individuals with rights. The HRC took the view that reservations offending peremptory norms would not be compatible with the object and purpose of the Covenant and raised the question of whether reservations to non-derogable provisions of the Covenant were compatible with its object and purpose. It expressed the view that reservations to the system of individual communications to the Committee established under the first Optional Protocol to the Covenant would not be compatible with its object and purpose. The HRC also took the view that it was the Committee itself, which should determine whether a specific reservation was compatible with the object and purpose of the Covenant.

The General Comment provoked strong reaction, including from the UK and US who considered VCLT Article 19(c) both adequate and applicable to reservations to human rights treaties and considered it for States parties to determine whether a reservation is compatible with the object and purpose of that treaty rather than the Committee. Moreover, the United States stressed that reservations formed an integral part of the consent to be bound and are not severable. The Committee, however, affirmed its General Comment in the *Rawle Kennedy* case, though it was questioned by a number of members who in a dissenting opinion observed that:

> The normal assumption will be that the ratification or accession is not dependent on the acceptability of the reservation and the unacceptability of the reservation will not vitiate the reserving State's agreement to be party to the Covenant. However, this assumption cannot apply when it is abundantly clear that the reserving State's agreement to becoming party to the Covenant is *dependent* on the acceptability of the reservation. The same applies with reservations to the Optional Protocol.[72]

However, in his Second Report as ILC Special Rapporteur Alain Pellet, argued that the system of the Vienna Convention is adequate to address reservations in human rights treaties[73] and has recently noted that the practice of human rights bodies not in uniform and eg, the Committees of the Conventions on Elimination of Discrimination against Woman and International Convention on the Elimination of All Forms of Racial Discrimination attempt to persuade States to withdraw offending reservations rather than to decide on impermissibility.[74] It is, then, clear that there is a significant on-going controversy surrounding this question.

This was confirmed by the 2007 meeting between the ILC and human rights regarding reservations to human rights treaties. During this meeting the representatives of several human rights bodies as well as the members of the Commission presented their views on this issue. During the discussion several issues were raised, the most important being the invalidity of reservation to treaties. Although the special character of human rights treaties was noted, a view was expressed that there were other areas such as environmental protection which also had special characteristics. However, a distinctive feature of human rights treaties was the presence of the human rights bodies. It was observed, nevertheless,

[72] *Rawle Kennedy* v *Trinidad and Tobago*, Comm. No 845/1999, Decision, 2 November 1999, UN Doc A/55/40, vol II, Annex XI, A, Individual Dissenting Opinion of Ando, Bhagwati, Klein, and Kretzmer, para 16.

[73] For a summary see *YBILC* (1997), vol II, pp 53–54, 57.

[74] A Pellet, *Eighth Report on Reservations to Treaties*, ILC, Fifty-fifth Session (2003), A/CN.4/535, paras 17–27.

that the law of treaties generally and the regime set up under Article 19 of the VCLT were applicable and adequate to deal with reservations to human rights treaties but should be applied in 'an appropriate and suitably adopted manner'. The heart of the discussion was the issue of the delicate balance between the integrity and universality of treaties in respect of reservations. All participants were in agreement as to the competence of the human rights bodies to assess the validity of reservations. The most important issue was so-called 'reservation dialogue' between the reserving State and the human rights body. Such an approach was the best the understanding of the political situation underlying reservations and giving the opportunity for the human rights body to exercise pragmatism (which is a particular feature of these bodies' policy towards reservations) and discretion. However, the question of the severance of an offending reservation from consent to be bound by a treaty, remains an unresolved problem in cases of the impossibility of ascertaining intention of the States parties in this respect. On one hand, there were views of the human rights bodies which supported the right of such bodies to severe reservations; on the other hand, some participants adhered to the view that the principle of sovereignty must prevail.[75]

D. INTERPRETATIVE DECLARATIONS

Interpretative declarations are not addressed by the VCLT. They are appended to treaties by governments at the time of signature, ratification, or acceptance and are explanatory in character, setting out how a State understands its treaty obligation when expressing its consent to be bound. However, such declarations must be subject to close scrutiny. If they change the scope of the obligation, they cease to be declarations and become reservations. The legal effect of interpretative declarations depends upon whether they aim to offer an interpretation of the treaty that may subsequently be proved incorrect (a 'mere interpretative declaration') or whether they offer an interpretation that is to be accepted by others (a 'qualified interpretative declaration'). In practice, distinguishing between reservations and forms of interpretative declarations can be a very daunting task.

According to the ILC, this task should be undertaken in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard should be given to the intention of the State or the international organization concerned at the time the statement was formulated.

VII. PROBLEMS CONCERNING THE GROUNDS FOR TERMINATION

This section will consider some specific issues concerning the external grounds for terminating or suspending a treaty, these being material breach, supervening impossibility of performance, and fundamental change of circumstances.

[75] A Pellet, *Fourteenth Report on Reservation to Treaties*, ILC, Sixty-first Session (2009), A/CN.4/6/14, 1–37, pp 27–34.

A. MATERIAL BREACH

VCLT Article 60 regulates the consequences of a breach of a treaty obligation deriving from the law of treaties, rather than from the law of State responsibility. The guiding principle is that of reciprocity. The ILC took a cautious approach to material breach, considering that a breach of a treaty, however serious, did not *ipso facto* put an end to a treaty but that within certain limits and subject to certain safeguards the right of a party to invoke the breach of a treaty as a ground for terminating it or suspending its operation must be recognized and Article 60 takes the same approach.

Taking a strict approach to the effect of a material breach aims at striking a balance between the need to uphold the stability of treaties and the need to ensure reasonable protection for the innocent victim of a breach, though it may appear that the stability of treaties is the first priority. It is certainly true that the ICJ takes a restrictive approach to the application of Article 60. For example, in the *Gabčíkovo-Nagymaros* case it responding to Hungary's claim that Slovakia's actions in relation to other treaties had a bearing upon the assessment of Hungary's own actions by saying that 'It is only material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty'.[76] The Court explained that, whilst the violation of any other treaty or rules of general international law might justify an injured State taking other measures, such as countermeasures, it did not constitute a ground for termination of the treaty under the law of treaties.

This case is also illustrative of what comprises a material breach. Hungary relied on the construction of a bypass canal in pursuance of a plan known as 'Variant C' by Czechoslovakia, and which was unauthorized by the original 1977 Treaty between the parties, as the basis for invoking material breach of that treaty. Czechoslovakia claimed that its plans were justified as a legitimate response to prior breaches of the treaty by Hungary. The Court found that Czechoslovakia had indeed violated the 1977 Treaty when it diverted the waters of the Danube into the bypass canal in October 1992 but that the construction of the works prior to this had not been unlawful. Thus the notification by Hungary in May 1992 that it was terminating the 1977 Treaty for material breach was premature, as no breach had yet occurred. Moreover, the Court took the view that by attempting to terminate the 1977 Treaty by means of a declaration issued on 6 May 1992 with effect as of some 19 days later on 25 May 1992, Hungary had not acted in accordance with the principle of good faith and therefore had by its own conduct prejudiced its right to terminate the 1977 Treaty. The Court stated that:

> This would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.[77]

The relationship between the material breach of a treaty and the law of State responsibility, and particularly with countermeasures, is extremely problematic. Although not resolved by the ILC in its work on the law of treaties it appears that its intention was that the two regimes should co-exist and the ILC's Commentary to its Articles on State Responsibility

[76] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 106.

[77] Ibid, para 110.

reflect this, indicating that State responsibility does not deal with the 'consequences of breach for the continual or binding effect of the primary rule (eg, the right of an injured State to terminate or suspend a treaty for material breach, as reflected in Article 60 of the Vienna Convention on the Law of Treaties)'. The Special Rapporteur, James Crawford, explained that:

> There is thus a clear distinction between action taken within the framework of the law of treaties (as codified in the Vienna Convention) and conduct raising questions of State responsibility (which are excluded from the Vienna Convention). The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of State responsibility takes as given the existence of primary rules (whether based on a treaty or otherwise) and is concerned with the question whether the conduct inconsistent with those rules can be excused and, if not, what consequences of such conduct are. Thus it is coherent to apply the Vienna Convention rules as to the materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the Draft articles as to proportionality etc, in dealing with countermeasures.[78]

B. SUPERVENING IMPOSSIBILITY OF PERFORMANCE

This ground for termination is well established and uncontested. VCLT Article 61 limits this ground to the 'permanent disappearance or destruction of an object indispensable for the execution of a treaty' and it cannot be invoked by a party that was itself instrumental in causing these circumstances to come about by the breach of its treaty obligations. Once again, the ICJ has taken a strict approach. In the *Gabčíkovo-Nagymaros* case Hungary argued that the essential object of the 1977 Treaty was a joint economic investment, which was inconsistent with environmental considerations and had ceased to exist, rendering the 1977 Treaty impossible to perform. The Court observed that if the joint exploitation of the investment was no longer possible, this was because of Hungary's failure to perform most of the works for which it was responsible under the 1977 Treaty and, as indicated above, impossibility of performance cannot be invoked by a party as a ground for terminating a treaty when it is the result of that party's own failure to perform its treaty obligations.

C. FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Fundamental change of circumstances as a ground for the termination of a treaty is controversial. The principle of stability of contractual obligations and the conviction that 'it is a function of the law to enforce contracts or treaties even if they become burdensome for the party bound by them' militates against it (*Oppenheim's International Law*, 1992) but this needs to be balanced against the view that 'One could not insist upon petrifying a state of affairs which had become anachronistic because it is based on a treaty which either does not contain any specific clause as to its possible termination or which even proclaimed itself to be concluded for all times to come' (Nahlik, 1971). VCLT Article 62 takes a particularly cautious approach. It accepts that termination on these grounds is possible, but it is of limited scope. It may not be invoked in relation to a treaty, which establishes

[78] Third Report on State Responsibility, A/CN.4507/Add.3.

a boundary; and, as with Article 61, a State may not invoke Article 62 if the change was caused by a breach of its own international obligations, either under the treaty in question or any other international agreement.

The ICJ has taken a very cautious approach to this principle. In the *Fisheries Jurisdiction* case it said:

> International law admits that a fundamental change of circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of obligation imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of a treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of termination of a treaty relationship on account of changed circumstances.[79]

The *Gabčíkovo-Nagymaros* case again illustrates the Court's approach. Hungary identified several 'substantive elements' that had been present when the 1977 Treaty had been concluded but which it claimed had changed fundamentally when it issued its notice of termination in May 1992, these being: the whole notion of socialist economic integration which underpinned the 1977 Treaty; the replacement of a joint and unified operational system with separate unilateral schemes; the emergence of market economies in both States; the Czechoslovakian approach that had turned a framework treaty into an immutable norm; and, finally, the transformation of a treaty inconsistent with environmental protection into a prescription for environmental disaster.[80]

The Court concluded that whilst the political situation was relevant to the conclusion of the 1977 Treaty, its object and purpose—the joint investment programme for the production of energy, the control of floods, and the improvement of navigation on the River Danube—were not so closely linked to political conditions that the political changes in central Europe had radically altered the extent of obligations still to be performed.[81] The Court drew the same conclusion regarding the changes in economic systems concluding that even if by 1992 the projected profitability of the scheme had declined, it had not done so to an extent that would transform the nature of the parties' obligations. Likewise, developments in environmental knowledge and environmental law were not completely unforeseen. Having analysed the parties' arguments the Court concluded that 'the changed circumstances advanced by Hungary are, in the Court's view, not of such nature, either individually or collectively, that their effect would radically transform the extent of the obligation still to be performed in order to accomplish the Project'.[82] The Court therefore interpreted VCLT Article 62 strictly, believing that a 'fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of consent of the parties to be bound by the Treaty,' believing that 'the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases'.[83]

[79] *Fisheries Jurisdiction (United Kingdom v Iceland), Jurisdiction of the Court, Judgment, ICJ Reports 1973*, p 3, para 36.
[80] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 95.
[81] Idem. [82] Ibid, para 104. [83] Ibid.

