

# CHAPTER 9

## STATE RESPONSIBILITY

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### BOX 9.1 Required Knowledge and Learning Objectives

**Required knowledge:** Sources; Subjects

**Learning objectives:** Understanding the regime of State responsibility and the steps to establish the consequences of an internationally wrongful act.

### BOX 9.2 Interactive Exercises

Access *interactive exercises for this chapter*<sup>1</sup> by positioning your smartphone camera at the dot-filled box, also known as a QR code.



Figure 9.1 QR code referring to interactive exercises.

## A. INTRODUCTION

Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.<sup>2</sup>

(Max Huber)

Max Huber's famous statement makes clear that responsibility for internationally wrongful acts is a fundamental principle of international law, dealing with the consequences of breaches of international obligations. Since the first half of the 20th century, there has been a growing interest in the development and codification of the principles of State responsibility, reinforced by the emergence of permanent courts and

<sup>1</sup> <https://openrewi.org/en-projects-project-public-international-law-state-responsibility/>

<sup>2</sup> *Spanish Zone of Morocco Claims (Spain v United Kingdom)* (1925) 2 RIAA 615.

tribunals and the discussions regarding reparations that followed the two world wars. The issue was taken up at the 1930 Hague Codification Conference,<sup>3</sup> but the participating States were unable to reach an agreement. Later, the issue was selected as one of the first topics to be dealt with by the International Law Commission (ILC).<sup>4</sup>

Starting in 1956, the ILC focused efforts on developing a series of articles on State responsibility, taking as a reference pre-existing case law, State practice, and doctrine. Finally, in 2001 the ILC approved the Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) and submitted the text to the UN General Assembly.<sup>5</sup> The original intention to translate the draft into a binding treaty never materialised. However, despite being commonly called ‘draft’ articles, great parts of the substantive content of the ARSIWA reflects customary international law and the articles are widely applied in practice.

This chapter analyses the concept of State responsibility. Following the structure proposed by the ILC, it discusses the elements required for the invocation of State responsibility and explores the consequences of established internationally wrongful acts.

## B. THE CONCEPT OF INTERNATIONALLY WRONGFUL ACTS

### I. THE NOTION OF ‘OBJECTIVE RESPONSIBILITY’ IN INTERNATIONAL LAW

Article 1 ARSIWA establishes the general principle of State responsibility. It states: ‘Every internationally wrongful act of a State entails the international responsibility of that State’.<sup>6</sup> The direct relationship between a wrongful act and responsibility has been classified as a form of *objective* responsibility, since it is not dependent on elements such as negligence, guilt, or other forms of subjective responsibility.<sup>7</sup>

State responsibility is the set of new legal relationships and obligations that emerge between subjects of international law once an internationally wrongful act is attributed to a State.<sup>8</sup> The content of these possible new obligations consists of the consequences of the wrongful act and varies from case to case, as will be further discussed below.

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3 Codification Conference, The Hague, 13 March to 12 April 1930. League of Nations Official Journal, Special Supplement, No. 92, 9.

4 James Crawford, *State Responsibility: The General Part* (CUP 2013) Part I.

5 ILC, ‘Responsibility of States for Internationally Wrongful Acts (53rd session 23 April–1 June and 2 July–10 August 2001) UN Doc A/RES/56/83 Annex.

6 James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 32.

7 Ibid 77.

8 James Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 AJIL 874.

## II. ELEMENTS OF AN INTERNATIONALLY WRONGFUL ACT

The elements of an internationally wrongful act can be understood as part of a two-tier test to establish State responsibility. In the first step, the internationally wrongful act is established; the second step consists of reviewing whether the conduct can be justified, as discussed below.

