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General observations

Even though nowadays there are multiple subjects of international law, states are still the main subjects. Another example of international law subjects are the international organisations, who can also be responsible for violations. The International Law Commission (ILC) has also discussed their responsibility within the scope of international law. Individuals can be held responsible as well, when they constituted international crimes. Whether multinationals can be held responsible under international law is debatable, in the contrary we know that they can be held responsible under national law. Opposition groups may also be responsible, but only to a limited extent.

The main document on this topic is the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Most articles are considered to represent customary law, and the ICJ has referred to various articles during international trials (for example in the *Genocide* case). One should bear in mind is not a treaty. It covers all conduct by any subject of international law, but this one is particularly limited to states.

The ILC, in this document, only looked at the general rules and principles, not at the substantive rules of international law. They followed the distinction between primary rules (which tell subjects of law what to do, directed more towards individuals) and secondary rules (about the creation of law / determinations of what it is / how they can be enforced, directed towards officials). The ILC has chosen to stay away from the substantive rules, and focused on primary rules.

There is a division made between subjective and objective responsibility. In international law we start from objective responsibility. This for example means that you don't have to show that states have neglected a rule. The only thing you have to prove is that the states acted in a certain way. Another point is that we there is no distinction between civil and criminal responsibility. Relations between states are horizontal in character, which means they are equal to one another. The scope of criminal law in principle is on vertical relations. Within international law the belief is that criminal responsibility of states is non-existing due to the lack of a vertical relationship as we (as states) are all equal.

In essence the responsibility of states is a collective responsibility. If a state has to pay a certain amount for reservations, that is considered to be the money of the taxes the people in the country pay.

Conditions internationally wrongful act

When a State commits an internationally wrongful act, they can be held responsible under international law. There are two conditions a state has to fulfill, which are laid down in article 2 ARSIWA. Damage is not a condition to show the existence of a violation. The ILC also decided to not include a fault as a condition. This is again why we have objective responsibility and not subjective responsibility.

- **Attribution of conduct**

This is the first condition. There has to be a conduct, being an act or omission, which is attributable to the State. Overall these rules are not that controversial, they are broadly accepted as customary international law. The basic rule is in article 4 ARSIWA, and the underlying principle is the unity of the State's organization. You have to decide who can act on behalf of the state (full powers). It can apply irrespective of the functions an organ has. It also doesn't matter how high/low this subject is in

the hierarchy. Both can display conduct which is contributable to the state and invoke responsibility of the state. It also doesn't matter whether it is the centralized government, or a decentralized one (for example in provinces). Anyone who works within the state organization can invoke responsibility of the state. Article 4 refers back to national law for deciding who is an organ of the state under international law.

Sometimes states don't act, but give competences to private persons but nonetheless are engaged in functions which normally only the state can engage in. This is given to prisons for example (this in article 5 ARSIWA). There is an exception mentioned in article 9. It assumes that circumstances can happen which make it impossible for officials to do their job. Like an earthquake/tsunami etc. In those circumstances it can happen that maybe the police cannot engage in their normal tasks. If private persons then take the initiative this will be considered as attributable to the state. This, of course, is dependent on the circumstances.

The only limitation on article 4,5 and 9 is that people can act on behalf of the state, or other times may act for private reasons only. If they act in their private capacity they do not act on behalf of the state and don't show conduct attributable to the state. Sometimes people do things and the state (after the fact) accepts this conduct (article 11). This article is a result of the *Tehran* case. A further rule is that when an organ acts in excess of the authority given (against instructions) the conduct will still be attributable to the state (article 7). Otherwise only very little would be left for state responsibility.

Conduct of private individuals or entities can generally not be attributed to the state, unless the state is using individuals/groups to do certain things which they don't want to be seen doing publically themselves (article 8).

The conduct needs to be attributable (*Diplomatic staff case).* In this case Iranian students occupied the embassy of the United States. The ICJ said that no suggestion had been made that the militant had any form of official status as recognized agents or organs of the Iranian State. In the *Genocide case* 'de jure' and 'de facto' organs of the State were discussed. De facto means that the group or the army is an organ from a factual perspective. Organs are organs of the state if they are completely dependent on your support. This means that the army had to be completely dependent on the government. Which in this case could not be shown. Thirdly it discussed if the authorities and army acted on the instructions and direction of the government, and under its control. The answer was negative again. Effective control could not be shown.

- **Breach international obligation**

This is the second condition. This conduct has to constitute a breach of an international obligation under international law. When conduct is attributable you still have to show that that conduct is as a matter fact a breach. Article 3 and 32 indicate that whether something is a breach must be decided on the basis of international law. The fact that the conduct is lawful under national law does for instance not matter. It also has to relate to an international obligation of the concerning state. The idea that a state cannot invoke national law is also laid down in article 27 VCLT. Due diligence obligations concern private actions where, if the state would take those actions, it would be a violation of international law. For example, the state has an obligation to prevent private persons from violating international law. This is a due diligence obligation. The state has to prevent the private persons from engaging in violations.

Circumstances precluding wrongfulness

Certain circumstances preclude the wrongfulness of an act. There are 6 written down in the draft articles, which are generally accepted. Some of them reflect customary law. They act as defenses under international law. In principle you can invoke more than one circumstance of wrongfulness. Some of these circumstances seem to be excuses for certain conduct. The nature of the circumstances is related to the person who has invoked it. The justification concerns the act committed. Some are an excuse, some are a justification of that act.

