canada had chosen not to intervene in the dispute. To accept the idea of the diplomatic protection of shareholders would, in the opinion of the International Court of Justice, result in the creation of an atmosphere of confusion and insecurity in economic relations especially since the shares

[237] See e.g. Brownlie, *Principles*, pp. 463 ff., and Schwarzenberger, *International Law*, pp. 387–412. See also *Sola Tiles Inc.* v. *Islamic Republic of Iran* 83 ILR, p. 460.

[238] ICJ Reports, 1970, pp. 3, 42; 46 ILR, pp. 178, 216.

of international companies are 'widely scattered and frequently change hands'.[239]

Article 9 of the ILC Draft Articles on Diplomatic Protection provides that the nationality of a corporation is the state where it was incorporated, although when the corporation is controlled by nationals of another state or states and has no substantial business activities in the state of incorporation, and the seat of management and the financial control of the corporation are both located in another state, that state shall be regarded as the state of nationality. Article 11 provides that the state of nationality of shareholders shall not be entitled to provide diplomatic protection to shareholders where the injury is to the corporation, unless the corporation has ceased to exist according to the law of the state of incorporation for a reason unrelated to the injury; or the corporation had, at the date of injury, the nationality of the state alleged to be responsible for causing the injury, and incorporation in that state was required by it as a precondition for doing business there.[240]

The International Court returned to the question of corporations in the *Diallo* case,[241] noting that,

> What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the state of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another state. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.[242]

In so far as the shareholders of such corporations in the context of diplomatic protection were concerned, the Court emphasised that,

> The exercise by a state of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another state for an injury caused to that person by an internationally wrongful act committed by that state. Ultimately, this is no

[239] ICJ Reports, 1970, p. 49; 46 ILR, p. 223. See also the Separate Opinion of Judge Oda, the *Elettronica Sicula (US* v. *Italy)* case, ICJ Reports, 1989, pp. 15, 84; 84 ILR, pp. 311, 390.

[240] However, where the injury is a direct one to shareholders as distinct from the corporation, their state of nationality is entitled to exercise diplomatic protection in respect of them: see article 12.

[241] ICJ Reports, 2007, paras. 60 ff.

[242] *Ibid.*, para. 61.

> more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent state of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that state, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.[243]

The United Kingdom, according to the set of Rules regarding the Taking up of International Claims produced by the Foreign Office in 1985,[244] may intervene in *Barcelona Traction* situations where a national has an interest as a shareholder or otherwise, and the company is defunct, although this is regarded as an exceptional instance. The United Kingdom may also intervene where it is the national state of the company that actively wrongs the company in which a United Kingdom national has an interest as a shareholder or in some other respect; otherwise the UK would normally take up such a claim only in concert with the government of the state of incorporation of the company.[245] Further, practice varies as between states[246] and under different treaty regimes.[247]

[243] *Ibid.*, para. 64. The Court also examined whether the general rule that where an unlawful act was committed against a foreign company only the national state of the company could sue still remained and concluded that it did, *ibid.*, paras. 87 ff.

[244] See above, p. 811. The increase in the number of bilateral investment treaties in the 1970s may be partly explained as the response to the post-*Barcelona Traction* need to protect shareholders. See e.g. M. Sornarajah, 'State Responsibility and Bilateral Investment Treaties', 20 *Journal of World Trade Law*, 1986, pp. 79, 87. Note that in the *Diallo* case, ICJ Reports, 2007, para. 88, the Court noted that questions as to the rights of companies and their shareholders were in contemporary international law more a matter for bilateral and multilateral treaties for the protection of foreign investments and that the role of diplomatic protection 'had somewhat faded'.

[245] See also the position adopted by the UK in the *III Finance Ltd* v. *Aegis Consumer Finance Inc.* litigation before the US courts to the effect that entities incorporated in any territory for which the UK is internationally responsible are the UK citizens for the purposes of the US federal alienage jurisdiction statute in question, UKMIL, 71 BYIL, 2000, pp. 552 ff., and similarly in the *Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure Ltd* litigation, UKMIL, 72 BYIL, 2001, p. 603.

[246] See e.g. W. K. Geck, 'Diplomatic Protection' in *Encyclopedia of Public International Law* (ed. R. Bernhardt), Amsterdam, 1992, vol. X, p. 1053.

[247] See e.g. the Algiers Declaration concerning the settlement of US–Iranian claims, 20 ILR, 1981, p. 230; the Convention on the Settlement of Investment Disputes, 1965, article 25 and *Third US Restatement of Foreign Relations Law*, Washington, 1987, vol. I, pp. 127–8.

