

CHAPTER NINE  
IMPACT OF SUPRANATIONAL AND INTERNATIONAL LAW

9.3. CASE-LAW OF INTERNATIONAL COURTS AND  
ARBITRAL TRIBUNALS

*Introductory Note*

a) This subsection is concerned with the case-law of international courts (the International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ)) and arbitral tribunals as it relates to issues of State responsibility. It is true that State responsibility under international law has evolved into an autonomous system whose role and function cannot really be compared with that of civil liability under domestic law. Yet it is nonetheless of interest to study briefly the evolution of the international law of State responsibility, since it is a common law to all States, irrespective of their domestic legal systems, and it has developed progressively by building upon concepts borrowed from the various domestic legal orders. Furthermore, in an era where the strictly inter-State nature of public international law is increasingly being challenged and questioned, State responsibility and civil liability are bound to become ever more mingled.<sup>1</sup>

b) It must be emphasized at the outset that the law of State responsibility, much like international law as a whole, is not structured around the same lines as civil liability under domestic legal systems (at least Western ones). For one, the principles of the law of State responsibility are meant to apply to all breaches of international law, irrespective of their source, namely convention (international treaties and other similar instruments), custom or the general principles of law, to name the primary ones. Accordingly, there is no equivalent in international law to the cardinal distinction between liability in tort and in contract under domestic legal systems.

c) The international law of State responsibility has quickly developed in the second half of the nineteenth century and the first half of the twentieth century in an international context tainted by colonialism and inequality between States. A series of claims commissions and arbitral tribunals produced a relatively large number of awards, mostly dealing with cases of mistreatment of foreigners (murders, attacks, abductions)

<sup>1</sup> See A. Rosas, "State Responsibility and Liability under Civil Liability Regimes", in O. Bring and S. Mahmoudi, eds., *Current International Law Issues: Nordic Perspectives* (Dordrecht: Martinus Nijhoff, 1994) 161.

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and their property (expropriation, destruction) in “weaker” States.<sup>2</sup> These are the “classical” cases of State responsibility, where a State will endorse the claims of its nationals against another State.<sup>3</sup>

After the Second World War and with the end of colonialism, the framework of international relations was thoroughly changed. The law of State responsibility also evolved. Efforts were undertaken to revisit this body of case law in light of the contemporary context of international relations and to restate it in a more general fashion, so that the principles of a general law of State responsibility, applicable beyond cases of unlawful treatment of aliens, would emerge. The International Law Commission (ILC) of the United Nations was entrusted in 1953 by the UN General Assembly with the task of elaborating these principles. The ILC is made up of eminent jurists representative of the UN membership, and it has been careful to try in its work on State responsibility to concentrate on international law as it stands, completing it only when necessary.

Thus, in 1996, after some 40 years of work on the topic, the ILC of the United Nations completed the provisional adoption of Draft Articles on State Responsibility, which it submitted to the members of the United Nations for comment.<sup>4</sup> Part One of the Draft Articles on the origins of international responsibility, on which work was completed in the 1970s, has already been followed by the ICJ.<sup>5</sup> The relevant Draft Articles are included below.

d) In public international law, as in the domestic legal systems surveyed in the previous sections, certain limitations have been imposed on the scope of protection afforded by the law of State responsibility. In the following pages, some key features of the State responsibility regime in international law that also work as limitations are reviewed, namely: (i) the very nature of State responsibility as an international law regime, which implies that it applies only in relations between States,<sup>6</sup> (ii) the requirement that the injurious conduct constitute a breach of an international obligation owed to the injured State and (iii) the remedies available. Each of these points is discussed below with reference to a case and to the Draft Articles.

<sup>2</sup> See K. Zemanek, “Responsibility of States: General Principles”, in R. Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. 10 (Amsterdam: North-Holland Publishing, 1987) 362 at 363.

<sup>3</sup> See PCIJ, 30 August 1924, *Greece v. UK (Mavrommatis Concessions)* Ser. A No. 2 (1924) at 12.

<sup>4</sup> See *Report of the International Law Commission on the work of its 48<sup>th</sup> session*, UN A/51/10 (1996) at para. 51-64.

<sup>5</sup> See *United States Diplomatic and Consular Staff in Tehran*, *infra*, **9.INT.11**.

<sup>6</sup> Including also other subjects of international law such as international organizations. As for the European Community, see further G. Gaja, “Some reflections on the European Community’s international responsibility” in T. Heukels and A. McDonnell, eds., *The Action for Damages in Community Law* (The Hague: Kluwer International Law, 1997) 351.

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e) In addition to its work on State responsibility, the ILC is also examining what it terms “Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law”. Here as well it has been preparing a series of draft articles, which have also been submitted to the members of the United Nations for comments.<sup>7</sup> This form of liability is meant to apply to activities which, while not prohibited by international law, nevertheless create a risk of transboundary harm: typically these activities include the operation of nuclear power plants, industrial activities which result in the emission of pollutants, etc.