VIII. CONCLUSION

This chapter has presented the main issues of treaty law found in the 1969 Vienna Convention on the Law of Treaties. It has attempted to illustrate the application and interpretation of the Convention in practice through the case law, in particular that of the International Court of Justice. Although rightly considered as one of the greatest accomplishments of the ILC, the Vienna Convention does not cover all possible areas and issues, particularly the question of reservation to human rights treaties and the relationship between State responsibility and material breach. The law of treaties is a classical yet constantly developing branch of international law. Treaties are the main tool of relations between States and therefore it is only to be expected that the rules that govern their application are not static but constantly evolve and reflect the development of other branches of international law.

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15

THE NATURE AND FORMS OF INTERNATIONAL RESPONSIBILITY

James Crawford and Simon Olleson

SUMMARY

On the international plane, responsibility is the necessary corollary of obligation: every breach by a subject of international law of its international obligations entails its international responsibility. The chapter starts by giving an overview of different forms of responsibility/liability in international law before examining the general character of State responsibility. Due to the historical primacy of States in the international legal system, the law of State responsibility is the most fully-developed branch of responsibility and is the principal focus of the chapter. Conversely, although the International Law Commission adopted draft Articles on Responsibility of International Organizations on first reading in 2009, the responsibility of international organizations remains an under-developed area; it is considered only briefly, as is the potential responsibility under international law of other international actors.

The law of State responsibility deals with three general questions: (1) has there been a breach by a State of an international obligation; (2) what are the consequences of the breach in terms of cessation and reparation; (3) who may seek reparation or otherwise respond to the breach as such, and in what ways? As to the first question, this chapter discusses the constituent elements of attribution and breach, as well as the possible justifications or excuses which may preclude responsibility. The second question concerns the various secondary obligations which arise upon the commission of an internationally wrongful act by a State, and in particular the forms of reparation. The third question concerns issues of invocation of responsibility, including the taking of countermeasures.

I. THE SCOPE OF INTERNATIONAL RESPONSIBILITY: INTRODUCTION AND OVERVIEW

Article 1 of the International Law Commission (ILC)'s Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA' or 'the Articles on State Responsibility'),[1] adopted in 2001, provides: 'Every internationally wrongful act of a State entails the international responsibility of that State'.[2] Due to the historical development of international law, its primary subjects are States. It is on States that most obligations rest and on whom the burden of compliance principally falls. For example, the human rights conventions, though they confer rights upon individuals, impose obligations upon States. If other legal persons have obligations in the field of human rights, it is only by derivation or analogy from the human rights obligations accepted by States (see Alston, 2005, Clapham, 2006, and McCorquodale, above, Ch 10). State responsibility is the paradigm form of responsibility on the international plane.

But there can be international legal persons other than States, as the International Court of Justice (ICJ) held in the *Reparation for Injuries* Advisory Opinion.[3] Being a subject of any legal system involves being subject to responsibilities as well as enjoying rights. Thus it would seem unproblematic to substitute the words 'international organization' or 'international legal person' for 'State' in Article 1 of the Articles on State Responsibility: that basic statement of principle would seem equally applicable by definition to all international legal persons.[4]

In relation to international organizations, at least, a corollary of their undoubted capacity to enter into treaties with States or with other international organizations is that they are responsible for breaches of the obligations undertaken; this follows from the principle *pacta sunt servanda*.[5] The same is true for breaches of applicable general international law.

[1] Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 August 2001: *Report of the International Law Commission, Fifty-third Session*, A/56/10, Chapter IV. The General Assembly took note of the Articles, recommended them to the attention of governments, and annexed them to GA Res 56/83 (10 December 2001), deferring until 2004 any decision on whether the Articles should be adopted in the form of a multilateral Convention; in 2004, the question was again deferred until 2007: see GA Res 59/35 (2 December 2004). In 2007, a decision was again deferred until 2010: see GA Res 62/61 (6 December 2007). For an account of the debate in 2004 see Crawford and Olleson, 2005. The Articles and the Commentaries are reproduced in Crawford, 2002 (the Articles at pp 61–73) and the Articles alone in Evans, 2009, pp 576–584.

[2] See the often quoted dictum of the Permanent Court of International Justice in *Factory at Chorzów, Jurisdiction, Judgment No 8, 1927, PCIJ, Ser A, No 9* at p 21: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation'.

[3] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 174 at p 179.

[4] This is the approach adopted by the ILC in its work on Responsibility of International Organizations: see Article 3, draft Articles on Responsibility of International Organizations, as adopted by the ILC on first reading: *Report of the International Law Commission, Sixty-First Session*, A/64/10 (2009), Chapter IV: 'Every internationally wrongful act of an international organization State entails the international responsibility of the international organization'.

[5] See Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986), Article 26; cf Morgenstern, 1986, pp 13–16, 32–36, 115.

The potential responsibility of international organizations under general international law was affirmed by the International Court of Justice in the *Cumaraswamy* Advisory Opinion.[6] But there are serious difficulties of implementation, since the jurisdiction of international courts and tribunals has been developed by reference to States and not international organizations.[7]

The ILC has attempted to pull together the sparse international practice in relation to the responsibility of international organizations. In doing so, it has to a large extent based itself upon the model of the Articles on State Responsibility; the draft Articles on Responsibility of International Organizations ('DARIO'), adopted on first reading in 2009, adapt many formulations of the Articles on State Responsibility. But there are also some major differences, reflecting the differences in structure and function as between States and international organizations. The most significant of these concerns attribution.[8] In the law of State responsibility, as will be seen, there are a number of ways in which conduct of organs, instrumentalities and even, in some circumstances, private parties may be attributed to the State (ARSIWA, Articles 4–11). By contrast, given the different structure of international organizations—which are functional entities, not territorial communities—the 'general rule' is that conduct must be that of an organ or agent of the international organization, acting in the performance of its functions (DARIO, Article 5). The 'functional' criteria underlying attribution of conduct to an international organization has parallels in other areas of the law, in particular as concerns the immunity from jurisdiction of agents of international organizations.[9]

The addition of the notion of agents to that of organs substantially widens the rule as compared to the corresponding rule under the law of State responsibility. As a result the rule substantially subsumes the other bases of attribution in the law of State responsibility. For instance, an individual who does not have any official status within an international organization but carries out conduct upon its instructions or under its direction and control will be regarded as its agent and the conduct will be attributable to the organization on that basis.

[6] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999*, p 62, para 66.

[7] Thus the EU, which is not a State, has had to be specifically provided for in order to be a party to contentious proceedings under the 1982 UN Convention on the Law of the Sea (see Article 305 and Annex IX) and under the WTO dispute settlement mechanism. See generally Wellens, 2002; Klabbers, 2009. Similarly, Article 17 of Protocol 14 to the European Convention of Human Rights (2004) provides for the amendment of Article 59 of the Convention so as to permit the European Union to become a party by accession.

[8] Part Five DARIO (Articles 57–61) deals with question of State responsibility in connection with the act of an international organization, and deals with questions paralleling those in Part One, Chapter IV of the Article on State Responsibility as regards aid or assistance, direction and control, and coercion (Articles 57–59). It also attempts to frame rules applicable to the situation in which a member State seeks to avoid compliance with its own international obligations by procuring an act of the international organization to do what it itself is unable to do (Article 60), as well as a provision in relation to the acceptance of responsibility by a State for the internationally wrongful act of an international organization (Article 61). Those provisions undoubtedly constitute progressive development, rather than codification.

[9] Whether the agent was carrying out functions on behalf of an organization is also the criteria on the basis of which is to be determined whether an international organization may bring a claim by way of 'functional protection' in relation to injuries caused to the agent: see *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 174 at pp 177, 180, 181–184.

As a result of the dominant role played by the rule permitting attribution of the conduct of organs and agents of international organizations, the draft Articles on Responsibility of International Organization contain only two alternative bases for the attribution of conduct to an international organization; first, in a similar fashion to the position under the law of State responsibility, conduct will be attributable if it has been acknowledged and adopted by the international organization as its own (DARIO, Article 8). Second, conduct may be attributed to an international organization on the basis that the conduct is that of the organ of a State or the organ or agent of another international organization which has been placed at the disposal of the international organization and over which the international organization exercises 'effective control'. In contrast to the other provisions dealing with attribution, the purpose of this rule is not to determine *whether* particular conduct is attributable as such, but rather it addresses the question of to which of two entities (the 'borrowing' international organization or the 'lending' State (or international organization)), the conduct is to be attributed.

That provision is of particular relevance in the context of the attribution of the conduct in breach of applicable international obligations of national contingents assigned to United Nations peacekeeping missions. Whether or not the conduct in question is to be attributed to the United Nations or to the contributing State turns on the relative degree of 'effective control' in fact exercised by those entities over the conduct in question. That in turn depends upon a number of factors, including the mandate under which the peacekeeping mission has been set up, any agreements between the United Nations and the contributing State as to the terms on which troops were to be placed at the disposal of the United Nations, the extent to which the troops remain subject to the command and jurisdiction of the contributing State, and whether (operational) United Nations command and control was in fact effective.[10]

The position so far as the international responsibility of individuals, corporations, non-governmental organizations, and other groups are concerned is far less clear. Despite the fact that international law may in certain circumstances, even outside the field of international human rights law, confer rights directly upon individuals,[11] it is doubtful whether they are in any meaningful sense 'subjects' of international law (see McCorquodale, above Ch 10); and so far no general regime of responsibility has developed to cover them.

In relation to individuals, international responsibility has only developed in the criminal field, and then only in comparatively recent times. True, piracy has been recognized as a 'crime against the law of nations' for centuries. But it is better to see this as a jurisdictional rule allowing States to exercise criminal jurisdiction for pirate attacks on ships

[10] Cf the decisions of the European Court of Human Rights in *Behrami and Behrami* v *France and Saramati* v *France, Germany and Norway* (Dec) [GC], nos 71412/01 and 78166/01, 2 May 2007, which applied a test of whether the United Nations maintained 'ultimate authority and control' in relation to the question of whether actions of troops forming part of KFOR in Kosovo were attributable to the United Nations. Compare the approach of the House of Lords in *R (Al-Jedda)* v *Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332 as concerns whether the actions of UK troops forming part of the multi-national force in Iraq authorized by SC Res 1546 (8 June 2004) were attributable to the United Nations.