The position with regard to ships is rather different. The International Tribunal for the Law of the Sea in *M/V Saiga* (*No. 2*) emphasised that under the Law of the Sea Convention, 1982 it is the flag state that bears the rights and obligations with regard to the ship itself so that 'the ship, every thing on it and every person involved or interested in its obligations are treated as an entity linked to the flag state. The nationalities of these persons are not relevant.'[248]

The exhaustion of local remedies[249]

Customary international law provides that before international proceedings are instituted or claims or representations made, the remedies provided by the local state should have been exhausted.[250] There is a theoretical dispute as to whether the principle of exhaustion of local remedies is a substantive or procedural rule or some form of hybrid concept,[251] but the purpose of the rule is both to enable the state to have an opportunity to redress the wrong that has occurred within its own legal order and to reduce the number of international claims that might be brought. Another factor, of course, is the respect that is to be accorded to the sovereignty and jurisdiction of foreign states by not pre-empting the operation of their legal systems. Article 44 of the ILC Articles on State Responsibility provides that the responsibility of a state may not be

[248] 120 ILR, pp. 143, 184–5 and see e.g. article 292 of the Law of the Sea Convention, 1982. See also the *Grand Prince (Belize* v. *France)* case, ITLOS, judgment of 20 April 2001, 125 ILR, p. 272.

[249] See further above, chapter 6, p. 273. See also the *Panevezys Railway* case, PCIJ, Series A/B, No. 76 (1939); 9 AD, p. 308; Whiteman, *Digest*, vol. III, p. 1558; Borchard, *Diplomatic Protection*, pp. 817–18; A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, 1983; C. Law, *The Local Remedies Rule in International Law*, Geneva, 1961; C. F. Amerasinghe, *Local Remedies in International Law*, Cambridge, 2nd edn, 2004, and J. Kokott, 'Interim Report on the Exhaustion of Local Remedies', International Law Association, Report of the Sixty-Ninth Conference, London, 2000, p. 606.

[250] See e.g. the *Interhandel (Switzerland* v. *USA)* case, ICJ Reports, 1959, pp. 6, 27 and the *Diallo (Guinea* v. *Democratic Republic of Congo)* case, ICJ Reports, 2007, paras. 42 and 44. See also *Ex parte Ferhut Butt* 116 ILR, pp. 607, 614–15 (High Court) and 619 (Court of Appeal). The requirement also arises in a number of treaties: see e.g. article 35, European Convention on Human Rights; article 46, Inter-American Convention on Human Rights; article 5, Optional Protocol I, International Covenant on Civil and Political Rights; and article 295 of the Law of the Sea Convention.

[251] See e.g. the discussions in *Yearbook of the* ILC, 1977, vol. II, part 2, pp. 30 ff. and Report of the ILC on its 54th Session, 2002, pp. 131 ff. See also Kokott, 'Interim Report', pp. 612 ff.

invoked if the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.[252]

Article 14 of the ILC Draft Articles on Diplomatic Protection reiterates the customary rule, noting that no international claim in respect of an injury to a national may be presented before that national has exhausted local remedies, which are defined as legal remedies open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the state alleged to be responsible for causing the injury. Article 15 provides that local remedies do not need to be exhausted where there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; there is undue delay in the remedial process which is attributable to the state alleged to be responsible; there was no relevant connection between the injured person and the state alleged to be responsible at the date of injury; the injured person is manifestly precluded from pursuing local remedies; or the state alleged to be responsible has waived the requirement that local remedies be exhausted.[253]

The general rule was well illustrated in the *Ambatielos* arbitration[254] between Greece and Britain. The former brought proceedings arising out of a contract signed by Ambatielos, which were rejected by the tribunal since the remedies available under English law had not been fully utilised. In particular, he had failed to call a vital witness and he had not appealed to the House of Lords from the decision of the Court of Appeal.

The requirement to exhaust local[255] remedies applies only to available effective remedies. It will not be sufficient to dismiss a claim merely because the person claiming had not taken the matter to appeal, where the appeal would not have affected the basic outcome of the case. This was stressed in the *Finnish Ships* arbitration[256] where shipowners brought

[252] ILC Commentary 2001, p. 305.

[253] The International Court noted in the *Diallo* case, ICJ Reports, 2007, para. 47, that administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings.

[254] 12 RIAA, p. 83 (1956); 23 ILR, p. 306.

[255] The terms domestic or municipal remedies are also used.

[256] 2 RIAA, p. 1479 (1934); 7 AD, p. 231.

a claim before the Admiralty Transport Arbitration Board, but did not appeal against the unfavourable decision. It was held that since the appeal could only be on points of law, which could not overturn the vital finding of fact that there had been a British requisition of ships involved, any appeal would have been ineffective. Accordingly the claims of the shipowners would not be dismissed for non-exhaustion of local remedies.