*ICJ, 24 May 1980*<sup>8</sup> **9.INT.11.-12.**  
*United States Diplomatic and Consular Staff in Tehran*  
*United States of America v. Islamic Republic of Iran*  
and  
*UN International Law Commission*  
*Draft Articles on State Responsibility*

### NOTION OF “ACT OF THE STATE” IN INTERNATIONAL LAW

*In order for State responsibility to arise, the allegedly wrongful conduct must be attributable to the State. The damaging actions of third parties without connection to the State cannot be attributed to the State, but the State can be found in breach of an obligation to prevent or counter these actions.*

A. ICJ, 24 May 1980

**9.INT.11.**

#### **Hostage crisis**

*Facts:* On 4 November 1979, demonstrators overran the Embassy of the United States of America in Tehran. They took control of the premises and took hostage the people who found themselves at the Embassy at that moment. It appears that the Iranian security forces in charge of protecting the Embassy were not present at the time of the assault and did nothing to prevent the demonstrators from gaining control of the Embassy building. Later on, Iranian security forces simply guarded the Embassy; Iran did not attempt to free the hostages or convince the demonstrators to cease their action. In subsequent declarations, the Iranian government, including the then Head of State Ayatollah Khomeini, manifested its

<sup>7</sup> See *Report of the International Law Commission on the work of its 48<sup>th</sup> session*, UN A/51/10 (1996) at para. 89-101.

<sup>8</sup> [1980] ICJ Rep. 3.

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support for the demonstrators.<sup>9</sup>

*Held:* Iran has breached its international law obligations towards the United States (13 votes to 2). Its responsibility under international law is engaged (13 votes to 2), and it must make reparation to the United States of America (12 votes to 3).

*Judgment:* “56... [The] facts have to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. The events which are the subject of the United States’ claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of the attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized ‘agents’ or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State...

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

[The Court then reviews, among others, Art. 22 and 29 of the Vienna Convention on Diplomatic Relations of 1961 and corresponding articles in the Vienna Convention on Consular Relations of 1963, and

<sup>9</sup> It should be noted that at the time the ICJ ruled in this matter, the hostages had not yet been released.

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the conduct of Iranian authorities in similar incidents which had occurred before 4 November 1979]...

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations...

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities:

- (a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the security of such other persons as might be present on the said premises;
- (b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part;
- (c) had the means at their disposal to perform their obligations;
- (d) completely failed to comply with these obligations.'

### B. UN International Law Commission, *Draft Articles on State Responsibility*

**9.INT.12.**

#### **Article 3 - Elements of an internationally wrongful act of a State**

There is an internationally wrongful act of a State when:

1. conduct consisting of an action or omission is attributable to the State under international law; and
2. that conduct constitutes a breach of an international obligation of the State.

#### **Article 5 - Attribution to the State of the conduct of its organs**

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

#### **Article 6 - Irrelevance of the position of the organ in the organization of the State**

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

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### Article 11 - Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

### Notes

(1) Draft Article 3 above lists the two elements generally seen as necessary and sufficient to lead to State responsibility, namely the *subjective* (attributability to a State) and *objective* (breach of an international obligation) elements. It can be seen from para. 56 of the *Diplomatic and Consular Staff* case that the ICJ has adopted this two-pronged definition. The subjective element is examined hereunder, while the limitations on the scope of State responsibility imposed by the objective element are discussed further below.<sup>10</sup>

(2) In order to establish the responsibility of a State in international law, it is therefore necessary to show that the breach of international law complained of can be attributed to the State in question. In practical terms, States as such do not act; their activities are conducted through their organs (including individual officials and civil servants). The law of State responsibility then contains a series of principles to establish a link between the conduct of these organs and agents and the State.

The “basic principle” distilled by the ILC is embodied in Article 5 of the Draft Articles, namely that under international law, the domestic legal order of each State is taken as a reference to determine which are the organs of the State, and furthermore when they act in this capacity.<sup>11</sup> For instance, if the law of State X states that State X has an army, navy and air force structured along certain lines, then these armed forces are part of the organization of State X and their conduct will in principle be attributable to State X under international law. Yet the reference to domestic law is only indicative; the determination is ultimately made by international law, and accordingly in some cases international law will deviate from domestic law.

Article 6 lists some of these cases:

- The international law of State responsibility will not follow domestic law when the latter purports to differentiate between the constituent, legislative, executive, judicial or other branch of the State when it comes to attaching liability. As the ILC wrote in 1973, “[f]or nearly a century there has not been a single international judicial or arbitral decision which has stated, or even implicitly

<sup>10</sup> See **9.INT.13.-14.** and notes thereunder.

<sup>11</sup> *Yearbook of the ILC 1973*, vol. II at 189.

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accepted, the principle of non-responsibility of the State for the acts of its legislative or judicial organs".<sup>12</sup>

It was seen above that in *Brasserie du Pêcheur*, the ECJ expressly relied on international law to rule that under Community law, Member States can be held liable for violations of Community law committed by their executive, legislative or judicial power.<sup>13</sup> The reference to international law in *Brasserie du Pêcheur* is not quite appropriate, however, as State responsibility under international law concerns the State taken as a whole towards other States, and it is settled by international courts and arbitration tribunals *external* to those States; in contrast, the liability of Member States for violations of Community law is ruled upon by national courts which are themselves part of the State. The reasoning of the ECJ puts national courts in an odd position.