[11] *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, PCIJ, Ser B, No 15* at pp 17–21; *LaGrand (Germany* v *United States of America), Merits, Judgment, ICJ Reports 2001*, p 466, para 77; *Avena and Other Mexican Nationals (Mexico* v *United States of America), ICJ Reports 2004*, p 12, para 40.

at sea rather than a rule conferring 'legal personality' on pirates.[12] One does not acquire international legal personality by being hanged at the yardarm.

Since the Second World War, by contrast, real forms of individual criminal responsibility under international law have developed. First steps were taken with the establishment of the Nuremberg and Tokyo war crimes tribunals and the conclusion of the Genocide Convention in the immediate post-war period; after the end of the Cold War there followed, in rapid succession, the creation by Security Council resolution of the International Criminal Tribunal for Yugoslavia (ICTY) (1992) and Rwanda (ICTR) (1994), and the adoption of the Rome Statute of the International Criminal Court (ICC) (1998), which entered into force on 1 July 2002. Further, various 'mixed' or 'hybrid' international criminal tribunals have been set up in, *inter alia*, Bosnia-Herzegovina (2004–), East Timor (2000–2006), Sierra Leone (2002–), Cambodia (2003–), and Lebanon (2007).

By contrast, so far there has been no development of corporate criminal responsibility in international law. Under the two ad hoc Statutes and the Rome Statute only individual persons may be accused. The Security Council often addresses recommendations or demands to opposition, insurgent, or rebel groups—but without implying that these have separate personality in international law. Any international responsibility of members of such groups is probably limited to breaches of applicable international humanitarian law or even of national law, rather than general international law. If rebel groups succeed in becoming the government of the State (whether of the State against which they are fighting or of a new State which they succeed in creating), that State may be responsible for their acts (ARSIWA, Article 10; Commentary, Crawford, 2002, pp 116–120). But if they fail, the State against which they rebelled is in principle not responsible, and any possibility of collective responsibility for their acts fails with them.

It is also very doubtful whether 'multinational corporations' are subjects of international law for the purposes of responsibility, although steps are being taken to develop voluntary adherence to human rights and other norms by corporations.[13] From a legal point of view, the so-called multinational corporation is better regarded as a group of corporations, each created under and amenable to the national law of its place of incorporation as well as to any other national legal system within which it operates.

Thus although Article 58 of the ILC's Articles on State Responsibility reserves in general terms the possibility of 'individual responsibility under international law of any person acting on behalf of a State',[14] a reservation which is not limited to criminal responsibility, so far there has been virtually no development in practice of civil responsibility of individuals or corporations for breaches of international law. Only the United States has legislation dealing (in a very uneven way) with this issue.[15] As the dissenting

[12] See the Separate Opinion of Judge Moore in *'Lotus', Judgment No 9, 1927, PCIJ, Ser A, No 10* at p 70; United Nations Convention on the Law of the Sea 1982, Articles 101–107; Rubin, 1998; *Oppenheim's International Law*, 1992, vol 1, pp 746–755.

[13] See, eg, the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977* (adopted by the Governing Body at its 204th Session), 17 ILM 416; the OECD's *'Guidelines for Multinational Enterprises'* (2000), 40 ILM 237; and the 'Nine Principles' of the UN Global Compact Initiative (2000) (relating to human rights, labour standards, and the environment). See De Schutter, 2006. On the problems of establishing international responsibility of corporations, see Ratner, 2001.

[14] See likewise DARIO, Article 65.

[15] Private parties (US or foreign) can be sued for torts occasioned 'in violation of the law of nations' anywhere committed against aliens, under the unusual jurisdiction created by the Alien Tort Claims Act (28

judges in the *Arrest Warrant* case pointed out, that legislation may be seen as 'the beginnings of a very broad form of extraterritorial jurisdiction'[16] in civil matters. They further commented that although 'this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally'.[17]

The development of international criminal law is considered in Chapter 25 of this book. In this chapter we examine the foundational rules of State responsibility—in particular the bases for and consequences of the responsibility of a State for internationally wrongful acts. Questions of the implementation of such responsibility by an injured State or by other interested parties, as well as possible responses (retorsion, countermeasures, sanctions) are dealt with briefly; they are discussed in greater detail in the following two chapters.

II. STATE RESPONSIBILITY: ISSUES OF CLASSIFICATION AND CHARACTERIZATION

The category 'State responsibility' covers the field of the responsibility of States for internationally wrongful conduct. It amounts, in other words, to a general law of wrongs. But of course, what is a breach of international law by a State depends on what its international obligations are, and especially as far as treaties are concerned, these vary from one State to the next. There are a few treaties (the United Nations Charter, the 1949 Geneva Conventions and some international human rights treaties) to which virtually every State is a party; otherwise each State has its own range of bilateral and multilateral treaty obligations. Even under general international law, which might be expected to be virtually uniform for every State, different States may be differently situated and may have different responsibilities—for example, upstream States rather than downstream States on an international river, capital importing and capital exporting States in respect of the treatment of foreign investment, or States on whose territory a civil war is raging as compared with third parties to the conflict. There is no such thing as a uniform code of international law reflecting the obligations of all States.

On the other hand, the underlying concepts of State responsibility—attribution, breach, excuses, consequences—seem to be general in character. Particular treaties or rules may

USC §1350). The US cases distinguish between corporate complicity with governmental violations of human rights, and those violations (eg genocide, slavery) which do not require any governmental involvement or State action. See, eg, *Kadić* v *Karadžić* 70 F.3d 232 (1995) (2nd Cir 1995); 104 ILR 135. Cf also the Torture Victims Protection Act 1992 (PL 102–256, 106 *Stat* 73), under which only designated 'rogue' States can be defendants: the Act on its face contradicts the principle of universality on which it purports to be based. The jurisdiction under the ATCA has survived scrutiny by the Supreme Court in *Sosa* v *Alvarez-Machain* 124 S Ct 2739; 542 US 692 (2004) although its scope has been somewhat reduced. In *Jones* v *Ministry of Interior for the of Kingdom of Saudi Arabia and Ors* [2006] UKHL 26, [2007] 1 AC 270, the House of Lords reversed a Court of Appeal decision [2004] EWCA Civ 1394, [2005] QB 699, which had seemed to open the door to claims brought on the basis of the English law of tort against State officials in relation to alleged acts of torture abroad.

[16] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3, Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 48.

[17] Ibid.

vary these underlying concepts in particular respects, otherwise they are assumed and they apply unless excluded.[18] These background or standard assumptions of responsibility on the basis of which specific obligations of States exist and are applied are set out in the ILC's Articles on State Responsibility. The Articles are the product of more than 40 years' work by the ILC on the topic, and in common with other ILC texts they involve both codification and progressive development (Crawford, 2002, pp 1–60; *Symposium*, 2002, 96 *AJIL* pp 773–890). They are the focus of what follows.

A. RESPONSIBILITY UNDER INTERNATIONAL OR NATIONAL LAW?

Evidently State responsibility can only be engaged for breaches of international law, ie for conduct which is internationally wrongful because it involves some violation of an international obligation applicable to and binding on the State. A dispute between two States concerning the breach of an international obligation, whether customary or deriving from treaty, concerns international responsibility, and this will be true whether the remedy sought is a declaration that conduct is wrongful, cessation of the conduct, or compensation for damage suffered. On the other hand, not all claims against a State involve international responsibility, even if international law may be relevant to the case. For example, if a State is sued on a commercial transaction in a national court, international law helps to determine what is the extent of the defendant State's immunity from jurisdiction and from measures of enforcement, but the underlying claim will derive from the applicable law of the contract. There is thus a distinction between State responsibility for breaches of international law, and State liability for breaches of national law. One does not entail the other.[19]

Responsibility claims were traditionally brought directly between States at the international level, or (much less often) before an international court or tribunal. Both these avenues remain but there is now a further range of possibilities. For example in some cases individuals or corporations are given access to international tribunals and can bring State responsibility claims in their own right, eg for breach of the European Convention on

[18] ARSIWA, Article 55 (*lex specialis*). For examples of a *lex specialis* see, eg, the provisions of the WTO Agreements excluding compensation for breach and focusing on cessation, and (perhaps) Article 41 of the European Convention on Human Rights which appears, at least in some circumstances, to give States an option to pay compensation rather than providing restitution in kind; nevertheless they remain bound by Article 46 of the European Convention to abide by the judgments of the European Court, and in that regard, to take, under the supervision of the Committee of Ministers, 'the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects' (*Scozzari and Giunta* v *Italy* [GC], nos 39221/98 and 41963/98, para 249; ECHR 2000-VIII). After initial hesitations (see eg, *Ireland* v *UK*, Judgment of 18 January 1978, para 187, Ser A no 25), the recent practice of the European Court of Human Rights appears to be evolving, at least in relation to certain types of breach, towards a requirement of real restitution by way of just satisfaction, rather than merely the payment of compensation: see eg *Assanidze* v *Georgia* [GC], no 71503/01, paras 202–203 ECHR 2004-II; *Ilaşcu and Others* v *Moldova and Russia* [GC], no 48787/99, para 490, ECHR 2004-VII; *Sejdovic* v *Italy* [GC] no 56581/00, paras 125–126, ECHR 2006-II.

[19] ARSIWA, Articles 1, 3, 27; *Elettronica Sicula SpA (ELSI), Judgment, ICJ Reports 1989*, p 15, paras 73 and 124. See also *Compañía de Aguas del Aconquija and Vivendi Universal* v *Argentine Republic (ICSID Case No ARB/97/3), Decision on Annulment*, 3 July 2002, 41 ILM 1135; *ICSID Reports*, vol 6, p 340, paras 93–103; *SGS Société Générale de Surveillance SA* v *Islamic Republic of Pakistan (ICSID Case No ARB/01/13), Decision on Objections to Jurisdiction*, 29 January 2004, *ICSID Reports*, vol 8, p 483, paras 146–148.

Human Rights before the European Court of Human Rights, or for breach of a bilateral investment treaty before an arbitral tribunal established under the treaty. Whether such international claims could also be enforced in national courts depends on the approach of the national legal system to international law in general (see Denza, above, Ch 14) as well as on the rules of State immunity (see Fox, above, Ch 12). In certain circumstances it is possible for responsibility claims to be 'domesticated', and the principles of subsidiarity and complementarity indicate an increasing role for national courts in the implementation and enforcement of international standards. But the interaction between rules of jurisdiction and immunity and the relation between national and international law make this a complex area. For the sake of simplicity, this chapter will be confined to claims of State responsibility brought at the international level.

B. THE TYPOLOGY OF STATE RESPONSIBILITY

National legal systems often distinguish types or degrees of liability according to the source of the obligation breached—for example, crime, contract, tort, or delict.[20] In international law it appears that there is no general distinction of this kind. As the arbitral tribunal said in the *Rainbow Warrior* case:

> the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation of a State of any obligation, of whatever origin gives rise to State responsibility.[21]

To this extent the rules of State responsibility form the basis for a single system, having no precise equivalent in national legal systems. The reason is that international law has to address a very wide range of needs on the basis of rather few basic tools and techniques. For example, treaties perform a wide range of functions in the international system—from establishing institutions in the public interest and rules of an essentially legislative character to making specific contractual arrangements between two States. Unlike national law, there is no categorical distinction between the legislative and the contractual.