In the *Interhandel* case,[257] the United States seized the American assets of a company owned by the Swiss firm Interhandel, in 1942, which was suspected of being under the control of a German enterprise. In 1958, after nine years of litigation in the US courts regarding the unblocking of the Swiss assets in America, Switzerland took the matter to the International Court of Justice. However, before a decision was reached, the US Supreme Court readmitted Interhandel into the legal proceedings, thus disposing of Switzerland's argument that the company's suit had been finally rejected. The Court dismissed the Swiss government's claim since the local remedies available had not been exhausted. Criticism has been levelled against this judgment on the ground that litigation extending over practically ten years could hardly be described as constituting an 'effective' remedy. However, the fact remains that the legal system operating in the United States had still something to offer the Swiss company even after that time.

The local remedies rule does not apply where one state has been guilty of a direct breach of international law causing immediate injury to another state, as for instance where its diplomatic agents are assaulted. But it does apply where the state is complaining of injury to its nationals.[258] The local remedies rule may be waived by treaty stipulation, as for example in Article V of the US–Mexico General Claims Convention of 1923 and Article XI of the Convention on International Liability for Damage caused by Space Objects, 1972.

The issue of local remedies was clarified in the *Elettronica Sicula SpA* (*ELSI*) case,[259] which referred to the concept as 'an important principle

[257] ICJ Reports, 1959, p. 6; 27 ILR, p. 475. The Court declared that the 'rule that local remedies must be exhausted before international proceedings may be instituted is a well-established principle of customary international law', ICJ Reports, 1959, p. 27; 27 ILR, p. 490. See also Rules VII and VIII of the International Claims Rules of the FCO, above, p. 811; Pleadings, *Israel* v. *Bulgaria*, ICJ Reports, 1959, pp. 531–2, and T. Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies', 25 BYIL, 1959, p. 95. Note, in addition, the *North American Dredging Co.* claim, 4 RIAA, p. 26 (1926); 3 AD, p. 4.

[258] See e.g. the *Heathrow Airport User Charges Arbitration*, 102 ILR, pp. 215, 277 ff.

[259] ICJ Reports, 1989, p. 15; 84 ILR, p. 311.

of customary international law'.[260] The case concerned an action brought by the US against Italy alleging injuries to the Italian interests of two US corporations. Italy claimed that local remedies had not been exhausted, while the US argued that the doctrine did not apply since the case was brought under the Treaty of Friendship, Commerce and Navigation, 1948 between the two states which provided for the submission of disputes relating to the treaty to the International Court, with no mention of local remedies. The Chamber of the Court, however, firmly held that while the parties to an agreement could if they so chose dispense with the local remedies requirement in express terms, it 'finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with'.[261] In other words, the presumption that local remedies need to be exhausted can only be rebutted by express provision to the contrary.

The Chamber also dealt with a claim by the US that the doctrine did not apply to a request for a declaratory judgment finding that the treaty in question had been violated. This claim in effect was based on the view that the doctrine would not apply in cases of direct injury to a state. The Chamber felt unable to find in the case a dispute over alleged violation of the treaty resulting in direct injury to the US that was both distinct from and independent of the dispute with regard to the two US corporations.[262] It was stressed that the matter 'which colours and pervades the US claim as a whole' was the alleged damage to the two US corporations.[263] In the light of this stringent test, it therefore seems that in such mixed claims involving the interests both of nationals and of the state itself one must assume that the local remedies rule applies.

The claim that local remedies had not in fact been exhausted in the case because the two US corporations had not raised the treaty issue before the Italian courts was rejected. It was held that it was sufficient if the essence of the claim had been brought before the competent tribunals. Accordingly, identity of claims as distinct from identity of issues is not required. The Chamber was not convinced that there clearly remained some remedy which the corporations, independently of their Italian subsidiary (ELSI), ought to have pursued and exhausted.[264]

[260] ICJ Reports, 1989, p. 42; 84 ILR, p. 348. [261] *Ibid.*

[262] ICJ Reports, 1989, pp. 42–4; 84 ILR, pp. 348–50.

[263] ICJ Reports, 1989, p. 43; 84 ILR, p. 349.

[264] ICJ Reports, 1989, pp. 46–8; 84 ILR, pp. 352–4. See e.g. M. H. Adler, 'The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in *ELSI*', 39 ICLQ, 1990, p. 641, and F. A. Mann, 'Foreign Investment in the International Court of

The treatment of aliens[265]

The question of the protection of foreign nationals is one of those issues in international law most closely connected with the different approaches adopted to international relations by the Western and Third World nations. Developing countries, as well as communist countries formerly, have long been eager to reduce what they regard as the privileges accorded to capitalist states by international law. They lay great emphasis upon the sovereignty and independence of states and resent the economic influence of the West. The Western nations, on the other hand, have wished to protect their investments and nationals abroad and provide for the security of their property.