- The relative position of that organ will not matter, that is to say the conduct of a single police officer, for instance, is just as attributable to the State under international law as that of its council of ministers.<sup>14</sup>

(3) Articles 7 to 10 contain further rules which enlarge the range of attributable conduct, irrespective of domestic law. Article 7 attributes to the State the conduct of other entities within the State empowered to exercise part of the governmental authority (such as provinces or *Länder*). Article 8 deals with persons acting *de facto* on behalf of the State in the absence of the official authorities. Article 9 concerns organs placed at the disposal of a State by another State or an international organisation. Article 10 governs cases where the State organ acted outside its competence or contrary to instructions; even in these cases, international law dictates that the conduct of the organ in question be attributed to the State.

As a result, the ILC, at Article 11, balanced the general principle that the conduct of "private persons" is not attributable to the State (paragraph (1)) with the general reservation at paragraph (2) that related conduct can nevertheless be attributed to the State if it falls under Articles 5 to 10.

(4) The workings of Article 11 are well illustrated in the *Diplomatic and Consular Staff* case reproduced above. In that case, the ICJ had to rule on a case brought before it by the United States, pursuant to the Treaty of Amity, Economic Relations, and

<sup>12</sup> *Yearbook of the ILC 1973*, vol. II at 194.

<sup>13</sup> *Supra*, 9.EC.6. at para. 34.

<sup>14</sup> However, according to the rule of exhaustion of local remedies, codified at Article 22 of the Draft Articles, in cases where a State breaches international law in the treatment of aliens on its territory, which often happens through the actions of lower-level State organs (police, municipalities, etc.), these aliens must first strive to obtain redress via the legal means put at their disposal in the domestic law of that State. A breach of international law committed by a lower-level State organ is no less actual, however.

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Consular Rights between the United States and Iran.<sup>15</sup> The Treaty was still in force at the time the US Embassy was overran, even though the relations between the two countries were tense following the Islamic Revolution of 1979. The ICJ concluded that it had jurisdiction to hear the case, even though Iran did not participate in the proceedings. In light of the information before it, the ICJ could not but conclude as it did at para. 58 that the assault on the US Embassy and the taking of hostages were conducted by a group of persons without apparent link to the Iranian State, and that those events could not accordingly be attributed to Iran. This finding conforms to the first paragraph of Article 11 of the Draft Articles on State Responsibility.

The ICJ did not stop its inquiry there, however. While the main positive actions could not be attributed to Iran, the ICJ recalled that Iran was party to the Vienna Convention on Diplomatic Relations<sup>16</sup> and the Vienna Convention on Consular Relations,<sup>17</sup> both of which were binding upon it. Pursuant to Articles 22, 24, 25, 26, 27 and 29 of the Convention on Diplomatic Relations (and corresponding articles in the Convention on Consular Relations), Iran was under a duty to guarantee the security of the premises of the US Embassy as well as that of its diplomatic and consular staff, to respect the inviolability of the Embassy, to grant facilities to that staff for the accomplishment of its mission and to ensure freedom of movement and of communications for that staff. The ICJ then found that Iran was in breach of these obligations in having failed to intervene to prevent the mob from overrunning the US Embassy and taking hostage the staff and thereafter in not having undertaken steps to bring the hostage takers to free their hostages and leave the premises of the US Embassy. Those duties clearly fell upon the organs of the Iranian State, be it the police, the administration or the army. A breach of those duties therefore constitutes a conduct imputable to Iran and can thus lead to the State responsibility of Iran. In Article 11, this type of situation corresponds to “conduct ... related to that of the [“private persons” within the meaning of Article 11(1)] and which can be considered as an act of the State” pursuant to paragraph 2.

The *Diplomatic and Consular Staff* case shows how, even if certain actions by “private persons” cannot be attributed to a State and therefore do not give rise to State responsibility, in practice States will in many cases be under a duty to prevent, counter or put an end to those actions<sup>18</sup>. This is true in particular when the actions of private

<sup>15</sup> 19 August 1955, 284 UNTS 93.

<sup>16</sup> 18 April 1961, 500 UNTS 95.

<sup>17</sup> 24 April 1963, 596 UNTS 262.

<sup>18</sup> A similar issue arose in ECJ, Judgment of 9 December 1997, Case C-265/95, *Commission v. France* [1997] ECR I-6959, where the question was whether a Member State may have breached EC law for failing to intervene to protect the property of individuals (strawberries from Spanish producers loaded on lorries driving through France) who suffered losses through the conduct of other individuals (French farmers)

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persons in State X, for instance, affect aliens in State X. The duty to protect aliens (which is particularly strong in the case of diplomatic and consular staff) will then intervene to provide a way of linking what are in appearance “private” events to State X. In the environmental law sector as well, to take another example, even if cross-border pollution usually emanates from the operations of private enterprises unrelated with the State, the international law obligations to prevent cross-border pollution generally rest on States,<sup>19</sup> so that the failure to prevent emissions can then be attributable to the State.<sup>20</sup> In the contemporary context where States are frequently under duties to prevent certain results from happening, therefore, the need for the damaging conduct to be attributable to a State in order for State responsibility to arise does not appear to constitute such a drastic limitation on recovery of damages pursuant to international law.