An internationally wrongful act is defined in article 2 ARSIWA as a conduct consisting of an act or omission that it is attributable to a State and constitutes a breach of a binding international obligation of a State at that time. The concept of ‘act’ was chosen by the ILC so as not to introduce concepts such as international ‘crime’ or ‘offence’, which could be confused with concepts of domestic law or international criminal law.<sup>9</sup>

Establishing State responsibility implies identifying (1) conduct, consisting of an action (positive acts against a primary obligation) or omission (e.g. failures to take measures,<sup>10</sup> or any inaction that breaches a primary obligation) (2) that is attributable to a State by different criteria of individuals or groups that can be linked to the State as agents or subjects under their control, and (3) is a breach of an international obligation of that State, emanating from any primary rule that can be represented in any source of international law, from treaties to customary law, including obligations included in peremptory rules of international law (*ius cogens*).<sup>11</sup>

It is fundamental to highlight that ‘harm’ or ‘damage’ are not constitutive elements of the notion of an international wrongful act. A breach of a treaty can occur without harm (e.g. breaching a boundary treaty by an unauthorised movement of troops, without harming the territory of the neighbour State). It is noteworthy that in space law a regime of strict liability has emerged for dangerous activities in outer space.<sup>12</sup>

## C. ATTRIBUTION

### I. GENERAL PRINCIPLE

Attribution of conduct to a State implies a legal exercise whereby the conduct of an organ, a person, or a group of persons is imputed on that State, in accordance with criteria determined by international law. The State will thus be considered as the author of that act and the legal consequences will fall on it, without prejudice to the legal consequences that may also fall on the material author of the act or fact emanating from other regimes.

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9 Crawford, *The International Law Commission's Articles on State Responsibility* (n 5) 111.

10 *Corfu Channel Case (UK v Albania)* (Assessment of Compensation) [1949] ICJ Rep 4.

11 Crawford, *The International Law Commission's Articles on State Responsibility* (n 5) 31.

12 Convention on International Liability for Damage Caused by Space Objects (adopted 29 November 1971, entered into force 1 September 1972) 610 UNTS 205. On space law, see Kansra, § 20, in this textbook.

In principle, the State is responsible only for wrongful acts of its organs and agents. Except in the cases expressly provided for, the acts of private persons are not attributable to the State under international law. However, not every conduct of organs and agents of the State is imputable to the State. Moreover, in exceptional situations, the State may be held responsible for acts of private persons. Public international law provides for several cases in which the conduct of certain individuals and organs is considered attributable to the State, as explained below.

## II. ATTRIBUTABLE CONDUCT

### 1. *Conduct of State Organs*

Article 4 ARSIWA provides that the conduct of any State organ, whatever its position or function within the State, is considered an act of that State. In this sense, the concept of responsibility extends to any State entity, whether it exercises executive, legislative, judicial, or even commercial functions, at the central, regional, local or even federal government level.

The domestic law of the State plays a fundamental role in establishing whether a given entity constitutes a State organ for the purposes of international responsibility. However, the conduct of institutions exercising public functions is attributable to the State even if under domestic law such institutions are considered independent or autonomous.

According to article 5 ARSIWA, the conduct of any person or entity empowered by domestic law of a State to exercise public functions is attributed to the State, if the person or entity acts in that capacity. This is a *functional* criterion, since it refers to the function exercised by the individual or entity, regardless of whether it is structurally considered an organ of the State or not. In the *Hyatt* case, the authority given by Iran to a non-governmental entity to suggest enterprises for expropriation was considered an element of public authority.<sup>13</sup> Therefore, the State may be held liable for the wrongful conduct of parastatal entities or public, semi-public, or even private companies provided that (1) they are empowered by domestic law to exercise certain public or regulatory functions and (2) the act is related to the exercise of the assigned public or regulatory function.<sup>14</sup>

Article 6 provides that the conduct of an organ of a State in the service of another State with its consent and acting under its authority and control shall be attributable to the receiving State, as long as the organ is acting in the exercise of public functions of the State at whose disposal it is placed. For example, the Privy Council, a body of advisors to the British monarch, has occasionally acted as a judicial body of last resort at the disposal of several Commonwealth States. In such cases, the decisions of the Privy Council are attributable to the receiving State and not to the United Kingdom, from which the Privy Council originates.