The diplomatic protection of nationals abroad developed as the number of nationals overseas grew as a consequence of increasing trading activities and thus the relevant state practice multiplied. In addition, since the US–UK Jay Treaty of 1794 numerous mixed claims commissions were established to resolve problems of injury to aliens,[266] while a variety of national claims commissions were created to distribute lump sums received from foreign states in settlement of claims.[267] Such international and national claims procedures together with diplomatic protection therefore enabled nationals abroad to be aided in cases of loss or injury in state responsibility situations.[268]

Justice: The *ELSI* Case', 86 AJIL, 1992, pp. 92, 101–2. See also the *M/V Saiga (No. 2)* case, 120 ILR, pp. 143, 182–4 and the *LaGrand* case, ICJ Reports, 2001, pp. 466, 487–8; 134 ILR, pp. 1, 26–7.

265 See references in footnote 1. See also Guha Roy, 'Is the Law of Responsibility of States for Injury to Aliens a Part of Universal International Law?', 55 AJIL, 1961, p. 863; A. Fatouros, 'International Law and the Third World', 50 *Virginia Law Review*, 1964, p. 783; I. Shihata, *Legal Treatment of Foreign Investment*, Dordrecht, 1993; *Oppenheim's International Law*, p. 903, and *Third US Restatement of Foreign Relations Law*, Washington, 1987, vol. II, p. 184. See also the Principles Concerning Admission and Treatment of Aliens adopted by the Asian–African Legal Consultative Committee at its fourth session: www.aalco.org/Principle%20Concerning%20admission%20and%20Treatment%20of%20aliens.htm.

266 See e.g. A. M. Stuyt, *Survey of International Arbitrations, 1794–1889*, 3rd edn, Dordrecht, 1990.

267 See e.g. *International Claims* (eds. R. B. Lillich and B. Weston), Charlottesville, 1982, and R. B. Lillich and B. Weston, *International Claims: Their Settlements by Lump-Sum Agreements*, Charlottesville, 2 vols., 1975. See also the US–People's Republic of China Claims Settlement Agreement of 1979, DUSPIL, 1979, pp. 1213–15, and Whiteman, *Digest*, vol. VIII, pp. 933–69.

268 Note the establishment of the UN Compensation Commission following the ending of the Gulf War in 1991 to enable the settlement of claims arising out of that conflict: see below, chapter 22, p. 1249.

The relevant standard of treatment

The developed states of the West have argued historically that there exists an 'international minimum standard' for the protection of foreign nationals that must be upheld irrespective of how the state treats its own nationals, whereas other states maintained that all the state need do is treat the alien as it does its own nationals (the 'national treatment standard'). The reason for the evolution of the latter approach is to be found in the increasing resentment of Western economic domination rather than in the necessary neglect of basic standards of justice. The Latin American states felt, in particular, that the international minimum standard concept had been used as a means of interference in internal affairs.[269] Accordingly, the Calvo doctrine was formulated. This involved a reaffirmation of the principle of non-intervention coupled with the assertion that aliens were entitled only to such rights as were accorded nationals and thus had to seek redress for grievances exclusively in the domestic arena.[270] It was intended as a shield against external interference. The international standard concept itself developed during the nineteenth century and received extensive support in case-law.

In the *Neer* case,[271] for example, where the American superintendent of a mine in Mexico had been killed, the Commission held 'that the propriety of governmental acts should be put to the test of international standards', while in the *Certain German Interests in Polish Upper Silesia* case,[272] the Court recognised the existence of a common or generally accepted international law respecting the treatment of aliens, which is applicable to them despite municipal legislation. In the *Garcia* case,[273] the US–Mexican Claims Commission emphasised that there existed an international standard concerning the taking of human life, and in the *Roberts* claim,[274] reference was made to the test as to whether aliens were treated in accordance with ordinary standards of civilisation. If the principle is clear, the contents or definition of that principle are far from clear. In the *Neer* claim,[275] the Commission stated that the treatment of an alien, in order to constitute an international delinquency,

[269] See e.g. Guha Roy, 'Law of Responsibility'; J. Castañeda, 'The Underdeveloped Nations and the Development of International Law', 15 *International Organisation*, 1961, p. 38, and R. P. Anand, *New States and International Law*, Delhi, 1972.

[270] See e.g. Lillich, 'Duties', p. 349.

[271] 4 RIAA, p. 60 (1926); 3 AD, p. 213.

[272] PCIJ, Series A, No. 7, 1926; 3 AD, p. 429.

[273] 4 RIAA, p. 119 (1926). See also the *Chattin* case, 4 RIAA, p. 282 (1927); 4 AD, p. 248.

[274] 4 RIAA, p. 77 (1926); 3 AD, p. 227.

[275] 4 RIAA, pp. 60, 61–2 (1926); 3 AD, p. 213. See similarly the *Chattin* case, 4 RIAA, p. 282 (1927); 4 AD, p. 248.

> should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.