It must not be forgotten, however, that only States are entitled to pursue State responsibility claims against other States, which works as an important limitation on the scope of protection, as will be seen below.<sup>21</sup>

(5) Article 3 of the Draft Articles on State Responsibility expressly puts acts and omissions on the same footing as possible forms of *conduct* in breach of international law. Indeed the ILC wrote that “whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used in a case of active conduct”.<sup>22</sup> The judgment of the ICJ in the *Diplomatic and Consular Staff* case supports this assessment, since the Court shows no difficulty in finding that Iran breached its international obligations in failing to intervene in the events taking place at the US Embassy in Tehran. That apparent indifference between acts and omissions can probably be explained by the pre-eminent place of unlawfulness in the law of State responsibility, as will be seen from the documents immediately following.

which were carrying out a blockade of agricultural products from other Member States. In his opinion at para. 38, Advocate-General Lenz pointed out that the question arises under ECHR law as well whether a State is obliged to protect the individual’s rights against other individuals: see D.J. Harris, M. O’Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 79 ff.

<sup>19</sup> See recent treaties such as the UN Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF. 62/22 (1982), reprinted in 21 ILM 1261 (1982), Art. 194 and the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, UN Doc. UNEP/19.53/Rev.1, reprinted in 26 ILM 1529 (1987) 1985, Art. 2.

<sup>20</sup> See for instance the *Trail Smelter* arbitral award, *Canada-United States* (1938) 3 RIAA 1911.

<sup>21</sup> See *infra*, 9.INT.15.-16. and notes.

<sup>22</sup> *Yearbook of the ILC 1973*, Vol. II at 180.

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*ICJ, 9 April 1949*<sup>23</sup>  
*Corfu Channel case (merits)*  
*United Kingdom v. Albania*  
and  
*UN International Law Commission*  
*Draft Articles on State Responsibility*

**9.INT.13-14.**

### BREACH OF AN INTERNATIONAL OBLIGATION

*State responsibility pre-supposes that an international obligation has been breached. States are under an international obligation to warn vessels from other States of known dangers in international channels passing through their territorial waters.*

A. ICJ, 9 April 1949

**9.INT.13.**

#### **Corfu Channel**

*Facts:* On 22 October 1946, two UK warships, the *Saumarez* and the *Volage*, struck mines and were damaged while proceeding through the Corfu Channel. The point where damage occurred was in Albanian territorial waters.<sup>24</sup> The UK asked the ICJ to find that Albania's responsibility is engaged.

*Held:* The ICJ found that the responsibility of Albania is engaged (11 votes to 5).

*Judgment:* "The Court... finds that the following facts are established. The two ships were mined in Albanian territorial waters in a previously swept and check-swept channel just at the place where a newly laid minefield consisting of moored contact German GY mines was discovered three weeks later. The damage sustained by the ships was inconsistent with damage which could have been caused by floating mines, magnetic ground mines, magnetic moored mines, or German GR mines, but its nature and extent were such as would be caused by mines of the type found in the minefield. In such circumstances the Court arrives at the conclusion that the explosions were due to mines belonging to that minefield.

[The Court thereafter examines whether Albania laid the mines or colluded with the country laying them]...

In the light of the information now available to the Court, the authors of the minelaying remain unknown. In any case, the task of the Court, as defined by the Special Agreement, is to decide whether

<sup>23</sup> [1949] ICJ Rep. 3.

<sup>24</sup> The right of the UK ships to pass through the Corfu Channel was also at stake in that case. The ICJ found that the Corfu Channel fell under a customary international law regime concerning maritime straits, and that accordingly Albania had to allow so-called "innocent" passage through the channel, even if it was within its territorial waters.

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Albania is responsible, under international law, for the explosions which occurred on October 22nd, 1946, and to give judgment as to the compensation, if any.

Finally, the United Kingdom Government put forward the argument that, whoever the authors of the minelaying were, it could not have been done without the Albanian Government's knowledge.

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 explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of minelaying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.

In the present case, two series of facts, which corroborate one another, have to be considered: the first relates to Albania's attitude before and after the disaster of October 22nd, 1946; the other concerns the feasibility of observing minelaying from the Albanian coast.

[The Court then examines these two issues]...

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government.

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

In fact, Albania neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching.

But Albania's obligation to notify shipping of the existence of mines in her waters depends on her

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having obtained knowledge of that fact in sufficient time before October 22nd; and the duty of the Albanian coastal authorities to warn the British ships depends on the time that elapsed between the moment that these ships were reported and the moment of the first explosion.

[The Court finds that there was enough time for Albanian authorities to warn the British ships]...

In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.”

### B. UN International Law Commission, *Draft Articles on State Responsibility*

**9.INT.14.**

#### **Article 16 - Existence of a breach of an international obligation**

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.