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13 *Hyatt International Corporation v Iran* (1985) 9 Iran-USCTR 72.

14 Michael Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 Berkeley Journal of International Law 142.

In any of the cases envisaged above, the conduct will be equally attributable to the State even if the person, organ, or entity has exceeded its competence or contravened its instructions or the domestic law of the State. Thus, article 7 ARSIWA provides that to the extent that the organ, person, or entity has acted in its official capacity, the State may not invoke the alleged violation of its instructions or the improper, illegitimate, or excessive exercise of public functions as circumstances for interrupting the link of attribution of the conduct to a State. However, if the conduct of the organ, person or entity is totally outside its official functions (i.e. *ultra vires*), such conduct will not be attributable to the State.

## **2. Conduct of Factual Organs of a State**

Article 8 ARSIWA provides for a control criterion according to which the conduct of a person or group of persons acting on the instructions or under the direction or control of the State is a de facto State organ. Their behaviour is considered attributable to the State even though from an administrative point of view it is not an organ within its official structure.

For example, in the case of an armed conflict, the internationally wrongful act of a paramilitary group fighting against government armed forces may give rise to the international responsibility of a third State if the group acts under its control.<sup>15</sup> Similarly, semi-public or even private companies may be attributable to the State when they act on the instruction or control of that State. The mere ownership of an enterprise by the State does not necessarily imply that the acts of the enterprise are attributable to the State, except in cases where the enterprise has exercised public powers, in accordance with article 5 of the Draft Articles.

Several criteria regarding the threshold of control needed to attribute conduct of private entities to a State have emerged from the practice of international courts: while the International Court of Justice (ICJ) has developed a strict notion of ‘effective control’,<sup>16</sup> the International Criminal Tribunal for the Former Yugoslavia (ICTY) developed an overall criterion that does not require direct, effective knowledge or control of every act committed by the entity and the direction of its goals.<sup>17</sup>

## **3. Attribution in the Absence of a State**

Article 9 ARSIWA provides for the case in which, exceptionally, due to a revolution, armed conflict or foreign occupation, the regular State organs are absent or prevented from acting. In such a case, the conduct of persons or groups of persons exercising public functions shall be attributable to the State.<sup>18</sup>

15 Veronika Holker and Walter Arévalo Ramírez, ‘La Responsabilidad Internacional y la Jurisdicción Especial para la Paz en Colombia Frente a la Corte Penal Internacional’ in Carlos Escobar Uribe (ed), *Gobernanza Global y Responsabilidad Internacional del Estado Experiencias en América Latina* (Universidad del Bosque 2019).

16 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA (Merits))* [1986] ICJ Rep 14.

17 *Prosecutor v Duško Tadić* (Judgment) ICTY-94-1-A (15 July 1999).

18 Tania Bonilla Matiz and Walter Arévalo Ramírez, ‘Responsabilidad Internacional del Estado por Hechos Internacionalmente Ilícitos, Obligaciones Internacionales Emanadas del Sistema Interamericano de Derechos

Article 10 of the Draft Articles provides that if an insurrectional movement succeeds in becoming the new government of a State, its conduct shall be attributable to that State. Furthermore, should the insurrectional movement succeed in establishing a new State, its conduct shall be attributable to the new State. If the insurrectional movement fails to take over the government of the State or in creating a new State, its acts shall not be attributable to the State, without prejudice to other criteria of attribution under the Draft Articles, for instance, if the insurrectional movement acts under the control of a third State under article 8 ARSIWA.

Article 11 contains a residual criterion, according to which the conduct of a person or entity that is explicitly or implicitly recognised and adopted by the State as its own shall be attributable to that State, even if none of the above-mentioned criteria of attribution are met. Therefore, the attribution of the conduct to the State will be determined by a subsequent act of that State recognising or adopting such conduct as its own.

#### **4. Responsibility in Connection With Acts of Another State**

In principle, each State is responsible for its own conduct. Nonetheless, there are three exceptional situations in which a State is held responsible for an internationally wrongful act committed by another State, without prejudice to the international responsibility of the State committing the wrongful act.