In other words, a fairly high threshold is specified before the minimum standard applies. Some indeed have argued that the concept never involved a definite standard with a fixed content, but rather a 'process of decision',[276] a process which would involve an examination of the responsibility of the state for the injury to the alien in the light of all the circumstances of the particular case.[277] The issue of the content of such a standard has often been described in terms of the concept of denial of justice.[278] In effect, that concept refers to the improper administration of civil and criminal justice as regards an alien.[279] It would include the failure to apprehend and prosecute those wrongfully causing injury to an alien, as in the *Janes* claim,[280] where an American citizen was killed in Mexico. The identity of the murderer was known, but no action had been taken for eight years. The widow was awarded $12,000 in compensation for the non-apprehension and non-punishment of the murderer. It would also include unreasonably long detention and harsh and unlawful treatment in prison.[281]

A progressive attempt to resolve the divide between the national and international standard proponents was put forward by Garcia-Amador in a report on international responsibility to the International Law Commission in 1956. He argued that the two approaches were now synthesised in the concept of the international recognition of the essential rights of man.[282] He formulated two principles: first, that aliens had to enjoy the same rights and guarantees as enjoyed by nationals, which should not in any case be less than the fundamental human rights recognised and defined in international instruments; secondly, international responsibility would only be engaged if internationally recognised fundamental human rights were affected.[283] This approach did not prove attractive to the ILC at that time in the light of a number of problems. However, human rights

[276] M. S. McDougal *et al.*, *Studies in World Public Order*, New Haven, 1960, p. 869.
[277] See Lillich, 'Duties', p. 350.
[278] See e.g. A. V. Freeman, *The International Responsibility of States for Denial of Justice*, London, 1938.
[279] See *AMCO* v. *Indonesia* (*Merits*) 89 ILR, pp. 405, 451.
[280] 4 RIAA, p. 82 (1926); 3 AD, p. 218.
[281] See e.g. the *Roberts* claim, 4 RIAA, p. 77 (1926); 3 AD, p. 227 and the *Quintanilla* claim, 4 RIAA, p. 101 (1926); 3 AD, p. 224.
[282] *Yearbook of the ILC*, 1956, vol. II, pp. 173, 199–203.
[283] *Yearbook of the ILC*, 1957, vol. II, pp. 104, 112–13.

law has developed considerably in recent years[284] and can now be regarded as establishing certain minimum standards of state behaviour with regard to civil and political rights. It is noticeable, for example, that the relevant instruments do not refer to nationals and aliens specifically, but to all individuals within the territory and subject to the jurisdiction of the state without discrimination.[285] One should also note the special efforts being made to deal with non-nationals, in particular the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live,[286] and the continuing concern with regard to migrant workers.[287]

Some differences as regards the relative rights and obligations of nationals and aliens are, of course, inevitable. Non-nationals do not have political rights and may be banned from employment in certain areas (e.g. the diplomatic corps), although they remain subject to the local law. It is also unquestioned that a state may legitimately refuse to admit aliens, or may accept them subject to certain conditions being fulfilled. Whether a state may expel aliens with equal facility is more open to doubt.

A number of cases assert that states must give convincing reasons for expelling an alien. In, for example, the *Boffolo* case,[288] which concerned an Italian expelled from Venezuela, it was held that states possess a general right of expulsion, but it could only be resorted to in extreme circumstances and accomplished in a manner least injurious to the person affected. In addition, the reasons for the expulsion must be stated before an international tribunal when the occasion demanded. Many municipal systems provide that the authorities of a country may deport aliens without reasons having to be stated. The position under customary international law is therefore somewhat confused. As far as treaty law is concerned, article 13 of the International Covenant on Civil and Political Rights stipulates that an alien lawfully in the territory of a state party to the Convention

[284] See above, chapters 6 and 7.

[285] See e.g. article 2 of the International Covenant on Civil and Political Rights, 1966 and article 1 of the European Convention on Human Rights, 1950.

[286] General Assembly resolution 40/144. See also E/CN.4/Sub.2/392 (1977) and R. B. Lillich and S. Neff, 'The Treatment of Aliens and International Human Rights Norms', 21 German YIL, 1978, p. 97.

[287] See further above, chapter 6, p. 333.

[288] 10 RIAA, p. 528 (1903). See also *Dr Breger's* case, Whiteman, *Digest*, vol. VIII, p. 861; R. Plender, *International Migration Law*, 2nd edn, Dordrecht, 1988, and G. Goodwin-Gill, *International Law and the Movement of Persons Between States*, Oxford, 1978.

> may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by and be represented for the purpose before, the competent authority.