- Consent: a state consents to certain conduct which would otherwise be a violation. Article 20. For example, if you consent to it you can allow foreign authorities to do things in your territory, like the police following a criminal on your territory. It would be a violation but now it is not because you have given consent.
- Self defense: is in article 21.
- Countermeasures: will be talked about in the next lecture.
- Force majeure: in article 23. Translated: major force. The idea is that you have no other choice. Something is impossible for you to perform and you cannot comply with international law. For example if your ship is pushed over the border during a storm.
- Distress: in article 24. When you can invoke circumstances which threaten your life or the life of persons that are your responsibility. An example is the *Hainan Island Incident in 2001.* Only if it is necessary to save lives.
- Necessity: in article 25. It is a bit more controversial. The conduct concerned is the only way to save an essential interest against a grave and imminent peril. What is an essential interest of the state? This came up in the Gabcikovo-Nagymaros case. There is a negative formulation in article 25 'you cannot invoke necessity unless…'. This is to make it clear that this defense is very exceptional. The circumstances and the conditions are customary law.
    - Essential interest
    - Grave and immanent peril
    - May not contribute to the situation

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Circumstances precluding wrongfulness

You cannot preclude the wrongfulness of any act which is not in conformity with obligations under a peremptory norm of general international law (jus cogens norms), according to article 26 ARSIWA. This means that you cannot excuse violations of jus cogens norms. A state can simply not consent to genocide for example.

Reparation

For a continuous violation there is an obligation for cessation (art. 29+30 ARSIWA). The obligation to cease the wrongful conduct is one form of reservation, another is the obligation to make reparation (art. 35 ARSIWA). This can be in the form of restitution, compensation or satisfaction (never punitive damages). These obligations exist irrespective of any claim by another state.

- Restitution
- Compensation
- Satisfaction

Invocation of State responsibility

When you determine a breach under international law, there should be someone who can invoke the responsibility. The actors that can invoke responsibility will be shortly discussed. Firstly the injured state can invoke responsibility (art. 42). An obligation can be owed to a state individually. In case of bilateral treaties it's always the other party who has the opportunity to do so. In many cases the breach identifies to whom the obligation was owed. Bilateralism: everything is reducible to a bilateral relation between two states. Who the injured state is can be very hard to determine when the situation cannot be bilateralised. For example when there is a violation of the obligation not to pollute the high seas.

If you are not an injured state we look further in article 48. In 1970 the ICJ pronounced that there were obligations erga omnes (towards all), to all the states in the international community. In these situations all states can be held to have a legal interest in protection. If there is a violation of an obligation erga omnes, any state can go to the ICJ. These obligations are for example:

- Aggression
- Genocide
- Racial discrimination
- Slavery

Other states – not being the injured state - can also invoke state responsibility when there is a collective interest. For example: human rights are in the collective interest. The ICJ also referred to the community interest. When it comes to reparation, other states can only ask for cessation or for reparation on behalf of the injured state. If there is a serious violation of a jus cogens norm, other states also have obligations on their behalf. They cannot recognize the situation resulting from the violations and they have to help to eliminate the violation by working together with other states. Whether this is customary law or not is tricky.

Countermeasures

Responding with lawful measures is a necessity. Countermeasures are measures that are in principle unlawful, but can be justified by a violation of another state. They are quite controversial under international law. Armed reprisals are given to be prohibited. The object of countermeasures is to induce compliance with obligations of reparation (art. 49). The character is a temporary non-performance of obligations. They are temporary in the sense that once the violation has stopped, a state has to stop the countermeasures as well. There is one essential condition: conditio sine qua non. The other state must have violated international law. Countermeasures cannot be directed at third states (who didn't breach international law). It is only justified against the state who violated the rule. The other state must also not perform its obligations of reparation or cession against the violating state. Countermeasures need to be necessary. Every state decides for themselves whether there is a breach of international law or not.

- The state must have committed a violation and is responsible.
- It is not performing its obligations of cessation and reparation.

Additional conditions are necessity and reversibility. If a state is willing to stop the violation and pay compensation then there is no necessity. And the measures need to be proportional (art. 51 and following). Necessity means that there is no alternative way to obtain the same result. The injured state has to notify the violating state of their claim. Whether measures are disproportionate is very difficult to assess.

Countermeasures cannot affect fundamental human rights of the inhabitants within the violating state. They can also not affect other peremptory norms, jus cogens norms. This is laid down in article 50

ARSIWA. They can also not affect obligations that you have in relation to dispute settlement. The jurisdiction aims to solve the dispute concerning. Finally article 50 mentions that you shall not take countermeasures violating the inviolability of diplomats and diplomatic rights.

The treatment of aliens

Aliens: belonging to a foreign country. The question used to be: how should we treat aliens. American states pushed the Calvo doctrine. This doctrine entails that aliens can only invoke the national rules of the state concerned. Aliens should not be treated better than nationals. Western states supported the International Minimum Standard. International law imposes on all states a minimum level of protection to give to foreigners. In the 1930's in the *Neer case*, it was said that when you talk about a violation of the Standard, that should amount to bad faith, to willful neglect of duty or to an insufficiency of governmental actions far short of international standards. When Aliens are treated badly that can lead to the exercise of the right of diplomatic protection.

The right of diplomatic protection

The ILC has its Draft articles on Diplomatic Protection. A state may exercise a right of diplomatic protection for nationals who are treated badly in a foreign state. This right is accepted under customary international law. This right only exists regarding your nationals, which leaves stateless people or refugees hanging (article 8). The home state can invoke diplomatic protection on their behalf, but whether this is customary international law or not is debatable. This right is not an individual, human right. It's a right between states, so it is a state right. When a state wants to make a claim, this claim has to relate to a national, at the moment of the violation, and he must be your national at the moment of the claim (nationality of claims). The individual must exhaust local remedies first. This is all in article 44 of the Draft.