First, a State which aids or assists another State in the commission of an internationally wrongful act is internationally responsible, provided that (1) the State has knowledge that its aid or assistance will contribute to the commission of an internationally wrongful act, (2) the aid or assistance is given with the intent to facilitate the commission of the wrongful act, and (3) the assisting State is also bound by the obligation breached, so that the conduct of the assisted State would have been equally wrongful had it been committed directly by the assisting State (article 16 ARSIWA).

Second, a State directing and controlling another State in the commission of an internationally wrongful act is internationally responsible, provided that (1) the controlling State has knowledge of the wrongful character of the act, and (2) the controlling State is also bound by the obligation breached (article 17 ARSIWA). For example, in case of military occupation where the organs of the occupied State act under the direction and control of the occupying State, the occupying State is vicariously liable, without prejudice to the direct responsibility of the occupied State.

Finally, article 18 provides for the responsibility of a State which coerces another State to commit an internationally wrongful act, that is, which exercises force or violence against another State to cause the coerced State to breach an international obligation.

The coercing State shall be held solely responsible towards the third State provided that it acted with knowledge of the circumstances of the wrongful act and that the act would have constituted an internationally wrongful act of the coerced State.

## **D. CIRCUMSTANCES PRECLUDING WRONGFULNESS**

### **I. GENERAL PRINCIPLE**

In certain situations, the breach of an obligation may be excused and some of the consequences of such breach avoided. These so-called circumstances precluding wrongfulness are of general application, that is, they apply to obligations arising from any source of international law.

Furthermore, the circumstances precluding wrongfulness only exclude the wrongfulness of the act but are not exemptions from responsibility. This implies that they do not exempt the State from the obligation to repair the damages caused by the conduct that would have been unlawful if the circumstances precluding wrongfulness had not arisen, nor do they destroy the existence and continuity of the international obligation, to which the State covered by the cause must return as soon as possible.

### **II. THE CIRCUMSTANCES PRECLUDING WRONGFULNESS**

#### **1. Consent**

Article 20 ARSIWA provides that a State may obtain the consent of another State which, in the absence of such permission, would constitute a wrongful act. To be valid, consent must be given by State authorities who are authorised to represent the State and bind it internationally.

Consent is not required to be given through an instrument as the one where the principal obligation arises, such as a treaty, and may extend both before and during the occurrence of the allegedly wrongful conduct. The limits of the consent granted by the State must be respected. Otherwise, independent wrongful acts will be established. For example, in the case of a permit to cross the airspace to attend to a specific situation, if unauthorised overflights were to take place subsequently, each of these would constitute an autonomous wrongful act.

#### **2. Self-Defence**

Wrongfulness is excluded if a State breaches its international obligations in the exercise of an act of self-defence under article 2(4) of the UN Charter,<sup>19</sup> whether

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<sup>19</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. On self-defence, see *Svicevic*, § 13, in this textbook.

against the State from which it is repelling an attack or against third States (article 21 ARSIWA).<sup>20</sup>

Self-defence as a circumstances precluding wrongfulness has certain limits.<sup>21</sup> On the one hand, for the circumstance to be valid, the State invoking it must comply with all the substantive and procedural elements described in the UN Charter on self-defence and the general prohibition of the use of force.<sup>22</sup> Likewise, acts carried out in the context of self-defence must respect international humanitarian law.<sup>23</sup>

### 3. Countermeasures

Countermeasures are reactive actions against a State's wrongful conduct, which seek to compel it to return to compliance with a breached obligation. They consist of measures that seek to have a sufficient effect on the State that has breached an obligation, so that it ceases its non-compliance. They have been described as legal reprisals or sanctions in some proceedings.<sup>24</sup> In the choice of these measures, obligations in force between the two States in question may be breached. An example is the enactment of a tax bill, otherwise prohibited by a free trade agreement, to induce the other State party to return to compliance with its obligations.<sup>25</sup>