Article 3 of the European Convention on Establishment, 1956, provides that nationals of other contracting states lawfully residing in the territory may be expelled only if they endanger national security or offend against public order or morality, and Article 4 of the Fourth Protocol (1963) of the European Convention on Human Rights declares that 'collective expulsion of aliens is prohibited'.[289] The burden of proving the wrongfulness of the expelling state's action falls upon the claimant alleging expulsion and the relevant rules would also apply where, even though there is no direct law or regulation forcing the alien to leave, his continued presence in that state is made impossible because of conditions generated by wrongful acts of the state or attributable to it.[290] Where states have expelled aliens, international law requires their national state to admit them.[291]

The expropriation of foreign property[292]

The expansion of the Western economies since the nineteenth century in particular stimulated an outflow of capital and consequent heavy

[289] Note also article 1 of Protocol 7 (1984) of the European Convention on Human Rights to the same general effect as article 13. See, as regards refugees, the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, and G. Goodwin-Gill, *The Refugee in International Law*, 2nd edn, Oxford, 1996.

[290] See *Rankin* v. *The Islamic Republic of Iran* 17 Iran–US CTR, pp. 135, 142; 82 ILR, pp. 204, 214. See also Goodwin-Gill, *International Law and the Movement of Persons*; Brownlie, *Principles*, pp. 498 ff., and M. Pellonpaa, *Expulsion in International Law*, Helsinki, 1984.

[291] This is a general principle, but cf. Lord Denning in the *Thakrar* case, [1974] QB 684; 59 ILR, p. 450. Note that the Lord Chancellor, in dealing with the expulsion of British aliens from East Africa, accepted that in international law a state was under a duty as between other states to accept expelled nationals: see 335 HL Deb., col. 497, 14 September 1972. See also *Van Duyn* v. *Home Office* [1974] ECR 1337; 60 ILR, p. 247.

[292] See e.g. G. White, *Nationalisation of Foreign Property*, London, 1961; B. Wortley, *Expropriation of Public International Law*, 1959; A. F. Lowenfeld, *International Economic Law*, 2nd edn, Oxford, 2008, part VI; M. Sornarajah, *The International Law on Foreign Investment*, 2nd edn, Cambridge, 2004, and Sornarajah, *The Settlement of Foreign Investment Disputes*, The Hague, 2000; I. Brownlie, 'Legal Status of Natural Resources', 162 HR, 1979, p. 245; R. Higgins, 'The Taking of Property by the State: Recent Developments in International Law', 176 HR, 1982, p. 267, and *The Valuation of Nationalised Property in International Law* (ed. R. B. Lillich), Charlottesville, 3 vols., 1972–5. See also *Oppenheim's International Law*, pp. 911 ff.; P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn, Oxford,

investment in the developing areas of the world. This resulted in substantial areas of local economies falling within the ownership and control of Western corporations. However, with the granting of independence to the various Third World countries and in view of the nationalisation measures taken by the Soviet Union after the success of the communist revolution, such properties and influence began to come under pressure.

In assessing the state of international law with regard to the expropriation of the property of aliens, one is immediately confronted with two opposing objectives, although they need not be irreconcilable in all cases. On the one hand, the capital-exporting countries require some measure of protection and security before they will invest abroad and, on the other hand, the capital-importing countries are wary of the power of foreign investments and the drain of currency that occurs, and are often stimulated to take over such enterprises. Nationalisation for one reason or another is now a common feature not only in communist and Afro-Asian states, but also in Western Europe. The need to acquire control of some key privately owned property is felt by many states to be an essential requirement in the interests of economic and social reform. Indeed it is true to say that extensive sectors of the economies of most West European states were at some stages under national control after having been taken into public ownership.

Since it can hardly be denied that nationalisation is a perfectly legitimate measure for a state to adopt and clearly not illegal as such under international law,[293] the problem arises where foreign property is involved. Not to expropriate such property in a general policy of nationalisation might be seen as equivalent to proposing a privileged status within the country for foreign property, as well as limiting the power of the state within its own jurisdiction. There is no doubt that under international law, expropriation of alien property is legitimate.[294] This is not disputed. However, certain conditions must be fulfilled.[295]

1999, pp. 491 ff.; A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran–US Claims Tribunal*, Dordrecht, 1994; P. M. Norton, 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation', 85 AJIL, 1991, p. 474; N. Schrijver, *Sovereignty over Natural Resources*, Cambridge, 1997, and F. Beveridge, *The Treatment and Taxation of Foreign Investment under International Law*, Manchester, 2000.