The Tribunal in the *Rainbow Warrior*[22] arbitration and the International Court in the *Gabčíkovo-Nagymaros Project*[23] case both held that in a case involving the breach of a treaty obligation, the general defences available under the law of State responsibility coexist with the rules of treaty law, laid down in the 1969 Vienna Convention on the Law of Treaties. But the two sets of rules perform different functions. The rules of treaty law determine when a treaty obligation is in force for a State and what it means, ie, how it is to be interpreted. The rules of State responsibility determine when a breach of such an obligation is to be taken to have occurred and what the legal consequences of that breach are in terms of such matters as reparation. There is some overlap between the two but they are legally and logically distinct. A State faced with a material breach of a treaty obligation can choose to suspend or terminate the treaty in accordance with the applicable rules of treaty law, thus releasing itself from its obligation to perform its obligations under the treaty in the future (VCLT, Article 60). But doing so does not prevent it also from claiming reparation for the breach.[24]

In addition, national legal systems also characteristically distinguish 'civil' from 'criminal' responsibility. By contrast there is little or no State practice allowing for 'punitive' or 'penal' consequences of breaches of international law. In 1976, Chilean agents killed a former Chilean minister, Orlando Letelier, and one of his companions by a car bomb in Washington, DC. The United States courts subsequently awarded both compensatory and punitive damages for the deaths, acting under the local torts exception of the Foreign State Immunity Act.[25] But the local judgment was practically unenforceable.[26] Subsequently, as part of the restoration of relations between the United States and Chile following the latter's return to democracy, it was agreed that a bilateral commission would determine the amount of compensation payable as an *ex gratia* settlement without admission of liability. Under the terms of reference of the Commission, the damages were to be assessed 'in accordance with applicable principles of international law, as though liability were established'.[27] The Commission awarded sums only on a compensatory basis for loss of income and moral damage; the separate opinion of the Chilean member of the Commission made clear that punitive damages were not accepted in international law.[28]

The draft of the ILC's Articles on State Responsibility adopted on first reading in 1996 sought to introduce the notion of 'international crimes' of States.[29] It was not envisaged that States could be fined or otherwise punished—no State has ever been accused of a criminal offence before an international court, even where the conduct involved aggression or genocide (see, eg, Abi-Saab, 1999, p 339; de Hoogh, 1996; Jørgensen, 2000; Pellet, 2001). In 1998, the concept of 'international crimes of States' was set aside, contributing to the unopposed adoption of the Articles on State Responsibility by the ILC in 2001. The episode suggests that State responsibility is an undifferentiated regime, which does not

[20] Cf the division of sources of obligation in Roman law into contract, delict, and quasi-contract/unjust enrichment: D.1.1.10.1 (Ulpian): 'Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere' ('the principles of law are these: to live honourably, not to harm any other person, and to render to each his own').

[21] *Rainbow Warrior (France/New Zealand)*, (1990) 20 *RIAA* 217, para 75; for the arguments of the parties, see ibid, paras 72–74. See also the ICJ in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 46–48, especially para 47: 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect', citing what is now ARSIWA, Article 12: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character*' (emphasis added).

[22] *Rainbow Warrior (France/New Zealand)*, (1990) 20 *RIAA* 217, para 75.

[23] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 46–48.

[24] In other words a State can terminate a treaty for breach while claiming damages for breaches that have already occurred: see VCLT, Articles 70(1)(b), 72(1)(b), 73.

[25] See *Letelier et al* v *The Republic of Chile et al*: see 488 F.Supp 665 (1980); 19 ILM 409; 63 ILR 378 (District Court, DC) for the decision on State immunity, and see 502 F.Supp 259 (1980); 19 ILM 1418; 88 ILR 747 (District Court, DC) for the decision as to quantum; the Court awarded the plaintiffs approximately $5 million, of which $2 million were punitive damages.

[26] The Court of Appeals for the 2nd Circuit, reversing the District Court, refused to allow enforcement against the Chilean national airline: 748 F.2d 790 (1984); the Supreme Court denied certiorari: 471 US 1125 (1985).

[27] *Re Letelier and Moffitt* (1992), 88 ILR 727 at 731.

[28] Ibid, p 741. The resulting award was paid to the victim's heirs on condition that they waived their rights under the domestic judgment.

[29] For the text of former Article 19 see Crawford, 2002, pp 352–353.

embody such domestic classifications as 'civil' and 'criminal'; and the International Court endorsed this approach in the *Bosnian Genocide* case.[30]

But this does not prevent international law responding in different ways to different kinds of breaches and to their different impacts on other States, on people and on international order. First, individual State officials have no impunity if they commit crimes against international law, even if they may not have been acting for their own individual ends.[31] Secondly, the Articles on State Responsibility make special provision for the consequences of certain serious breaches of peremptory norms of general international law. A breach is serious if it involves a 'gross or systematic failure by the responsible State to fulfil' such an obligation (Article 40(2)). The major consequence of such a breach is the obligation on all other States to refrain from recognizing as lawful the situation thereby created or from rendering aid or assistance in maintaining it (Article 41(2)). In addition, States must cooperate to bring the serious breach to an end 'through any lawful means'; the principal avenues for such cooperation are through the various international organizations, in particular the Security Council, whose powers to take measures to restore international peace and security substantially overlap with these provisions (Koskenniemi, 2001). But they are not the only ones, since the possibility remains of unilateral action by States against other States responsible for such serious breaches as genocide, war crimes, or denial of fundamental human rights.[32]

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment*, 26 February 2007 (nyr), paras 65 and 66.

[31] At the international level see the Statute of the ICTY, Articles 7(2), 7(4); the Statute of the ICTR, Article 6(2), 6(4); Rome Statute of the ICC, Articles 27, 33. At the national level see *R* v *Bow Street Metropolitan Stipendiary, ex parte Pinochet Ugarte (Amnesty International Intervening) (No 3)* [1997] UKHL 17; [2000] 1 AC 147. However, the ICJ has held that serving foreign ministers (and by implication, serving heads of State and other senior ministers) while in office are inviolable and have absolute jurisdictional immunity from prosecution in the national courts of other States: *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3, paras 51–61. The Court protested that this immunity did not involve impunity, *inter alia* because of the possibility of prosecution at the international level, or prosecution by the national State. The jurisdictional immunity apparently lasts only so long as the individual holds office: cf, however, ibid, paras 60–61, and compare with the Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, ibid, para 89. As a matter of English law, officials of a foreign State who, in the performance of their functions, commit crimes abroad contrary to international law enjoy immunity before the English courts when faced with *civil* claims in relation to those acts, even if the acts of which they are accused constitute a breach of a peremptory norm of international law (*jus cogens*): *Jones* v *Ministry of Interior for the of Kingdom of Saudi Arabia and Ors* [2006] UKHL 26, [2007] 1 AC 270; cf the possibility under US law of bringing such a civil claim under the Alien Tort Claims Act and/or the Torture Victim Protection Act (106 Stat. 73 (1992)).

[32] For instance States may adopt measures which are not inconsistent with their international obligations (retorsion). In addition, a right *may* exist allowing States which themselves are not injured to take countermeasures in the case of breach of certain types of obligation. See, for instance, the catalogue of State practice discussed in the commentary to ARSIWA, Article 54, which may be evidence of such a customary international rule. The ILC left the question open in Article 54 for future development. Further, the ILC proposed that in relation to a breach of an obligation 'owed to the international community as a whole', a category that encompasses most, if not all, peremptory norms of international law, any State, in addition to a directly injured State, should be entitled the invoke the responsibility of the wrongdoing State (Article 48(1)(b)); given that such States will by definition not normally have suffered any injury save the purely 'legal' injury resulting from the very violation of the norm in question, it was proposed that in invoking the responsibility of the responsible State they should be limited to claiming cessation of continuing wrongful acts and assurances and guarantees of non-repetition, as well as performance of the obligation of reparation 'in the interest of the injured State or the beneficiaries of the obligation breached' (Article 48(2)(a) and (b)). As yet, the ILC's proposal has found no concrete support in State practice (although cf the comments of Judge Simma in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v *Uganda), Judgment, ICJ Reports 2005*, p 168, Separate Opinion of Judge Simma, paras 32–41.

In the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, the ICJ discussed the existence of such consequences for third States as a result of the breaches by Israel the right of self-determination and certain obligations of international humanitarian law. The Court made no express reference to Articles 40 and 41 of the Articles; rather it reasoned first that the norms in question constituted rights and obligations *erga omnes* and then held that '[g]iven the character and the importance of the rights and obligations involved', other States were under an obligation not to recognize the illegal situation resulting from the construction of the Wall, and were under an obligation not to render aid and assistance in maintaining the situation thereby created, as well as an obligation 'while respecting the United Nations Charter and international law to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.'[33] In addition, the Court was of the view that the 'United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall…'[34]

III. THE ELEMENTS OF STATE RESPONSIBILITY

As already noted, the international responsibility of a State arises from the commission of an internationally wrongful act. An internationally wrongful act presupposes that there is conduct consisting of an action or omission that (a) is attributable to a State under international law; and (b) constitutes a breach of the international obligations of the State (ARSIWA, Article 2). In principle, the fulfilment of these conditions is a sufficient basis for international responsibility, as has been consistently affirmed by international courts and tribunals.[35] In some cases, however, the respondent State may claim that it is justified in its non-performance, for example, because it was acting in self-defence or was subject to a situation of *force majeure*. In international law such defences or excuses are termed 'circumstances precluding wrongfulness'. They will be a matter for the respondent State to assert and prove, not for the claimant State to negative.

The three elements—attribution, breach, and the absence of any valid justification for non-performance—will be discussed in turn before we consider the consequences of State responsibility, in particular for the injured State or States.

[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, ICJ Reports 2004*, p 136, para 159.

[34] Ibid, para 160.

[35] See the Permanent Court of International Justice in *Phosphates in Morocco, Preliminary Objections, Judgment, PCIJ, Ser A/B, No 74*, p 10, and the International Court of Justice *in United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, para 56; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, para 226, and *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 78. See also the decision of the Mexico-United States General Claims Commission in *Dickson Car Wheel Company* (1931) 4 *RIAA* 669, 678.

A. ATTRIBUTION OF CONDUCT TO THE STATE

Although they seem real enough to their citizens, States are juridical abstractions. Like corporations in national law, they necessarily act through their organs or agents. The rules of attribution specify the actors whose conduct may engage the responsibility of the State, either generally or in specific circumstances. It should be stressed that the issue here is one of responsibility for breaches of international obligations of the State. It does not concern the question which officials can enter into those obligations in the first place. Only senior officials of the State (the head of State or government, the minister of foreign affairs, and diplomats in certain circumstances: see VCLT, Article 7) have inherent authority to bind the State; other officials act upon the basis of express or ostensible authority (VCLT, Article 46).[36] By contrast, any State official, even at a local or municipal level, may commit an internationally wrongful act attributable to the State—the local constabulary or army torturing a prisoner or causing an enforced disappearance,[37] for example, or the local mayor requisitioning a factory.[38]

A clear example of attribution of conduct performed by State agents vis-à-vis another State was the sinking on 10 July 1985 of the Greenpeace ship *Rainbow Warrior* in Auckland harbour. The French Government subsequently admitted that the explosives had been planted on the ship by agents of the Directorate General of External Security, acting on orders received. New Zealand sought and received an apology and compensation for the violation of its sovereignty.[39] This was quite separate from the damage done to Greenpeace, a non-governmental organization, and to the Dutch national who was killed by the explosion; separate arrangements were made to provide compensation for these interests.