#### *Notes*

(1) The second element in the definition given at Article 3 of the Draft Articles on State Responsibility is the *objective element*, namely the breach of an international obligation.<sup>25</sup> Once the subjective and objective elements are present, the international responsibility of a State is engaged without more.

In particular, the ILC *did not* include in Article 3 as necessary elements fault or the causation of damage,<sup>26</sup> thereby pointing to a key distinguishing feature of the law of State responsibility, namely the subsumption of fault, causation and damage within a very broadly construed concept of unlawfulness.

(2) It must be recalled that, in keeping with the decentralized structure of the international community, international obligations are very diverse and very scattered. If one follows the classical presentation of Article 38(1) of the *Statute of the International Court of Justice*, the primary sources of international obligations are: international conventions (treaties and other types of binding instruments between States), international custom (notoriously difficult to discern), the general principles of law recognized by civilized nations, to which one should add unilateral acts.<sup>27</sup> Case law and doctrinal writings are subsidiary means of ascertaining the substance of international law. There are few unifying features to these international obligations, yet

<sup>25</sup> *Supra*, 9.INT.12.

<sup>26</sup> See for the latter *Yearbook of the ILC 1973*, Vol. II at 183-184.

<sup>27</sup> See ICJ, June 22 1973, *France v. Australia, France v. New Zealand (Nuclear Tests)* [1974] ICJ 267.

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the law of State responsibility is meant to apply to breaches of all of them.<sup>28</sup>

The law of State responsibility accordingly cannot rely on general norms of conduct such as Article 1382 C.civ. or § 823 BGB. Instead, it cannot but refer to each individual obligation in order to establish whether it has been breached. To use the examples mentioned by the ILC in its commentary on Article 3, the obligation to allow innocent passage in territorial waters, for instance, is breached if passage is refused, irrespective of whether the refusal had material consequences or not. On the other hand, the obligation to protect embassies and foreign diplomats, which was at stake in the *Diplomatic and Consular Staff* case discussed above, is only breached if personal injury to diplomats or property damage to the embassy follows from the failure to grant appropriate protection. As the ILC writes:<sup>29</sup>

“If there is no internationally wrongful act so long as the event [e.g. the causation of damage] has not occurred, the reason is that until then the State’s conduct has not resulted in the breach of an international obligation... In other words, the occurrence of an external event is a condition for the breach of an international obligation, and not a new element which has to be combined with the breach for there to be a wrongful act.”

(3) There has long been controversy among international law scholars as to whether fault was a condition for State responsibility.<sup>30</sup> It seems however that with Article 3 of the Draft Articles, the ILC has concluded that as a general principle it was not necessary that some element of fault be established in order to trigger State responsibility. Rather, Article 16 defines a breach of an international obligation as “an act of [the] State not in conformity with what is required of it by [the] obligation”. Articles 20 to 23 elaborate further on the meaning of “breach of an international obligation” in the context of obligations to adopt a particular course of conduct, to achieve a specified result or to prevent a given event. The breach is thus established by comparing the content of the international obligation with the actual facts.

The role of fault will then depend on the content of the international obligation in question. As I. Brownlie puts it:<sup>31</sup>

“The relevance of fault, the relative ‘strictness’ of the obligation, will be determined by the content

<sup>28</sup> Art. 17 of the Draft Articles.

<sup>29</sup> *Yearbook of the ILC 1973*, vol. II at 182-183.

<sup>30</sup> See the presentation of the opposing theories in M. Bedjaoui, “Responsibility of States: Fault and Strict Liability”, in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 10 (Amsterdam: North-Holland Publishing, 1987) 358.

<sup>31</sup> *Systems of the Law of Nations: State Responsibility (Part I)* (Oxford: Oxford University Press, 1983) at 41.

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of each rule... [I]t would be pointless to embark on an examination of a question, framed in global terms, whether state responsibility is founded upon fault (i.e. *culpa* and *dolus*) or strict liability: the question is unreal.”

On the other hand, it must be pointed out that, if the Draft Articles on State responsibility do not leave much room for the concept of fault in the general principles, they contain a fairly elaborated set of principles relating to circumstances precluding wrongfulness (Article 29 on consent, 30 on countermeasures, 31 on force majeure and fortuitous event, 32 on distress, 33 on necessity and 34 on self-defence). Articles 29 to 34 have been seen as a form of counterbalance to the absence of fault as a general requirement for State responsibility.<sup>32</sup>

(4) As a consequence, the scope of protection offered by the law of State responsibility is fully dependent on the content of the international obligations involved. The ILC echoes mainstream legal thought when it states that “the rules relating to the international responsibility of the State are, by their very nature, complementary to other rules of international law which give rise to the legal obligations that States may be led to breach”.<sup>33</sup> State responsibility is thus seen as a set of *secondary* rules which add consequences to breaches of the *primary* rules of international law, i.e. the rules which create legal obligations for States. It is then by and large up to the primary rule to lay out the conditions under which it is breached.