Countermeasures are a circumstance excluding wrongfulness if they meet certain requirements: they need to be proportionate, temporary, and to be lifted once the breach has ceased. Furthermore, they may not constitute measures of armed force and must be reversible in nature and not punitive in character.<sup>26</sup>

### 4. Force Majeure

Force majeure is characterised especially by the presence of an invincible, uncontrollable, and involuntary element that compels the State to perform a conduct that is contrary to what is required of it by an international obligation. Article 23 ARSIWA, by recognising an 'irresistible force' or an 'unforeseen event' beyond the control of the State, accepts that both natural and human-made causes may constitute circumstances of force majeure, such as an avalanche, an earthquake, or an armed attack on a portion of the territory.

20 Walter Arévalo Ramírez, 'Responsabilidad Internacional del Estado por Hechos Internacionalmente Ilícitos: Las Causales de Exclusión de Ilicitud, su Contenido y Escenarios de Aplicación' in Ricardo Abello Galvis (ed), *Derecho Internacional: Varias Visiones un Maestro: Liber Amicorum en Homenaje a Marco Gerardo Monroy Cabra* (Editorial Universidad del Rosario 2015).

21 Jean-Marc Thouvenin, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010).

22 On self-defence, see Svicevic, § 13, in this textbook.

23 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226.

24 *Case Concerning the Air Services Agreement of 27 March 1946 (US v France)* (1979) 54 ILR 303.

25 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007).

26 Thomas M Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 AJIL 715.

These circumstances, apart from being unforeseeable (or difficult to foresee or avoid) must create a situation where it is materially impossible to perform an international obligation, and not only make its performance more difficult.<sup>27</sup> A circumstance where the State invoking it has directly contributed to the existence of the circumstance will not be admissible as force majeure. Nor does it exempt from the damage generated by the action; it only exempts from its wrongfulness, such as the damage caused by the ships of a State that are dragged to a foreign port by an irresistible storm.

### **5. Distress**

In the case of distress, article 24 ARSIWA recognises the voluntary and conscious action to take a measure contrary to an international obligation to save lives in a situation of maximum danger and urgency. The circumstance has been mostly invoked in cases of ships and aircrafts that, in the face of mechanical failures or meteorological threats, enter the territory of another State without permission seeking shelter from the weather or other emergencies that threaten the loss of the ship and the lives on board. The circumstance of distress cannot be invoked if the measure taken to safeguard the lives of the persons on board generates a greater danger. Likewise, the circumstance of distress is invalidated if the situation of distress is the result of the negligence of the State, such as the lack of aircraft maintenance.

### **6. Necessity**

Article 25 ARSIWA provides that necessity may not be invoked unless the act from which wrongfulness is sought to be excluded (1) is the only way for the State to safeguard an essential interest against a grave and imminent peril and (2) does not seriously affect an essential interest of another State. This is the only circumstance identified by the ILC that begins with a prohibition on its invocation. This is due to the delicate legal and political consequences of the indeterminacy of the concept 'essential interest of the State' at the heart of the circumstance. In the case of a recent economic crisis in Argentina, resolving the claims of different foreign investors against the State, some arbitral tribunals admitted and at the same time others rejected that Argentina invoked that its economic stability was an 'essential interest' to justify violations of obligations regarding the protection of foreign investment.<sup>28</sup>

## **E. INVOCATION OF STATE RESPONSIBILITY**

The international responsibility of a State arises when the conditions analysed above are met. However, to give effect to such responsibility, it must be invoked by the injured State or another subject of international law entitled to that effect. Who is entitled

<sup>27</sup> Crawford, *The International Law Commission's Articles on State Responsibility* (n 5).