On the other hand, a State does not normally guarantee the safety of foreign nationals on its territory or the security of their property or the success of their investments. In terms

[36] See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, ICJ Reports 1994*, p 112, paras 26–27; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening), Merits, Judgment, ICJ Reports 2002*, p 303, paras 264–268. For an analogous question as to whether the position taken by organs of the constituent entities of a federal State are sufficient to give rise to a 'dispute as to the meaning or scope' of a prior judgment in order to form the basis for a request for interpretation of a prior judgment under Article 60 of the Statute of the ICJ, see *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) Request for the Indication of Provisional Measures, (Mexico v United States of America), Order of 16 July 2008* (nyr). The Court held that the refusal of the courts of certain constituent states of the United States to give effect to the Court's prior judgment in *Avena*, as well as the decision of the Supreme Court that the judgment was not directly enforceable as a matter of domestic constitutional law, were sufficient *prima facie* to give rise to a 'dispute' as to the meaning of the Court's judgment; this was held to be the case despite the statement of the federal executive authorities that they did not dispute the meaning and effects of the ICJ's judgment in *Avena* to the effect that the United States was under an obligation to allow reconsideration and review of the convictions (ibid, paras 55–56).

[37] See, eg, *Velásquez-Rodríguez v Honduras, Merits, Judgment of 29 July 1988, Ser C no 4*, 95 ILR 259, para 183 ('not all levels of the Government of Honduras were necessarily aware of those acts, nor is there any evidence that such acts were the result of official orders. Nevertheless, those circumstances are irrelevant for the purposes of establishing whether Honduras is responsible under international law'). See also ibid, 269, para 170.

[38] *Elettronica Sicula SpA (ELSI), Judgment, ICJ Reports 1989*, p 15.

[39] *Rainbow Warrior (No 1)* (1986), 74 ILR 256.

of any injury suffered, there has to be some involvement by the State itself—in effect, by the government of the State, in the conduct which is complained of. A State will generally only be liable for the conduct of its organs or officials, acting as such (ARSIWA, Article 4; Commentary, Crawford, 2002, pp 94–99). Purely private acts will not engage the State's responsibility, although the State may in certain circumstances be liable for its failure to prevent those acts, or to take action to punish the individuals responsible.[40] On the other hand, the scope of State responsibility for official acts is broad, and the definition of 'organ' for this purpose comprehensive and includes 'all the individual or collective entities which make up the organization of the State and act on its behalf'.[41] There is no distinction based on the level of seniority of the relevant officials in the State hierarchy; as long as they are acting in their official capacity, responsibility is engaged. In addition, there is no limitation to the central executive; responsibility may be engaged for acts of federal, provincial or even local government officials. Further, the classification of powers is also irrelevant: in principle, the concept of 'organ' covers legislatures, executive officials and courts at all levels (ARSIWA, Article 4).[42]

'Acts or omissions of any State organ or of persons or entities exercising elements of governmental authority, are attributable to the State provided they were acting in that capacity at the time, even if they may have been acting *ultra vires*.[43] Indeed, the State may be responsible for conduct which is clearly in excess of authority if the official has used an official position. For example, in the *Caire* case, a French national in Mexico was shot and killed by members of the Mexican army after he had refused their demands for money. The tribunal held that, for the *ultra vires* acts of officials to be attributable to the State, 'they must 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'.[44] In the circumstances the responsibility of the State was engaged 'in view of the fact that they acted in their capacity of officers and used the means placed at their disposition by virtue of that capacity'.[45] Similarly, in *Youmans*, United States citizens cornered in a house by a mob were killed after soldiers sent to disperse the crowd, contrary to orders, opened fire on the house, forcing the inhabitants out into the open. The Tribunal held that there was State responsibility given that 'at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer'. The Tribunal went on to comment that:

> Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability

[40] *Janes (US v Mexico)* (1926) 4 *RIAA* 82; cf *Noyes (US v Panama)* (1933) 6 *RIAA* 308.

[41] Commentary to Article 4, paragraph (1). ARSIWA, Article 4 itself and this passage from the Commentary were cited with approval by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment of 26 February 2007 (nyr), para 388.

[42] ARSIWA, Article 4. See also *LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999*, p 9, para 28: 'Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be'.

[43] Article 7 ARSIWA; see also the final words of Article 5 ARSIWA. For an illustration, see *Union Bridge Company (USA v Great Britain)* (1924) 6 *RIAA* 138.

[44] *Caire (France v Mexico)* (1929) 5 *RIAA* 516 at p 530.

[45] Ibid, at p 531.

whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.[46]

By contrast, a State is not responsible for the acts of mobs or of private individuals as such. Their conduct will only be attributable to the State if they were in fact acting under the authority or control of the State (ARSIWA, Article 8), or if the State acknowledges adopts (or in common law terminology 'ratifies') their acts as its own (ARSIWA, Article 11). In the *Tehran Hostages* case, the International Court held that although initially the students who took control of the US embassy in Tehran were not acting as agents of Iran, a subsequent decree of Ayatollah Khomeini endorsing the occupation of the embassy,

> translated continuing occupation of the Embassy and detention of the hostages into acts of [Iran]. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.[47]

Similarly, the State will be responsible if the authorities act in collusion with the mob or participate in the mob violence. However, international tribunals generally require strong evidence of such collusion.[48]

In addition, conduct which is not attributable to a State because it was carried out by persons acting in a purely private capacity may nonetheless be chargeable to the State because the State failed in some obligation to prevent the conduct in question. However, in such a case, responsibility arises as a result of the State's own failings, rather than directly as a result of the conduct of the private individuals. For instance, in the *Tehran Hostages* case, Iran was held to have breached its special obligation of protection of the embassy and consular premises and personnel, even prior to its adoption of the acts of the occupying students.[49] The duty to control a mob is particularly important when the mob is in some way under the control of the authorities.[50]

Like other systems of law, international law does not limit attribution to the conduct of the regular officials or organs of the State; it also extends to conduct carried out by others who are authorized to act by the State or at least who act under its actual direction or control. In the *Nicaragua* case, the International Court stated that:

> For this conduct [of the *contra* rebels] to give rise to legal responsibility of the United States it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.[51]

The Articles on State Responsibility follow this approach: under Article 8, conduct of a person or group of persons is attributable to the State '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' (ARSIWA, Article 8; Commentary, Crawford, 2002, pp 110–113), and it was reaffirmed by the International Court in *Bosnian Genocide*, as concerns the

46 *Youmans (USA v Mexico)* (1926) 4 *RIAA* 110; (1927) 21 *AJIL* 571, para 14.

47 *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, paras 73–74.

48 *Janes (USA v Mexico)* (1926) 4 *RIAA* 82.

49 *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, para 63.

50 See, eg, *The Zafiro (Great Britain v USA)* (1925) 6 *RIAA* 160.

51 *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment (Nicaragua v United States of America), ICJ Reports 1986*, p 14, para 115 (emphasis added).

attribution to the FRY of the conduct of the Bosnian Serb forces and paramilitary groups.[52] There the Court observed;

> 'the overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf... [T]he 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.[53]

As that last passage illustrates, the governing principle is that of independent responsibility: the State is responsible for its own acts, ie for the acts of its organs and agents, and not for the acts of private parties, unless there are special circumstances warranting attribution to it of such conduct. The same applies where one State is somehow implicated in the conduct of a third State—indeed it applies *a fortiori*, since that third State will ordinarily be responsible for its own acts in breach of its own international responsibilities (ARSIWA, Articles 16–19). But there is another facet to the principle of independent responsibility: a State cannot hide behind the involvement of other States. It is responsible if and to the extent that it contributed to that wrongful conduct by its own acts. Thus in *Nicaragua*, the acts of the *contras* were not as such attributable to the United States, but the United States was responsible for its own conduct (in itself internationally wrongful) in training and financing the *contras* and in carrying out some specific operations, including the mining of a Nicaraguan harbour.[54] Likewise if a number of States act together in administering a territory, each will be responsible for its own conduct as part of the common enterprise.[55]

In another and rather special form of parallelism, the State will be responsible for the conduct of an insurrectional movement which subsequently becomes the government of that State (or, if they are a secessionary movement, of the new State they are struggling to create). The rule is to some extent anomalous, since it determines the attribution of conduct not by events at the time of that conduct but by reference to later contingencies—the success or failure of the revolt or secession. But it is established, and finds expression in Article 10 of the ILC Articles. For instance, in *Yeager*[56] immediately after the revolution in Iran in 1979, the claimant had been detained for several days by 'revolutionary guards' and had then been evacuated from the country. The Tribunal held that, although the guards were not recognized under internal law as part of the State apparatus, they were in fact

52 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment of 26 February 2007 (nyr), paras 402–407.

53 Ibid, 406.

54 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, in particular paras 75–80, 238, 242, 252, 292(3)–(6).

55 Cf *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, ICJ Reports 1992*, p 240 where the International Court left the question of possible apportionment of any compensation found to be due between the other implicated States to the merits stage. See also the *Legality of the Use of Force* cases between Yugoslavia and the NATO States (eg, *Legality of the Use of Force (Yugoslavia v Belgium), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999*, p 124); the Court eventually held that it did not have jurisdiction over the claims (eg, *Legality of the Use of Force (Yugoslavia v Belgium), Preliminary Objections, Judgment, ICJ Reports 2004*, p 279).

56 *Yeager v The Islamic Republic of Iran* (1987), 82 ILR 178.

exercising public functions in the absence of the previous State apparatus: Iran was thus held responsible for their acts.[57]

B. BREACH OF AN INTERNATIONAL OBLIGATION OF THE STATE

The second element of responsibility is breach of an international obligation of the State. Here an initial distinction is drawn between State responsibility arising in the context of direct State-to-State wrongdoing and State responsibility arising in the context of diplomatic protection (injury to aliens or their property). This is so even though the relevant obligations may be contained in a treaty, the breach of which in principle engages direct State-to-State responsibility. The International Court was careful to preserve the distinction in the *ELSI* case, where the United States sought to base its action on breach of a bilateral treaty: nonetheless, the Chamber said, its claim was in the nature of diplomatic protection and was thus subject to such requirements as the exhaustion of local remedies.[58]

Many of the problems which arise in the context of diplomatic protection (nationality of claims, exhaustion of local remedies) do not arise in the context of direct State-to-State disputes. The only issue in these direct State-to-State cases is whether conduct attributable to State B causes legal harm to State A in violation of international law. If so, responsibility is *prima facie* engaged.

