State responsibility

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chapter BIBLIOGRAPHY

- D'ARGENT Pierre, "Responsabilité Internationale", in VAN STEENBERGHE Raphaël (ed.), *Droit international humanitaire : un régime spécial de droit international?*, Brussels, Bruylant, 2013, pp. 103-149.

Introductory text

In conformity with the traditional structure of international law, violations are considered to have been committed by States and measures to stop and repress them therefore must be directed against the State responsible for the violation. Such measures can be foreseen in IHL itself, in the general international law of State responsibility, or under the UN Charter, the “constitution” of organized international society.

Before violations can be repressed, they have, of course, to be ascertained. The Conventions provide that an enquiry must be instituted into alleged violations if requested by a party to the conflict. However, the procedure has to be agreed on between the parties. Experience shows that such an agreement is difficult to reach once the alleged violation has occurred – in particular between parties fighting an armed conflict against each other. *Art. 90 of Protocol I* therefore constitutes an important step forward, as it establishes the International Humanitarian Fact-Finding Commission and its procedure. The Commission is competent to enquire into alleged violations of one party at the request of another party if both parties agree on its competence, either on an *ad hoc* basis or by virtue of a general declaration. The Commission has declared its readiness to act in non-international armed conflicts as well, if the parties concerned agree. In conformity with the traditional approach of IHL, the enquiry is based on an agreement between the parties, and the result will only be made public with their consent. This may be one of the reasons why no request for an enquiry has ever been brought before the Commission, although some 70 States have made a general declaration accepting its competence. States have preferred to impose enquiries through the UN system, which produces a published report, or to establish *ad hoc* commissions of enquiry, but the results have not been much more convincing.

In the event of a dispute, all means afforded by international law for the peaceful settlement of disputes are available. A conciliation procedure involving the Protecting Powers is foreseen, but needs the agreement of the parties. The Protecting Power system itself is an institutionalization of good offices. The general problem, however, is that a peaceful settlement of disputes on points of IHL between parties who prove by their participation in an armed conflict that they have been unable to settle their disputes in respect of jus ad bellum peacefully would be an astonishing occurrence and only rarely succeeds. Therefore, the use of coercive measures which can only be taken through the UN system seems more promising, but risks mixing jus ad bellum and jus in bello. Such a mix-up is natural for the UN, as its main role is to ensure respect for jus ad bellum, but it jeopardizes the autonomy, neutrality and impartiality required for the application of IHL.

When a violation occurs, not just the injured State, which is the direct victim, but – under common *Art. 1* and the general rules on State responsibility – every State may and indeed must take measures to restore respect. Those measures must themselves conform to IHL and to the UN Charter and must be taken in cooperation with the UN as the frail embryo of a centralized international law enforcement system. Cooperation between all States, however, does not mean that no reaction to violations is possible in the absence of a consensus.

In keeping with the rules of the law of State responsibility, IHL recalls the general obligation to pay compensation. According to a majority of writers and court decisions, this implies, in conformity with the traditional structure of international law, that the State responsible for the violation has to compensate the State injured by the violation; it does not confer a right to compensation on the individual victims of violations. This traditional implementation structure is at variance with internal armed conflicts, as in such cases victims of violations are often nationals of the State concerned. Thus, for a growing number of violations, International Human Rights Law requires that the State make reparation directly to the beneficiary of the rule.

For the rest, IHL prescribes some changes to the general rules on State responsibility (or makes clear that certain of its exceptions apply in this branch). It holds the State strictly responsible for all acts committed by members of its armed forces; it prohibits reprisals against protected persons and goods and the civilian population; reciprocity in the application of IHL treaties being excluded by the general rules; and it makes clear that, as the rules of IHL are mostly *jus cogens*, States may not agree to waive the rights of protected persons nor may the latter renounce their rights. Finally, as IHL is intended for application in armed conflicts, which are by definition emergency situations, and as many armed conflicts are fought in self-
defence, while the same IHL must apply to both sides, necessity (except where explicitly stated otherwise in some of its rules\textsuperscript{[13]}) and self-defence are not circumstances precluding the wrongfulness of IHL violations.\textsuperscript{[14]}