In sum, besides attributability, the essential condition for State responsibility is unlawfulness. Conversely, if no specific international obligation has been breached, then no State responsibility follows, even if State organs may have caused damage. The ILC has expressed how strongly State responsibility relied on unlawfulness when it wrote:<sup>34</sup>

“It should be noted that in international law the idea of breach of an obligation can be regarded as the exact equivalent of the idea of infringement of the subjective rights of others... The correlation between legal obligation on the one hand and subjective right on the other admits of no exception: unlike the situation in municipal law, there are no obligations on a subject which are not matched by an international subjective right of another subject or subjects.”

State responsibility under international law thus shows an original feature, which distinguishes it from the major domestic legal systems studied before. Under French law, for instance, unlawfulness (apart from objective fault) is not generally considered as a central feature of tort law. Similarly, English common law is able to recognize a

<sup>32</sup> K. Zemanek, “Responsibility of States: General Principles”, in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, vol. 10 (Amsterdam: North-Holland Publishing, 1987) 362 at 366.

<sup>33</sup> *Yearbook of the ILC 1976*, vol. II, Part Two at 76.

<sup>34</sup> *Yearbook of the ILC 1973*, vol. II at 182.

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duty of care even in cases where the tortfeasor did not breach a legal norm in causing injury to the victim. German law, even if it insists on either the violation of a *Rechtsgut* at § 823(1) BGB or the breach of a protective enactment at § 823(2), still retains at § 826 BGB the possibility that particularly blameworthy conduct would entail liability if it is *contra bonos mores*, irrespective of whether it is legal or not.

(5) The above principles are applied by the ICJ in the *Corfu Channel* case. The ICJ first finds what international obligations are involved. The ICJ recalls that it is a “general and well-recognized principle” that a state must not “allow knowingly its territory to be used for acts contrary to the rights of other States”. It denies that the mere fact that mines were in Albanian waters would be sufficient to conclude to Albania’s knowledge, but it finds that on the basis of the facts and the experts reports which were made for the case, Albania could not but have noticed that mines were present in the Corfu Channel, and that it did not warn the UK ships. Accordingly, Albania had breached the obligation outlined above. While the *Corfu Channel* case has sometimes been presented as evidence that fault is generally required for State responsibility to arise, the reading of I. Brownlie seems more consistent with the judgment: Brownlie notes that the ICJ found that knowledge was part of the obligation at stake in the case and not of a more general requirement of fault; furthermore, two of the ICJ judges in dissenting opinions expressly espoused the general fault theory, which tends to show that the majority of the Court did not.<sup>35</sup>

*PCIJ, Judgment No. 13, 13 September 1928*<sup>36</sup>      **9.INT.15.-16.**  
*Factory at Chorzów (Merits)*  
*Germany v. Poland*  
and  
*UN International Law Commission*  
*Draft Articles on State Responsibility*

### ALLOWABLE REMEDIES

*Only a State can present claims under the law of State responsibility. A State can claim restitution in kind or monetary compensation for material damage to itself (including material and non-material damage to its nationals), as well as satisfaction for moral damage to itself.*

<sup>35</sup> *Systems of the Law of Nations: State Responsibility (Part I)* (Oxford: Oxford University Press, 1983) at 43-44.

<sup>36</sup> PCIJ Rep., Ser. A No. 17.

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A. PCIJ, 13 September 1928

9.INT.15.

### Chorzów Factory

*Facts:* Pursuant to a contract with the German Empire concluded in 1915, the Bayerische Stickstoffwerke AG (“Bayerische”) was entrusted with the establishment and operation of a nitrate factory at Chorzów in Upper Silesia (then under German control) for the German Empire. In 1919, the interests of the German Empire were sold to the Oberschlesische Stickstoffwerke AG (“Oberschlesische”). On 5 May 1922, Germany and Poland concluded a Convention concerning Upper Silesia whereby part of this region (including the location of the factory) was ceded to Poland. On 1 July 1922, a Polish Court annulled the registration of the Oberschlesische as owner of the Chorzów factory and, invoking the Treaty of Versailles<sup>37</sup> and Polish law, declared that the factory now belonged to the Polish State. The case was brought before the PCIJ. In a judgment of 25 May 1926,<sup>38</sup> the PCIJ found that Poland had breached international law in taking over the Chorzów factory in violation of the Convention concerning Upper Silesia. The PCIJ rejected the justification brought forward on the basis of the Treaty of Versailles. It concluded that the responsibility of Poland was engaged towards the German Empire. The German Empire did not request that the factory be handed back to the Oberschlesische and instead demanded reparation. The case came back before the PCIJ for a decision on the reparation owed by Poland.

*Held:* The PCIJ found that Poland had to compensate Germany with a lump-sum payment for the damage sustained by the Bayerische and the Oberschlesische, but as it could not decide on the amount of that payment on the basis of the file before it, it requested expert reports on certain issues (9 votes to 3).

*Judgment:* “On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzów undertaking is therefore equivalent to the total value - but to that total only - of the property, rights and interests of this Company in that undertaking, without deducting liabilities.

[The Court considers the issue and concludes that the Oberschlesische also suffered damages]...