On its face, the requirement that there should be a breach of an international obligation of the State seems obvious enough. However, a number of questions arise: for example, causation, the notion of injury, the time factor (rules concerning non-retrospectivity of international law and acts continuing in time), and so on. An important preliminary point should be made: international law is a distinct system, separate from national legal systems. In its own terms it prevails over national law in the event of conflict, and this is so irrespective of the approach taken by the national legal system. Several consequences follow. First, a State cannot invoke its own municipal law as a justification for refusal to comply with its international obligations, whether under treaties or otherwise.[59] The fact that an act or omission is lawful (or unlawful) under national law does not prejudge the question of its lawfulness or otherwise under international law.[60] Secondly, the content of municipal law is a matter of fact for international law;[61] in theory, the two live in distinct spheres, communicating via the rules of evidence. Thirdly, a State cannot seek to invalidate the entry into force of international obligations by reference to municipal law constraints which it failed to observe.[62]

[57] Cf however *Short* v *The Islamic Republic of Iran* (1987), 82 ILR 148 and *Rankin* v *The Islamic Republic of Iran* (1987), 82 ILR 204 (decided on the basis that the claimants had failed to prove that their departure was caused by actions attributable to Iran, rather than the general turmoil accompanying the revolution).

[58] *Elettronica Sicula SpA (ELSI), Judgment, ICJ Reports 1989*, p 15, para 52.

[59] *Greco-Bulgarian 'Communities', Advisory Opinion, 1930, PCIJ, Ser B, No 17* at p 32; ARSIWA, Articles 3, 32.

[60] *Compañía de Aguas del Aconquija and Vivendi Universal* v *Argentine Republic (ICSID Case No ARB/97/3), Decision on Annulment*, 3 July 2002, 41 ILM 1135.

[61] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No 7, 1926, PCIJ, Ser A, No 7* at p 19.

[62] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, PCIJ, Ser A/B, No 46*, p 96 at p 167 and see ibid, at p 170; *Legal Status of Eastern Greenland, Judgment, 1933, PCIJ, Ser A/B, No 53*, p 22 at p 71, and the Dissenting Opinion of Judge Anzilotti, ibid, pp 91–92. In relation to the law of treaties, see

Of course conduct attributable to a State may consist of both actions and omissions; breach of international obligations by omission is relatively common. For instance in the *Tehran Hostages* case, the International Court held that the responsibility of Iran was due to 'the inaction' of its authorities which 'failed to take appropriate steps' in circumstances where such steps were evidently called for.[63]

1. Fault, injury, and damage

There has been a major debate about whether international law has a general requirement of fault. The debate is between those who maintain that international law requires some fault on the part of the State if it is to incur responsibility and supporters of so-called 'objective responsibility'. The case law tends to support the objective school. Thus in *Caire*, the arbitral tribunal affirmed 'the doctrine of the "objective responsibility" of the State, that is, the responsibility for the acts of its officials or organs, which may devolve upon it despite the absence of any "*faute*" on its part'.[64] However, there are statements which may be seen as going the other way. In the *Corfu Channel* case, the International Court held that:

> It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosion of which the British warships were victims... [I]t 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.[65]

In that case Albania's responsibility was upheld on the basis that (according to the evidence gathered, including by an expert commission) Albania must have known that the mines had been recently laid and nonetheless, in breach of its international obligations, failed to warn ships passing through the strait of their presence.

When scholarly debate bogs down around some dichotomy such as 'responsibility for fault'/'objective responsibility', something has almost always gone wrong. Here the problem is one of level of analysis: there is neither a rule that responsibility is always based on fault, nor one that it is always independent of it—indeed, there appears to be no presumption either way. This is hardly surprising in a legal system which has to deal with a wide range of problems and disposes of a limited armoury of techniques. But in any

Vienna Convention on the Law of Treaties, Articles 27, 46; and see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening), Judgment, ICJ Reports 2002*, p 303, paras 264–268.

[63] *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, paras 63, 67. See also *Velásquez-Rodríguez v Honduras, Merits, Judgment of 29 July 1988, Ser C no 4*, 95 ILR 259, para 170: 'under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions...'; *Affaire relative à l'acquisition de la nationalité polonaise (Germany* v *Poland)* (1924) 1 *RIAA* 425.

[64] *Caire (France* v *Mexico)* (1929) 5 *RIAA* 516 at p 529.

[65] *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at p 18. See also the decision in *Home Missionary Society (USA* v *Great Britain)* (1920) 6 *RIAA* 42.

event circumstances alter cases, and it is illusory to seek for a single dominant rule. Where responsibility is essentially based on acts of omission (as in *Corfu Channel*), considerations of fault loom large. But if a State deliberately carries out some specific act, there is less room for it to argue that the harmful consequences were unintended and should be disregarded. Everything depends on the specific context and on the content and interpretation of the obligation said to have been breached.

Thus the ILC Articles on State Responsibility endorse a more nuanced view. Under Articles 2 and 12, the international law of State responsibility does not require fault before an act or omission may be characterized as internationally wrongful. However, the interpretation of the relevant primary obligation in a given case may well lead to the conclusion that fault is a necessary condition for responsibility in relation to that obligation, having regard to the conduct alleged (ARSIWA, Articles 2 and 12; Commentary, Crawford, 2002, pp 83–85, 125–130).

Similarly, there has been an intense debate concerning the role of harm or damage in the law of State responsibility. Some authors (and some governments) have claimed that the State must have suffered some form of actual harm or damage before responsibility can be engaged (Bollecker-Stern, 1973). Once more, the ILC Articles leave the question to be determined by the relevant primary obligation: there is no *general* requirement of harm or damage before the consequences of responsibility come into being. In some circumstances, the mere breach of an obligation will be sufficient to give rise to responsibility; for instance, even a minor infringement of the inviolability of an embassy or consular mission. On the other hand, in the context for example of pollution of rivers, it is necessary to show some substantial impact on the environment or on other uses of the watercourse before responsibility will arise.[66]

A corollary of this position is that there may have been a breach of international law but no material harm may have been suffered by another State or person in whose interest the obligation was created. In such cases international courts frequently award merely declaratory relief on the ground that nothing more is required.[67] However, in such circumstances, the main point of asserting responsibility may be for the future, to avoid repetition of the problem, rather than to obtain compensation for the past.

2. Continuing wrongful acts and the time factor

The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. It is therefore necessary to examine closely at what point an obligation entered into force or at what point the obligation was terminated or ceased to bind the State.

[66] Thus the mere risk of future harm was held not to constitute a sufficient basis for responsibility in the *Lac Lanoux Arbitration* (1957), 24 ILR 101. In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, the ICJ held that preparations for the diversion of the Danube on the territory of one State did not involve a breach of treaty until the diversion went ahead (and caused damage to the other State).

[67] *The 'I'm Alone'* (1935) 3 *RIAA* 1609 at p 1618; see also *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at pp 35–36, in which the ICJ made such a declaration in relation to Albania's claim of violation of its sovereignty as the result of the mine-sweeping operations carried out within its territorial waters by British warships.

For example in the *Mondev* case,[68] a claim was brought by a Canadian company alleging breach of the NAFTA Chapter 11 investment protection provisions by the United States. The claimant alleged that by various actions of the Boston city authorities the value of the applicant's interests in building and development projects had effectively been expropriated. But all of these actions took place before NAFTA's entry into force on 1 January 1994: the only later events were decisions of United States courts denying Mondev's claims under United States law. The tribunal held that NAFTA could not be applied retrospectively to actions prior to its entry into force. This left open the possibility of a claim of denial of justice in respect of the court decisions after NAFTA came into force, but the courts had not in any way acted improperly, and thus there had been no denial of justice.

The relevant principle is stated in Article 13 of the ILC Articles: 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'. The principle is clear enough, but its application may cause problems, in particular regarding changes in customary international law obligations, when it will not be clear precisely when an old customary rule was replaced by a new one.[69] For example, slavery was not always unlawful under international law, yet claims are sometimes made for reparation for persons or groups whose lives are said to have been affected by slavery and the slave trade.[70]

Another problem in applying Article 13 involves determining exactly when, or during what period, a wrongful act occurs. Wrongful acts can continue over a period of time—for instance the continued detention of diplomatic and consular personnel in the *Tehran Hostages* case, or the forced or involuntary disappearance of a person contrary to human rights norms.[71] Other wrongs may be instantaneous, even though their effects may continue after the point of breach. For example, an unlawful killing or a law expropriating property have effect at a specific moment; the breach occurs at the moment the victim is killed or the property passes, and this even though the effects of these breaches are enduring. In general such continuing consequences concern the scope of reparation, not whether there has been a breach in the first place (ARSIWA, Article 14; Commentary, Crawford, 2002, pp 135–140).

These distinctions may also be significant when it comes to issues of the jurisdiction of courts in cases concerning responsibility. For example under the European Convention on Human Rights (ECHR), claims can only be brought against a State party concerning breaches occurring after the Convention entered into force for that State, and previously could only be brought by individuals when the State in question had accepted the right of individual petition.[72] But it may be—depending on how one characterizes

[68] *Mondev International Ltd* v *United States of America* (Case No ARB(AF)/99/2), award of 11 October 2002, *ICSID Reports*, vol 6, 192.

[69] See, eg, *Fisheries Jurisdiction (United Kingdom* v *Iceland), Merits, Judgment, ICJ Reports 1974*, p 3.

[70] *Le Louis* (1817) 2 Dodson 210.

[71] See, eg, the judgment of the Inter-American Court of Human Rights in *Blake* v *Guatemala, Merits, Judgment of 24 January 1998, Ser C, no 36* (1998).

[72] Under the ECHR as originally concluded, the jurisdiction of the European Commission on Human Rights and the European Court of Human Rights in relation to claims by individuals was conditional on acceptance of such jurisdiction by the State in question made by way of a declaration (see former Articles 25 and 46). Acceptance of the right of individual petition became compulsory upon entry into force of Protocol No 11 on 1 November 1998 (see now Article 34, ECHR). An applic-

the conduct—that a breach which was initially committed by a State before it became a party or before it accepted jurisdiction in relation to individual petitions continues thereafter and to that extent falls within the jurisdiction *ratione temporis* of the tribunal in question. For example, the circumstances of the *Loizidou* case before the European Court of Human Rights went back to the Turkish intervention in Cyprus in 1974, after Turkey became a party to the European Convention, but long before it accepted the right of individual petition; but the continuing exclusion of Mrs Loizidou from access to her property in the Turkish-controlled north continued after that date and could be dealt with by the Court.[73]

C. CIRCUMSTANCES PRECLUDING WRONGFULNESS: DEFENCES OR EXCUSES FOR BREACHES OF INTERNATIONAL LAW

As noted above, although conduct may be clearly attributable to a State, and be clearly inconsistent with its international obligations, it is possible that responsibility will not follow. The State may be able to rely on some defence or excuse: in the Articles on State Responsibility these are collected under the heading of 'Circumstances precluding wrongfulness' in Chapter V of Part One. Chapter V is essentially a catalogue or compilation of rules that have been recognized by international law as justifying or excusing non-compliance by a State with its international obligations, and it is not exclusive.[74] It should be noted that none of the circumstances precluding wrongfulness can operate to excuse conduct which violates a peremptory norm (ARSIWA, Article 26): one cannot plead necessity to justify invading Belgium, for example.[75]

1. Consent

Valid consent by a State to action by another State which would otherwise be inconsistent with its international obligations precludes the wrongfulness of that action (ARSIWA, Article 26). This is consistent with the role of consent in international relations generally: thus a State may consent to military action on its territory which (absent its consent) would be unlawful under the United Nations Charter. More mundanely, a State may consent to foreign judicial inquiries or arrest of suspects on its territory.[76] However the scope of any consent in fact given by a State needs to be carefully examined and

Convention on Human Rights (ACHR) in relation to acceptance by State parties of the jurisdiction of the Inter-American Court of Human Rights (see Article 62).