**Cases and Documents**

- ICRC, Protection of War Victims (Para. 4)
- UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law
- The Netherlands, Responsibility of International Organizations
- Democratic Republic of the Congo, Conflict in the Kivus (Part III., Paras. 7, 29-60)

**SPECIFIC BIBLIOGRAPHY**

**Suggested reading:**


**Further reading:**


1. **Assessment of violations**

**Cases and Documents**

- *Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law*
Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)

ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 (Para 237)

1. a) enquiry procedures
   GC I-IV, Arts 59/53/132/149 respectively; P I, 90(2)(e)

Cases and Documents

- Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
- Israel/Gaza, Operation Cast Lead (Part II.)
- Israel, The Targeted Killings Case (Para. 40)
- Israel, Human Rights Committee’s Report on Beit Hanoun (Paras. 67-70)
- Israel, Report of the Winograd Commission (Para. 46)
- Case Study, Armed Conflicts in the former Yugoslavia (Para. 25)
- UN, Request for an Investigation on War Crimes
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia (Paras. 140-142)
- Central African Republic, Coup d’Etat
- Somalia: Deeply Flawed Rape Inquiry
- Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
- Colombia – Sexual violence
- Libya, NATO Intervention 2011

sPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:


1. b) the International Humanitarian Fact-Finding Commission
   (See http://www.ihffc.org)
**Cases and Documents**

- ICRC, *The International Humanitarian Fact-Finding Commission*
- UN, *Resolutions and Conference on Respect for the Fourth Convention (Part D II.3)*
- *Case Study, Armed Conflicts in the former Yugoslavia (Paras. 7)*
- UN, *Report of the Secretary-General for the World Humanitarian Summit*
- *Afghanistan, Attack on Kunduz Trauma Centre*

**SPECIFIC BIBLIOGRAPHY**

**Suggested reading:**


**Further reading:**


**2. Consequences of violations**

**SPECIFIC BIBLIOGRAPHY**

**Suggested reading:**


**Further reading:**


a. cooperation among the States Parties
   P I, Art. 89

CASES AND DOCUMENTS

- International Law Commission, Articles on State Responsibility (Part A., Art. 41(1), 48 and 54)
- Case Study, Armed Conflicts in the former Yugoslavia (Para. 17)

SPECIFIC BIBLIOGRAPHY

Suggested reading:


b. compensation
   Hague Convention IV, Art. 3; P I, Art. 91 [CIHL, Rule 150]

Cases and Documents

- ICRC, Protection of War Victims (Para. 4.3)
- International Law Commission, Articles on State Responsibility (Part A., Arts 28-33)
- UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law
- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory (Part A., para. 152)
- Israel, Human Rights Committee's Report on Beit Hanoun (Paras. 67-78)
- Sudan, Report of the UN Commission of Enquiry on Darfur (Paras 593-600)
- UN Compensation Commission, Recommendations
- United States, Kadic et al. v. Karadzic
- Afghanistan, Assessment of ISAF Strategy
- India, People’s Union for Civil Liberties v. Union of India
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia (Paras 143-148)
- Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
- Afghanistan, Attack on Kunduz Trauma Centre

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Suggested reading:

Further reading:


Further reading:

- RONEN Yaël, “Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict”, in...
c. applicability of the general rules on State responsibility
[CIHL, Rule 149]

Cases and Documents

- International Law Commission, Articles on State Responsibility
- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory (Part A., paras 149-153)
- ECHR, Cyprus v. Turkey
- Former Yugoslavia, Special Agreements Between the Parties to the Conflicts (Part A., Art. 14(1))
- The Netherlands, Responsibility of International Organizations
- ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo (Paras. 213-214, 243, 245-250)
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia (Paras. 76-78)
- UK, Serdar Mohammed v. Ministry of Defence (Paras. 158-187)
- ECHR, Al-Jedda v. UK (Paras. 80-86)
- Women and Sexual violence
- Somalia: Deeply Flawed Rape Inquiry