[T]he Court must now lay down the guiding principles according to which the amount of compensation due may be determined.

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation — to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interest which could not be expropriated even against compensation...

<sup>37</sup> Art. 256 of the Treaty of Versailles provided that the Allied Powers were to obtain title to all properties of the German Empire situated in regions which were ceded to them by Germany.

<sup>38</sup> Judgment No. 7, PCIJ Ser. A No. 7.

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It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interest protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland has respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Art. 6 and following articles of the Convention - that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia - since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

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, as 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...

The dispossession of an industrial undertaking - the expropriation of which is prohibited by the Geneva Convention - then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved.

[Applying these principles to the case, the PCIJ concludes that it does not have sufficient information before it to determine the lump-sum payment due by Poland to Germany.]”

### B. UN International Law Commission, *Draft Articles on State Responsibility*

#### 9.INT.16.

#### Article 40 - Meaning of injured State

1. For the purposes of the present articles, “injured State” means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.
2. In particular, “injured State” means:
  1. if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;
  2. if the right infringed by the act of a State arises from a judgement or other binding dispute

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settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

3. if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
  4. if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;
  5. if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
    - a. the right has been created or is established in its favour;
    - b. the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
    - c. the right has been created or is established for the protection of human rights and fundamental freedoms;
  6. if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.
3. In addition, “injured State” means, if the internationally wrongful act constitutes an international crime, all other States.

### **Article 42 - Reparation**

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination...
3. In no case shall reparation result in depriving the population of a State of its own means of subsistence...

### **Article 43 - Restitution in kind**

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

- a. is not materially impossible;
- b. would not involve a breach of an obligation arising from a peremptory norm of general international law;
- c. would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or
- d. would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

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### **Article 44 - Compensation**

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

### **Article 45 - Satisfaction**

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.
2. Satisfaction may take the form of one or more of the following:
  - a. an apology;
  - b. nominal damages;
  - c. in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;
  - d. in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.
3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

### *Notes*

(1) A third key feature of the law of State responsibility that can affect the scope of protection is the range of remedies available. These are set out in Part Two of the Draft Articles on State Responsibility, which is concerned with the consequences of internationally wrongful acts.<sup>39</sup>

It was seen above that two elements are necessary and sufficient to establish an internationally wrongful act and thereby lead to international responsibility, among which a subjective element, namely attributability to a State. In keeping with the principle that international law applies as between States (and international organizations), not only the wrongdoer but also the claimant must be a State (the “injured State”).

Article 40 of the Draft Articles demonstrates that international law takes a relatively strict approach to the definition of the injured State. As a general rule, the injured State is the holder of the right infringed by the wrongdoer State (Article 40(1)). Article 40(2) makes that general rule more specific. In cases of bilateral relationships, the other State

<sup>39</sup> Art. 36 to 53 of the Draft Articles.

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will naturally be the injured State (Articles 41(2)(a) and (b)). In cases of multilateral relationships, however, it is not enough that a State is party to a multilateral treaty or bound by custom: the injured State must show a closer relationship with the wrongdoer State, either because it benefits from the right which was breached (Article 41(2)(c), (e)(i)), the breach necessarily affects the workings of the multilateral relationship (Article 41(e)(ii)), or a breach of human rights or fundamental freedoms is involved (Article 41(e)(iii)). Article 41(f) covers the interesting but still rare case of rights which are expressly aimed at the protection of collective interests, such as the protection of the deep seabed.<sup>40</sup>

(2) Damage to the injured State can take two forms: material or moral. Material damage comprises both damage to the State itself (e.g. destruction of State property or disruption in tax income from trade flows, etc.) as well as damage, *both material and non-material*, to the nationals of that State.<sup>41</sup> Indeed, as mentioned in the Introductory Note, it is a long-standing principle of international law that States may — but are not obliged to — endorse the claims of their nationals against other States and obtain reparation for the benefit of those nationals under State responsibility rules.<sup>42</sup> Moral damage to the State includes violations of sovereignty, infringements of the dignity of the State, etc.

Many features of the regime of reparation for breaches of international law affect the scope of protection. The leading case on reparation is the *Chorzów Factory* judgment of the PCIJ reproduced in part above. It mentions two forms of reparation, namely restitution in kind and monetary compensation, to which Article 42(1) of the Draft Articles adds two others, namely satisfaction as well as assurances and guarantees of non-repetition; the latter is of less interest here. Article 42(3) already places an outer limit on reparation, in that it cannot deprive the population of the wrongdoer State of its means of subsistence.

(3) The first form of reparation is restitution in kind, covered by Article 43 of the Draft Articles. It will be noted that the ILC has framed it in terms of restoring the *status quo ante* (before the breach took place), as opposed to the situation which would now prevail had the breach not occurred. The ILC admits that this issue is not settled, although the majority opinion is clearly that restitution in kind is limited to the *status quo ante*.<sup>43</sup> Limitations on the entitlement to restitution in kind are made at Article 43(a) to (d).

<sup>40</sup> *Yearbook of the ILC 1985*, vol. II, Part Two at 27.