[73] See *Loizidou* v *Turkey (Preliminary Objections)*, Judgment of 23 March 1995, Ser A, no 310, 20 *EHRR* 99 and *Merits, RJD 1996–VI*, 23 *EHRR* 513: see also *Papamichalopoulos and others* v *Greece*, Judgment of 24 June 1993, Ser A, no 260–B (European Court of Human Rights). For cases dealing with similar issues before other human rights bodies, see eg the decision of the Human Rights Committee in *Lovelace* v *Canada*, decision of 30 July 1981, UN Doc A/36/40, p 166 under the individual petition provisions of the Optional Protocol to the ICCPR; and the judgments of the Inter-American Court of Human Rights in *Blake* v *Guatemala, Preliminary Objections, Judgment of 2 July 1996, Ser C, no 27* (1996) and *Blake* v *Guatemala, Merits, Judgment of 24 January 1998, Ser C, no 36* (1998), affirming the continuing character of forced disappearances.

[74] Specific defences or excuses may be recognized for particular obligations: eg, Article 17 of the 1982 Convention on the Law of the Sea. Cf ARSIWA, Article 55.

[75] As Chancellor von Bethmann-Hollweg did before the Reichstag in 1914: see Crawford, 2002, p 178.

[76] See, eg, *Savarkar (Great Britain* v *France)* (1911) 11 *RIAA* 243.

normally will be strictly construed.[77] Further, consent only goes so far: a State cannot waive the application of what in national law would be called mandatory rules and in international law are called peremptory norms. Thus a State cannot (by treaty or otherwise) consent to or legitimize genocide, a situation expressly provided for in the ILC's formulation of the defence of consent; consent must be 'valid' (ARSIWA Article 20; cf Article 26). Further, consent will only preclude the wrongfulness of conduct with regard to the consenting State; if the obligation breached is owed in parallel to more than one State, the wrongfulness of the act will not be precluded with regard to those States that have not consented.[78]

2. Self-defence

In certain circumstances, a State may permissibly disregard other international obligations whilst acting in self-defence in accordance with the Charter of the United Nations (ARSIWA, Article 21). The point was implicitly recognized by the International Court in the *Nuclear Weapons* Advisory Opinion, when it distinguished between *per se* restrictions on the use of force, whatever the circumstances—in another formulation, 'obligations of total restraint'—and considerations which, even if mandatory in time of peace, might be overridden for a State facing an imminent threat and required to act against it in self-defence.[79]

3. *Force majeure*

In common with most legal systems, international law does not impose responsibility where the non-performance of an obligation is due to circumstances entirely outside the control of the State. This defence obviously needs to be tightly circumscribed, and the language of Article 23(1) of the ILC Articles provides that *force majeure* is a defence only where 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, [makes] it materially impossible in the circumstances to perform the obligation'. The defence of *force majeure* is further circumscribed by the limitations in Article 23(2), which provide that *force majeure* will not apply if either the situation 'is due, either alone or in combination with other factors, to the conduct of the State invoking it', or if, as a result of assessment of the situation, the State seeking to invoke *force majeure* assumed the risk of the situation occurring.

4. Distress and necessity

The two circumstances of distress and necessity have much in common in that they both excuse conduct which would otherwise be wrongful because of extreme circumstances. According to Article 24, distress operates to excuse conduct where the author of the act 'had no other reasonable way ... of saving the author's life or the lives of other persons entrusted to the author's care'. By contrast, necessity operates to excuse conduct taken

[77] See, eg, the careful consideration given by the ICJ to the scope and extent of the DRC's consent to the presence of Ugandan troops on its territory in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v *Uganda), Judgment, ICJ Reports 2005*, p 168.

[78] See, eg, *Customs Régime between Germany and Austria, 1931, Advisory Opinion, PCIJ, Ser A/B, No 41*, p 37.

[79] On *per se* restrictions see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, paras 39, 52; on 'obligations of total restraint', see ibid, para 30.

which 'is the only means for the State to safeguard an essential interest against a grave and imminent peril'. Distress and necessity are to be distinguished from *force majeure* in that violation of the obligation in question is theoretically avoidable, although absolute compliance of the State with its international obligations is not required; a State is not required to sacrifice human life or to suffer inordinate damage to its interests in order to fulfil its international obligations.

The possibilities of abuse are obvious, in particular for invocation of necessity, and in the ILC Articles both circumstances are narrowly confined. Thus reliance on them is precluded if the State has in some way contributed to the situation which it is seeking to invoke to excuse its conduct. Further, the invoking State can only excuse conduct which is not unduly onerous for other States. Reliance on distress is precluded if the act in question is likely to create a comparable or greater peril' (Article 24(2)(b)). Likewise, the invocation of a state of necessity is precluded if the action would 'seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole' (Article 25(1)(b)).

In recent years, Argentina has sought to rely on a state of necessity as justifying the measures it adopted to deal with the Argentine financial crisis between 1999 and 2002; those measures have given rise to a large number of claims by foreign investors under bilateral investment protection treaties. In the majority of cases, the plea of necessity has been rejected on the grounds that the financial crisis and its potential consequences were not sufficiently serious to be regarded as imperilling an 'essential interest' and the situation did not involve a 'grave and imminent peril'; in any case, the measures adopted were not the 'only way' for Argentina to deal with the crisis, there were other lawful means at its disposal in that regard, and Argentina had contributed to the situation.[80]

Although where either distress or a state of necessity is found to have been established the wrongfulness of the act is precluded, other States are not necessarily expected to bear the consequences of another State's misfortune; the invoking State may have to pay compensation for any material loss caused to the State or States to which the obligation breached was owed (Article 27(b)).[81]

5. Countermeasures

As the International Court affirmed in the *Gabčíkovo-Nagymaros Project* case, countermeasures taken by a State in response to an internationally wrongful act of another State

[80] See eg *CMS Gas Transmission Company v Argentine Republic (ICSID Case No ARB/01/8)*, Award of 12 May 2005; *Enron Corporation and Ponderosa Assets LP v Argentine Republic (ICSID Case No ARB/01/3)*, Award of 22 May 2007; *Sempra Energy International v Argentine Republic (ICSID Case No ARB/02/16)*, Award of 28 September 2007; *BG Group plc v Republic of Argentina*, Final Award of 24 December 2007. Cf *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic (ICSID Case No ARB/02/1)*, Decision on Liability of 3 October 2006, in which the Tribunal concluded that a state of necessity had existed for at least part of the period in question. The Award in *CMS* was the subject of an application for annulment; the ad hoc Committee, although finding various defects in the reasoning, declined to annul the Award: *CMS Gas Transmission Company v Argentine Republic (ICSID Case No ARB/01/8)*, Decision on Annulment of 25 September 2007.

[81] Cf *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic (ICSID Case No ARB/02/1)*, Decision on Liability of 3 October 2006, in which the Tribunal held that no compensation was payable to the investor in relation to the period during which it held that a state of necessity had existed.

are not wrongful acts, but are recognized as a valid means of self-help as long as certain conditions are respected.[82] Countermeasures as described in the ILC Articles only cover the suspension of performance by a State of one or more of its obligations; they are to be distinguished from acts of retorsion which, since they are by definition not a breach of the obligations of the State, cannot give rise to State responsibility and therefore require no justification. Certain obligations, such as that to refrain from the use of force, those of a humanitarian character prohibiting the taking of reprisals, and those under other peremptory norms may not be suspended by way of countermeasure.

6. Consequences of invoking a circumstance precluding wrongfulness

Despite the fact that the wrongfulness of an act may be precluded by international law, that is not the end of the question. First, the wrongfulness of the act will only be precluded so long as the circumstance precluding wrongfulness continues to exist. For instance, if State A takes countermeasures in response to a breach by State B of obligations owed to State A, if State B recommences performance of its obligations State A must terminate its countermeasures; if it does not, it will incur responsibility for the period from which the countermeasure was no longer justified (Article 27(a) ARSIWA; and see Articles 52(3)(a) and 53 ARSIWA). Secondly, the preclusive effect may be relative rather than general: again, this is obviously true of countermeasures, where conduct which is justified vis-à-vis a wrongdoing State will not or may not be justified *erga omnes*.

IV. THE CONTENT OF INTERNATIONAL RESPONSIBILITY

Upon the commission of an internationally wrongful act, certain secondary obligations arise by operation of law. These are codified in Part Two, Chapter I of the ILC Articles, which identifies two main categories, the obligations of cessation and reparation. The equal emphasis on these involves an important insight. Issues of State responsibility are not only backward-looking, concerned at obtaining compensation for things past. They are at least as much concerned with the restoration of the legal relationship which has been threatened or impaired by the breach—ie with the assurance of continuing performance for the future. This is particularly clear where the individual breach may not have in itself caused any great amount of harm but where the threat of repetition is a source of legal insecurity. It can be seen in matters as diverse as the protection of embassies and protection of the environment. In these and other contexts, the relevant rules exist to protect ongoing relationships or situations of continuing value. The analogy of the bilateral contract, relatively readily terminated and replaceable by a contract with someone else, is not a useful one even in the context of purely inter-State relations, and

[82] The conditions required by the ARSIWA, in order for countermeasures to be lawful are: they must be taken to induce compliance with the obligations contained in Part Two of the Articles (reparation, cessation...) (Article 49(1)); they must be as far as possible reversible (Article 49(3)); they must be proportionate (Article 51); and there must have been a request to the State to fulfil its obligations, and notification of the decision to take countermeasures accompanied by an offer to negotiate (Article 52(1)). For the recognition of these conditions as customary see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7.

a fortiori where the legal obligation exists for the protection of a wider range of (non-synallagmatic) interests.

Thus the fact that the responsible State is under an obligation to make reparation for a breach does not mean that it can disregard its obligation for the future, effectively buying its way out of compliance; when an obligation is breached, it does not disappear of its own accord. The obligation continues to bind the responsible State, and the State therefore remains obliged to perform the obligation in question (Article 29). As a corollary, in the case of a continuing wrongful act, the responsible State is under an obligation to bring that act to an end (Article 30(a)). Indeed in certain circumstances it will be appropriate for—and may be incumbent upon—the responsible State to offer appropriate assurances and guarantees of non-repetition of the act in question to the State to which the obligation is owed (Article 30(b)).

The point was made by the International Court in the *LaGrand* case, which concerned the United States' non-observance of obligations of consular notification under Article 36 of the Vienna Convention on Consular Relations. The particular occasion of Germany's complaint was the failure of notification concerning two death row inmates who (notwithstanding their German nationality) had hardly any connection with Germany; but there was a wider concern as to United States' compliance with its continuing obligations of performance under the Consular Relations Convention. Indeed the United States accepted this, and spelled out in detail the measures it had taken to ensure compliance for the future. In consequence the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), must be regarded as meeting Germany's request for a general assurance of non-repetition.[83]

But of course questions of reparation also arise, especially where actual harm or damage has occurred, and under international law the responsible State is obliged to make full reparation for the consequences of its breach, provided that these are not too remote or indirect. The linkage between breach and reparation is made clear, for example, in the Statute of the International Court of Justice, which specifies among the legal disputes which may be recognized as falling within the Court's jurisdiction:

> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (d) the nature or extent of the reparation to be made for the breach of an international obligation.