293 See e.g. *De Sanchez* v. *Banco Central de Nicaragua and Others* 770 F.2d 1385, 1397; 88 ILR, pp. 75, 89.

294 See e.g. *AMCO* v. *Indonesia (Merits)* 89 ILR, pp. 405, 466.

295 See e.g. the World Bank Guidelines on the Treatment of Foreign Direct Investment, 31 ILM, 1992, p. 1363.

The question, of course, arises as to the stage at which international law in fact becomes involved in such a situation. Apart from the relevance of the general rules relating to the treatment of aliens noted in the preceding section, the issue will usually arise out of a contract between a state and a foreign private enterprise. In such a situation, several possibilities exist. It could be argued that the contract itself by its very nature becomes 'internationalised' and thus subject to international law rather than (or possibly in addition to) the law of the contracting state. The consequences of this would include the operation of the principle of international law that agreements are to be honoured (*pacta sunt servanda*) which would constrain the otherwise wide competence of a state party to alter unilaterally the terms of a relevant agreement. This proposition was adopted by the Arbitrator in the *Texaco* v. *Libya* case in 1977,[296] where it was noted that this may be achieved in various ways: for example, by stating that the law governing the contract referred to 'general principles of law', which was taken to incorporate international law; by including an international arbitration clause for the settlement of disputes; and by including a stabilisation clause in an international development agreement, preventing unilateral variation of the terms of the agreement.[297] However, this approach is controversial and case-law is by no means consistent.[298] International law will clearly be engaged where the expropriation is unlawful, either because of, for example, the discriminatory manner in which it is carried out or the offering of inadequate or no compensation.[299]

[296] 53 ILR, p. 389.

[297] See e.g. C. Greenwood, 'State Contracts in International Law – The Libyan Oil Arbitrations', 53 BYIL, 1982, pp. 27, 41 ff. See also A. Fatouros, 'International Law and the Internationalised Contract', 74 AJIL, 1980, p. 134.

[298] See e.g. J. Paulsson, 'The ICSID *Klöckner* v. *Cameroon* Award: The Duties of Partners in North–South Economic Development Agreements', 1 *Journal of International Arbitration*, 1984, p. 145; the *Aminoil* case, 21 ILM, 1982, p. 976; 66 ILR, p. 519, and D. W. Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', 59 BYIL, 1988, p. 49.

[299] See in particular article 1 of Protocol I of the European Convention on Human Rights, 1950 as regards the protection of the right to property and the prohibition of deprivation of possessions 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. See e.g. the following cases: *Marckx*, European Court of Human Rights, Series A, No. 31; 58 ILR, p. 561; *Sporrong and Lönnroth*, ECHR, Series A, No. 52; 68 ILR, p. 86; *Loizidou* v. *Turkey*, Judgment of 18 December 1996; 108 ILR, p. 444. See also e.g. *Jacobs and White European Convention on Human Rights* (eds. C. Ovey and R. C. A. White), 4th edn, Oxford, 2006, chapter 15. However, it has been held that the reference to international law did not apply to the taking

The property question

Higgins has pointed to 'the almost total absence of any analysis of conceptual aspects of property'.[300] Property would clearly include physical objects and certain abstract entities, for example, shares in companies, debts and intellectual property. The 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[301] discusses the concept of property in the light of 'all movable and immovable property, whether tangible or intangible, including industrial, literary and artistic property as well as rights and interests in property'. In the *Liamco* case the arbitration specifically mentioned concession rights as forming part of incorporeal property,[302] a crucial matter as many expropriation cases in fact involve a wide variety of contractual rights.[303]

The nature of expropriation[304]

Expropriation involves a taking of property,[305] but actions short of direct possession of the assets in question may also fall within the category. The 1961 Harvard Draft would include, for example, 'any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference'.[306] In 1965, for example, after a series of Indonesian decrees, the UK government stated that:

by a state of the property of its own nationals: see *Lithgow*, European Court of Human Rights, Series A, No. 102; 75 ILR, p. 438; *James*, ECHR, Series A, No. 98; 75 ILR, p. 397 and *Mellacher*, ECHR, Series A, No. 169. See also Brock, 'The Protection of Property Rights Under the European Convention on Human Rights', *Legal Issues of European Integration*, 1986, p. 52.

300 Higgins, 'Taking of Property', p. 268.

301 55 AJIL, 1961, p. 548 (article 10(7)).

302 20 ILM, 1981, pp. 1, 53; 62 ILR, pp. 141, 189. See also the *Shufeldt* case, 2 RIAA, pp. 1083, 1097 (1930); 5 AD, p. 179.

303 See also below, p. 839, concerning the definition of 'investments' in bilateral investment treaties. See also article 1(6) of the European Energy Charter Treaty, 1994.

304 See e.g. R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, 2008, chapter 6.

305 The North American Free Trade Agreement (NAFTA) Arbitration Tribunal noted that the term 'expropriation', 'carries with it the connotation of a "taking" by a government-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the "taking"', *S.D. Myers* v. *Canada* 121 ILR, pp. 72, 122.

306 55 AJIL, 1961, pp. 553–4 (article 10(3)a).