<sup>41</sup> *Yearbook of the ILC 1990*, vol. II, Part Two at 72.

<sup>42</sup> See PCIJ, Judgment No. 2, 30 August 1924, *Greece v. UK (Mavrommatis Concessions)* Ser. A No. 2 at 12.

<sup>43</sup> *Yearbook of the ILC 1993*, vol. II, Part Two at 62.

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In the above excerpts from the *Chorzów Factory* case, the PCIJ finds that, as both parties to the case had agreed, restitution in kind (in that case restoring the undertaking to its German owners) was impossible. Accordingly, monetary compensation was ordered.

(4) The second form of reparation is monetary compensation, dealt with in Article 44 of the Draft Articles. In line with the PCIJ judgment in the *Chorzów Factory* case, the ILC has retained at Article 44 the principle of full compensation for all losses which can be expressed in monetary terms. Article 44 is thus not limited to restoring the *status quo ante*, as is Article 43; monetary compensation is intended to “wipe out all consequences of the illegal act”, as the PCIJ writes.

According to Article 44(2), “compensation covers any economically assessable damage”. In this respect, it is important not to forget that Article 44(2) concerns damage to the injured State. “Economically assessable damage” within the meaning of Article 44(2) refers to material damage to the injured State, as outlined above. It therefore includes both material and non-material injury suffered by nationals of the injured State. With respect to non-material injury suffered by nationals, the *Lusitania* case provides an illustration of the approach of international law.<sup>44</sup> In that case, the United States were seeking compensation from Germany for the losses suffered by its nationals in the sinking of the *Lusitania* by the German Navy. The umpire in that case allowed compensation to the United States, on behalf of the relatives of the victims of the tragedy, for mental suffering, injury to one’s feelings, humiliation, shame, degradation, loss of social position or injury to one’s credit and reputation.

As regards material injury, the ILC notes that loss of profits (*lucrum cessans*, a type of economic loss) is not as well-established as a head of compensation in international law as other types of material losses.

One of the controversial issues in that respect arises in cases of expropriation. In the *Chorzów Factory* case above, the PCIJ draws a clear line between cases of lawful and unlawful expropriation as far as the scope of compensation is concerned, holding that “compensation... is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. That limitation would only be admissible if the Polish Government had had the right to expropriate”. Following *Chorzów Factory*, it is now well-established that full compensation for the whole loss of profit is due in cases of *unlawful* expropriation. In cases of *lawful* expropriation, the *implication* from *Chorzów Factory* would be that compensation should be limited to the value of the property taken (*damnum emergens*), but not to lost profit (*lucrum cessans*). However, the PCIJ did not expressly state that such a limitation had to be applied in lawful expropriation cases; it only found that that limitation would not be

<sup>44</sup> *United States v. Germany* (1923) 7 RIAA 32.

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appropriate in unlawful expropriation cases. Recent arbitral awards have shown a certain reluctance to deny any compensation for *lucrum cessans* altogether in lawful expropriation cases. The distinction between lawful and unlawful expropriations, in terms of compensation, is reduced to matters of degree, so that compensation for *lucrum cessans* is awarded, but not necessarily to the same extent as in cases of unlawful expropriation. This is one of the main reasons why the ILC Draft Articles could not be more conclusive on the issue of lost profits, and decided to include the mention “where appropriate” in reference to them at Article 44(2) of the Draft Articles.<sup>45</sup>

(5) Reparation for moral damage to the injured State usually takes the form of satisfaction, as indicated at Article 45(1) of the Draft Articles. The various modern forms of satisfaction are exhaustively listed at Article 45(2). The form of satisfaction awarded will often depend on the nature of the infringement and its gravity. In some cases, such as the *Corfu Channel* case excerpted above, the mere fact that an international court or arbitral tribunal declares that an internationally wrongful act was committed will be considered sufficient reparation for the prejudice to the dignity of the injured State. In the *I'm Alone* case, Canada received nominal damages of USD 25,000 for a violation of its territorial waters by the United States Coast Guard when pursuing a ship allegedly used by smugglers.<sup>46</sup> A recent case of interest is the *Rainbow Warrior* case, where two French agents intruded in New Zealand territorial waters to sink a ship. In its award, the UN Secretary-General decided that France, in addition to apologizing to New Zealand, would also pay USD 7 million to New Zealand (an amount in excess of any material damage suffered by New Zealand) and would undertake to put the two agents involved in confinement.<sup>47</sup> All in all, the ILC is careful to point out that satisfaction remains an exceptional remedy, and that as mentioned at Article 45(3), it should not be used so as to impose abusive demands on the wrongdoer State.<sup>48</sup>

<sup>45</sup> *Yearbook of the ILC 1990*, vol. II, Part Two at 74-76.

<sup>46</sup> *Canada v. United States* (1933, 1935) 3 RIAA 1609.

<sup>47</sup> *New Zealand v. France* (1986) 19 RIAA 199, reprinted in 26 ILM 1346.

<sup>48</sup> *Yearbook of the ILC 1990*, vol. II, Part Two at 77, 81.