This link was spelled out by the Permanent Court in the *Factory at Chorzów* case, in a classic passage:

> 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 and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[84]

Thus there is no need for a specific mandate to an international court or tribunal to award reparation, if it has jurisdiction as between the parties in the matter: a dispute as to the interpretation or application of a treaty covers a dispute as to the consequences of its breach and thus the form and extent of reparation.

The underlying principle is that reparation must wipe out the consequences of the breach, putting the parties as far as possible in the same position as they would have been if the breach had not occurred. In order to achieve that, reparation may take several forms, including but not limited to monetary compensation. Again, both points were made by the Permanent Court in the *Chorzów* case:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[85]

As this passage suggests, in theory at least, international law has always placed restitution as the first of the forms of reparation; it is only where restitution is not possible that other forms are substituted. This contrasts with the common law approach, under which money was taken to be the measure of all things and specific performance or restitution in kind were historically somewhat exceptional. In practice the two approaches are tending to converge—on the one hand, it is not infrequently found that specific restitution is not possible or can only be made in an approximate form in international law, while courts in the common law tradition have been expanding the scope of non-pecuniary remedies.

The basic requirement of compensation is that it should cover any 'financially assessable damage' flowing from the breach (ARSIWA, Article 36). In many cases (especially those involving loss of life, loss of opportunity, or psychiatric harm), the process of quantification is approximate and may even appear arbitrary; however, as in domestic legal systems, the difficulty in quantifying intangible loss has never had as a consequence that no compensation is payable.[86] By contrast in cases involving loss of property (including expropriation) a market for the property may exist which will give greater guidance. In addition, issues such as loss of profits may arise and, provided they are clearly established,

[83] *LaGrand (Germany* v *United States of America), Merits, Judgment, ICJ Reports 2001*, p 466, para 124; see also the dispositif, para 128(6).

[84] *Factory at Chorzów, Jurisdiction, Judgment No 8, 1927, PCIJ, Ser A, No 9* at p 21.

[85] *Factory at Chorzów, Merits, Judgment No 13, 1928, PCIJ, Ser A, No 17* at p 47.

[86] See eg the classic statement by Umpire Parker in relation to non-material damage in *The S.S. 'Lusitania' (USA v Germany)*, (1923) 7 *RIAA* 32 at p 40: 'That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages.'

may be compensable. Compensation may be supplemented by interest (including, where it is justified, compound interest); after some prevarication, the ILC decided to treat the issue of interest in a separate article (ARSIWA, Article 38; Commentary, Crawford, 2002, pp 235–239).

Although international tribunals have gradually been moving towards a more realistic appreciation of issues of compensation (Gray, 1987, pp 77–95; Crawford, 2002, pp 218–230)—and of remedies more generally—it remains the case that many international disputes have a distinctly symbolic element. The claimant (whether a State or some other entity) may seek vindication more than compensation, and this is recognized in the international law of reparation by way of the somewhat protean remedy of satisfaction'. According to Article 37(2) of the ILC Articles, satisfaction 'may consist in an acknowledgement of the breach, an expression of regret, an apology or another appropriate modality'. In many cases before international courts and tribunals, an authoritative finding of the breach will be held to be sufficient satisfaction: this was the case in terms of Albania's claim that the United Kingdom had violated its sovereignty by conducting certain mine-sweeping operations in its territorial waters in the *Corfu Channel* case,[87] and it has been held to be the situation in innumerable human rights cases, including those where more substantial remedies might have seemed justified (Shelton, 2005, pp 253–268). Similarly, in the *Bosnian Genocide* case, the ICJ held that the FRY had breached its obligation to prevent genocide in relation to the massacre at Srebrenica. Having recognized that restitution was not possible and that compensation was not appropriate given the lack of the necessary 'sufficiently direct and causal nexus' between the breach by the FRY of the obligation and the massacre,[88] it held that a declaration constituted in itself 'appropriate just satisfaction'.[89]

On the other hand, in a situation in which the breach is a continuing one, a declaration of breach and that the responsible State is under a duty to put an end to it may rely on some of the characteristics of an injunction, albeit that there are few mechanisms to ensure enforcement or compliance. Thus in *Avena*, the ICJ held that the United States had breached its obligations under the Vienna Convention on Consular Relations in relation to a number of Mexican nationals who had been convicted and sentenced to death by failing to inform them of their right to have the consular authorities notified. The Court made declarations as to the specific violations of the Vienna Convention,[90] and further held that appropriate reparation consisted in a declaration that the United States was to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals'.[91] Similarly, in *Bosnian Genocide*, the Court concluded that there had been a failure to comply with the obligation to punish genocide. The Court in that regard made a declaration not only of the fact of the breach, but also ordered that Serbia 'should immediately take effective steps to ensure full compliance' with its obligation to punish, and 'to transfer individuals accused of genocide [...] for trial by the

[87] *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at p 25 and pp 35–36.

[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007 (nyr), paras 460–462.

[89] Ibid, paras 463 and 471(5) and (9).

[90] *Avena and Other Mexican Nationals (Mexico v United States of America), ICJ Reports 2004*, p 12, paras 153(4)–(8).

[91] Ibid, para 153(9).

International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that tribunal'.[92]

As was noted above in Section II B, if the breach in question constitutes a serious breach of an obligation arising under a peremptory norm of general international law certain additional consequences arise for all other States under Article 41—in particular, the obligation not to recognize as lawful the situation created and not to render aid or assistance in its maintenance.

V. INVOCATION OF RESPONSIBILITY: RESPONSES BY THE INJURED STATE AND OTHER STATES

Although international responsibility is deemed to arise directly by operation of law on the occurrence of a breach, for practical purposes that responsibility has to be invoked by someone. It may be invoked by the injured State or other party, or possibly by some third State concerned with the 'public order' consequences of the breach. Part Three of the ILC Articles deals with this important issue but in a non-exclusive way. In particular, while it acknowledges that the responsibility of a State may be invoked by an injured party other than a State (eg, by an individual applicant to the European Court of Human Rights), Article 33(2) leaves issues of the rights of persons or entities other than States (including the right of invocation) for treatment elsewhere. The scope of Part Three is thus narrower than that of Parts One and Two of the Articles: these deal with the conditions for and consequences of *all* breaches of international law by a State in the field of responsibility, whereas Part Three only deals with the invocation of the responsibility of a State by another State or States.

Even so, the subject of Part Three is a large and controversial one. To what extent is a State to be considered as injured by a breach of international law on the part of another State? And if not individually injured, to what extent might it demand remedies for the breach—with the inferential consequence of countermeasures if such remedies are not forthcoming? Given that international law includes not only bilateral obligations analogous in national systems to contract and tort (or delict), but also obligations intended to protect vital human interests of a generic kind (peace and security, the environment, sustainable development), the questions dealt with in Part Three could scarcely be more important.

They are primarily addressed through two articles. One (Article 42) defines in relatively narrow and precise terms the concept of the 'injured State', drawing in particular on the analogy of Article 60(2) of the Vienna Convention on the Law of Treaties.[93] The second (Article 48) deals with the invocation of responsibility in the collective interest,

[92] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007 (nyr), para 493(8).

[93] Article 60(2) provides as follows:

> 2. A material breach of a multilateral treaty by one of the parties entitles:
>
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State; or
>
> (ii) as between all the parties;

in particular with respect to obligations owed to the international community as a whole, giving effect to the Court's dictum in the *Barcelona Traction* case, set out below. The former category covers the breach of an obligation owed to a State individually. Also treated as 'injured States' are those which are particularly affected by the breach of a multilateral obligation, either because they are 'specially affected' or because the obligation is integral in character, so that a breach affects the enjoyment of the rights or the performance of the obligations of all the States concerned. The contrast is with the 'other States' entitled to invoke responsibility, which are specified in Article 48(1):

> Any State other than an injured State is entitled to invoke the responsibility of another State...if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) the obligation breached is owed to the international community as a whole.

Article 48(1)(b) reflects the distinction drawn by the International Court in *Barcelona Traction* between 'bilaterizable' obligations and obligations owed to the international community as a whole (sometimes called obligations *'erga omnes'*). In the case of the latter:

> By their very nature [they] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection...[94]

The Court in 1970 gave a number of examples of such obligations, including the prohibition of acts of aggression and genocide and 'the principles and rules concerning the basic rights of the human person, including protection from slavery and discrimination'.[95] Since then, the Court has also recognized the right of self-determination as falling within the category,[96] as well as those obligations of international humanitarian law which it had previously described as 'intransgressible principles of international customary international law'.[97]

Article 48(1)(a) tackles the problem of obligations owed to a group of States and established for the protection of a collective interest, where in the case of a breach there is

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

[94] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3, para 33.

[95] Ibid, para 34. For reaffirmation of the *erga omnes* nature of the prohibition of genocide, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Reports 1996*, p 595, para 31; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v *Rwanda), Provisional Measures, Order of 10 July 2002, ICJ Reports 2002*, p 219, para 71.

[96] See *East Timor (Portugal* v *Australia), Judgment, ICJ Reports 1995*, p 90, para 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, ICJ Reports 2004*, p 136, para 155.

[97] Ibid, para 157; the quoted passage is from the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 266, para 79.

normally no individual State injured in the sense of Article 42. Examples of such obligations are human rights norms and certain environmental protection norms; the beneficiaries of such obligations are either individuals in the case of the former, or the group of States as a whole in the case of the latter.[98]

In the case of breach of one or other of these categories of obligation, third States can demand cessation and assurances and guarantees of non-repetition, as well as performance of the obligation of reparation on behalf of either the State injured or the beneficiaries of the obligation breached (Article 48(2)).

Part Three of the ILC Articles goes on to consider a number of related questions, for example, the consequences of invocation of responsibility by or against several States, circumstances such as waiver or delay where a State may be considered to have lost the right to invoke responsibility, as well as that ultimate form of invocation, the taking of countermeasures in response to an international wrongful act which remains unredressed and unremedied. Some of these issues are dealt with elsewhere in this volume.

VI. FURTHER DEVELOPMENT OF THE LAW OF INTERNATIONAL RESPONSIBILITY

As we have seen, there has traditionally been a tendency to view international responsibility as, in the first place, essentially a bilateral matter, without wider consequences for others or for the international system as a whole, and, in the second place, as quintessentially an inter-State issue, separated from questions of the relations between States and individuals or corporations, or from the rather unaccountable world of international organizations. This approach works well enough for bilateral treaties between States or for breaches of general international law rules which have an essentially bilateral operation in the field of intergovernmental relations. But international law now contains a range of rules which cannot be broken down into bundles of bilateral relations between States but cover a much broader range. How can these be accommodated within the traditional structure of State responsibility? The attempt to develop the law beyond traditional paradigms was the greatest challenge facing the ILC, and constitutes one of the more fascinating fields of a rapidly developing—and yet precarious—international order.

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[98] This does not exclude the possibility that one or more States may be injured in the sense of ARSIWA, Article 42 by a breach of an environmental protection norm. In addition, Article 48 seeks to articulate the possible interest of other States in compliance with the obligation.