<sup>28</sup> Walter Arévalo Ramírez and Laura García, 'El Estado de Necesidad en el Arbitraje de Inversión: su Invocación Consuetudinaria y Convencional en los Arbitrajes Enron, Sempra, CMS, LG&E y Continental ante el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI)' (2017) 17 AMDI 469.

to invoke of a breach or in other words enjoys standing depends on the nature of the obligation. Article 42 ARSIWA illustrates that in the case of bilateral treaties, the standing lies in the injured State party. In a multilateral treaty or an obligation owed to a group of States, the standing lies on any State that has been specially affected by the breach, or the breach has affected its position for further compliance of the obligation. Finally, in the case of peremptory norms of international law (*ius cogens*), recent cases such as the *Genocide* case show that any State could bear a legitimate interest to invoke the breach.<sup>29</sup>

## F. CONSEQUENCES OF STATE RESPONSIBILITY

Article 28 of the Draft Articles reflects the general principle that an internationally wrongful act produces legal consequences. The responsible State will be subject to several obligations, without prejudice to the legal consequences provided for under other regimes. By way of example, in case of a serious breach of a treaty, the injured State will be entitled to terminate or suspend the treaty.<sup>30</sup>

### I. CESSATION AND NON-REPETITION

Besides the obligation to make reparation as discussed in the next section, article 30 ARSIWA provides two additional obligations of the responsible State. First, the responsible State must cease its wrongful conduct. The obligation will arise only if the wrongful act is of a continuing or composite nature and the breached norm remains in force despite its violation by the responsible State.

Second, the responsible State may be obliged to provide adequate assurances and guarantees of non-repetition of its wrongful conduct when this is deemed necessary for the purpose of restoring confidence between the parties and preventing future violations. Unlike the obligations to make reparation and to cease the wrongful conduct, this obligation will arise only in exceptional situations considering the rank of the obligation breached, the gravity of the breach, and the risk that the responsible State will again incur in the breach of the obligation.<sup>31</sup>

The flagrant or systematic violation of a peremptory norm (*ius cogens*), for instance in case of genocide or torture, in addition will give rise to obligations for the international community as a whole.<sup>32</sup> Article 41 ARSIWA provides for the obligation of all States (1) to cooperate to put an end to the violation, either within the framework of the UN

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29 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar (Request for the Indication of Provisional Measures: Order) [2020] ICJ Rep 3.*

30 On the grounds for treaty termination, see Fiskatoris and Svicevic, § 6.1, in this textbook.

31 Ricardo Abello Galvis, 'Introducción al Estudio de las Normas de Ius Cogens en el Seno de la Comisión de Derecho Internacional, CDI' (2011) 60 *Vniversitas* 75.

32 *Ibid.*

or through any other lawful means,<sup>33</sup> (2) not to recognise as lawful situations resulting from the violation, and (3) not to give aid or assistance to the responsible State to maintain the situation of non-compliance.

## II. REPARATION

### 1. General Principle

Articles 31 and 34 ARSIWA state the obligation to make full reparation for the damages caused by a wrongful act, including both material and moral damages and interest. International tribunals, such as the PCIJ, the PCA, the ICJ, or the IACHR, have reiterated that reparation of the damage is carried out under the principle of *restitutio in integrum*, or integral reparation of the damage, enunciated by the ICJ in the *Factory at Chorzów* case.<sup>34</sup> According to this principle, the possibility that the reparation exceeds the damage and may have punitive, sanctioning or preventive functions, as occurs with the *torts* regime in common law, is excluded.<sup>35</sup>

The forms of reparation may be given in a single or combined form. Some specific treaties and particular jurisdictions (e.g. regional human rights systems)<sup>36</sup> may require that the forms of reparation be given concomitantly in the face of serious human rights violations to achieve true *restitutio in integrum*.<sup>37</sup>

### 2. The Different Forms of Reparation

#### a) Restitution

The first measure of reparation, enshrined in article 25 ARSIWA, is restitution, understood as the return to the situation as it was before the internationally wrongful act. Usually, it takes the form of a material conduct such as the release of persons illegally detained, the return of property, the reversal of a judicial decision<sup>38</sup> or a legal norm that violates an international obligation, the withdrawal of troops, and so forth. Restitution as a path within reparation is only available in cases where it is materially possible to return to previous circumstances.