> in view of the complete inability of British enterprises and plantations to exercise and enjoy any of their rights of ownership in relation to their properties in Indonesia, Her Majesty's Government has concluded that the Indonesian Government has expropriated this property.[307]

In *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran* before the Iran–US Claims Tribunal,[308] it was emphasised by the Tribunal that:

> measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

In that case, it was held that a taking had occurred by the end of January 1980 upon the appointment by the Iranian Housing Ministry of a temporary manager of the enterprise concerned, thus depriving the claimants of the right to manage and of effective control and use.[309] However, a series of events prior to that date, including armed incursions and detention of personnel, intimidation and interference with supplies and needed facilities, did not amount to a taking of the property, since investors in foreign countries assume certain risks with regard to disturbances and even revolution. The fact that the risks materialise, held the Tribunal, did not mean that property rights affected by the events could be deemed to have been taken.[310] There is clearly an important, but indistinct, dividing line here.

It has also been held that the seizure of a controlling stock interest in a foreign corporation is a taking of control of the assets and profits of the enterprise in question.[311] In *Biloune* v. *Ghana Investment Centre*, an

[307] BPIL, 1964, p. 200. See also 4 ILM, 1965, pp. 440–7. Note also *Shanghai Power Co.* v. *US* 4 Cl. Ct. 237 (1983), where it was held that the settlement of the plaintiff's claim by the US government in an agreement with China for less than its worth did not constitute a taking for which compensation was required in the context of the Fifth Amendment.

[308] Interlocutory Award, 4 Iran–US CTR, p. 122; 85 ILR, p. 349.

[309] 4 Iran–US CTR, p. 154; 85 ILR, p. 390. See also *Harza Engineering Co.* v. *The Islamic Republic of Iran* 1 Iran–US CTR, p. 499; 70 ILR, p. 117, and *AIG* v. *The Islamic Republic of Iran* 4 Iran–US CTR, p. 96. See also *SEDCO* v. *NIOC* 84 ILR, p. 483.

[310] 4 Iran–US CTR, p. 156; 85 ILR, p. 392. Cf. the Concurring Opinion by Judge Holtzmann on this issue, 4 Iran–US CTR, pp. 159, 178; 85 ILR, p. 414.

[311] *Kalamazoo Spice Extraction Company* v. *The Provisional Military Government of Socialist Ethiopia* 86 ILR, p. 45 and 90 ILR, p. 596. See also *Agip SpA* v. *The Government of the Popular Republic of the Congo* 67 ILR, p. 319 and *Benvenuti and Bonfant* v. *The Government of the Popular Republic of the Congo, ibid.*, p. 345.

investor began construction work relying upon government representations although without building permits; a stop order was then issued based upon the absence of such permit. The Tribunal held that an indirect expropriation had taken place because the totality of the circumstances had the effect of causing the irreparable cessation of work on the project.[312]

Where the taking constitutes a process rather than one clear act, there will be a problem of determining when the process has reached the point at which an expropriation in fact has occurred.[313] This issue may be important, for example, in determining the valuation date for compensation purposes. In *Santa Elena* v. *Costa Rica*, the Tribunal stated that 'a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property . . . This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case.'[314]

The expropriation of a given property may also include a taking of closely connected ancillary rights, such as patents and contracts, which had not been directly nationalised.[315]

[312] 95 ILR, pp. 183, 207–10. See also *Metalclad Corporation* v. *United Mexican States* 119 ILR, pp. 615, 639–40, a case under the North American Free Trade Agreement (NAFTA), article 1110 of which prohibits direct and indirect expropriation, where the Tribunal noted that expropriation included 'covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host state', para. 108. See also *CME* v. *Czech Republic* 9 ICSID Reports, p. 121 and *Middle East Cement Shipping* v. *Egypt* 7 ICSID Reports, p. 178.

[313] See e.g. *Generation Ukraine* v. *Ukraine* 44 ILM 2005, p. 404, paras. 20.22 and 20.26, noting that the plea of 'creeping expropriation' proceeded on the basis of an investment existing at a particular time that was eroded by a series of acts attributable to the state to the extent that it is violative of the relevant international standard of protection against expropriation. See also *Siemens* v. *Argentina*, Award of 6 February 2007, and W. M. Reisman and R. D. Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation', 74 BYIL, 2003, p. 115.

[314] 39 ILM, 2000, pp. 1317, 1329.

[315] PCIJ, Series A, No. 7, 1926. See also the *Norwegian Shipowners' Claims* case, 1 RIAA, p. 307 (1922) and the *Sporrong and Lönnroth* case before the European Court of Human Rights, Series A, No. 52 (1982); 68 ILR, p. 86. See also *Papamichalopoulos* v. *Greece*, European Court of Human Rights, Series A, No. 260 (1993), p. 15. Note in addition *Revere Copper* v. *Opic* 56 ILR, p. 258. See G. C. Christie, 'What Constitutes a Taking of Property under International Law?', 38 BYIL, 1962, p. 307; DUSPIL, 1976, p. 444; Brownlie, *System and State Responsibility*, pp. 24–5; Whiteman, *Digest*, vol. VIII, pp. 1006 ff., and *Third US Restatement on Foreign Relations Law*, vol. II, pp. 200–1.