33 Andrés Téllez Nuñez, 'Aproximación Multidimensional al Régimen de Responsabilidad Internacional y al Principio de No Intervención. El Problema Hermenéutico' (2020) 13 ACIDI 79.

34 *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17.

35 Walter Arévalo Ramírez and Laura Garcia Matamoros, 'Recent Developments in Punitive Damages in Civil Law, Common Law, the Interamerican Human Rights System and International Law' (2019) 37 *Revista de Derecho Privado* 183.

36 Eduardo Ferrer Mac-Gregor, 'Conventionality Control the New Doctrine of the Inter-American Court of Human Rights' (2015) 109 *AJIL Unbound* 93.

37 *Case of Velásquez-Rodríguez v. Honduras*, Merits, Inter-American Court of Human Rights Series C No 4 (29 July 1988) 25.

38 Walter Arévalo Ramírez, 'Resistance to Territorial and Maritime Delimitation Judgments of the International Court of Justice and Clashes with "Territory Clauses" in the Constitutions of Latin American States' (2022) 35 *LJIL* 185.

### b) Compensation

If restitution is not possible, article 36 provides compensation as another way of redressing an injury caused by an internationally wrongful act. Compensation corresponds to the payment of any damage that is susceptible of financial assessment, including loss of profits insofar as proven.<sup>39</sup> International jurisprudence has repeatedly held that a court that has jurisdiction to declare the international responsibility for a wrongful act has jurisdiction to produce a judgment fixing the amount of compensation, unless otherwise agreed by the parties. The practice of the tribunals has not only recognised compensation to pay for damages caused to the property of a State,<sup>40</sup> but has also for environmental damage,<sup>41</sup> violations of investment regimes, loss of profits, and injuries to individuals. Regularly, the value of compensation corresponds to an average of the market cost of the affected assets. Likewise, loss of profit has generally been predicated on assets whose nature is the production of wealth, such as industries, infrastructure works, merchant ships, investments, and so forth. It has also been recognised that some incidental measures taken by the affected State to mitigate the damage may be subject to compensation.<sup>42</sup>

### c) Satisfaction

Exceptionally, when some type of damage with special characteristics has not been repaired through restitution or is not susceptible of financial evaluation, the responsible State must resort to satisfaction to achieve full reparation of the damage caused (article 37 ARSIWA).

Satisfaction responds directly to the moral damages not susceptible of financial evaluation that the affected party may suffer which is of a *symbolic* nature. Examples are affronts to national symbols such as the flag, invasion of territory, or mistreatment of the head of State.

Forms of satisfaction include the express acknowledgment of the act, public apologies, diplomatic notes, reestablishment of diplomatic relations, and expressions of regret by the head of State. In more particular scenarios, more complex forms of satisfaction have been developed to repair wrongful acts relating to serious human rights violations, such as the experience of the IACtHR.<sup>43</sup>

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39 See *Chorzów Factory Case* (n 33) and *Nicaragua v USA* (n 15).

40 *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4.

41 Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833.

42 Ángela Rey Anaya and Ernesto Rey Cantor, *Medidas Provisionales y Medidas Cautelares en el Sistema Interamericano de Derechos Humanos* (Temis 2005).

43 Juana Inés Acosta López and Álvaro Francisco Amaya Villarreal, 'La Responsabilidad Internacional del Estado Frente al Deber de Custodia: Estándares Internacionales Frente a los Centros Estatales de Detención' (2011) 13 ESJ 301. On reparations in the Inter-American system, see Kahl, Arévalo-Ramírez, and Rousset-Siri, § 21.5, in this textbook.

## G. CONCLUSIONS

State responsibility for international wrongful acts, despite the successful attempts of codification by the ILC, is still an evolving subject of international law. Recent discussions mentioned above include the issue of standing in the face of breaches of peremptory norms of international law, the scope of the circumstances precluding wrongfulness and the development of new ways to fulfil the reparations of the damages that can come along with the breach of an international obligation.

### BOX 9.3 Further Readings

#### Further Readings

- M Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 Berkeley Journal of International Law 142
- D Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833