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Suggested reading:


Further reading:


aa) but strict responsibility for armed forces

CASES AND DOCUMENTS

- International Law Commission, Articles on State Responsibility (Part A., Art. 7 and commentary; and Part B.)
- Democratic Republic of the Congo, Conflict in the Kivus (Part III., Paras. 7, 29-60)
- India, Press release, Violence in Kashmir
- Private Military Security Companies

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:


bb) but necessity is not a circumstance precluding wrongfulness

Cases and Documents

- International Law Commission, Articles on State Responsibility (Part A., Arts 25(2)(a), 26 and commentary of Art. 25)
- Belgium, Law on Universal Jurisdiction (Part A., Art. 136(g))
- British Military Court at Hamburg, The Peleus Trial
- United States Military Tribunal at Nuremberg, United States v. Alfred Krupp et al. (Section 4. (iii))
- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory (Part A., para. 140)
- Israel, Methods of Interrogation Used Against Palestinian Detainees
- ICTY, The Prosecutor v. Strugar (Part B., Paras. 280 and 295)

Specific bibliography

Suggested reading:


Further reading:


cc) but self-defence is not a circumstance precluding wrongfulness

### Cases and Documents

- *International Law Commission, Articles on State Responsibility* (Part A., Arts 21, 26 and para. 3 of the commentary of Art. 21)
- *France, Accession to Protocol I* (Part B., para. 11)
- *ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory* (Part A., paras 138-139)
- *ICTY, The Prosecutor v. Martic* (Part C., para. 268)
- *ICTY, The Prosecutor v. Kupreskic et al.* (Paras 511-520)

### SPECIFIC BIBLIOGRAPHY

**Suggested reading:**


**Further reading:**


dd) but no reciprocity

[C]HL, Rule 140

### Quotation

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

[...]

2. A material breach of a multilateral treaty by one of the parties entitles:
   a. the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
      i. in the relations between themselves and the defaulting State; or
ii. as between all the parties;
b. a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
c. any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:
a. a repudiation of the treaty not sanctioned by the present Convention; or
b. the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

[...]

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.


Cases and Documents

- International Law Commission, Articles on State Responsibility (Part A., Arts 49-51)
- United States Military Tribunal at Nuremberg, The Ministries Case
- ICRC Appeals on the Near East (Part B.)
- Eritrea/Ethiopia, Partial Award on POWs (Part B., Paras. 148-163)
- ICTY, Prosecutor v. Martic (Part A., Para. 9)
- ICTY, The Prosecutor v. Kupreskic et al. (Paras. 517-520)
- Colombia, Constitutional Conformity of Protocol II (Para. 9)

Specific Bibliography

Suggested reading:


Further reading:


ee) admissibility of reprisals

[CIHL, Rules 145-147]

Cases and Documents

- International Law Commission, Articles on State Responsibility (Part A., Arts 49, 50 and 51 and Para. 8 of the commentary of Art. 50)
- United Kingdom and Australia, Applicability of Protocol I (Part C.)
- Switzerland, Prohibition of the Use of Chemical Weapons (Para. 2)
- ICTY, The Prosecutor v. Martic (Part B., Paras. 464-468)
- ICTY, The Prosecutor v. Kupreskic et al. (Paras. 517-520)

Specific Bibliography

Suggested reading:


Further reading:


Cases and Documents

- Belgium, Law on Universal Jurisdiction (Part A., Art. 136(g))
- United Kingdom and Australia, Applicability of Protocol I (Part C.)
- United States, President Rejects Protocol I
- Germany/United Kingdom, Shackling of Prisoners of War
- Israel, Cheikh Obeid et al. v. Ministry of Security

no reprisals against the civilian population

(See supra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 6. Prohibited attacks, d. attacks against the civilian population (or civilian objects) by way of reprisals)

P I, Arts 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)

- no reprisals against protected persons:

GC IV, Arts 46/47/13(3)/33(3) respectively; P I, Art. 20 [CIHL, Rules 146 and 147]

- conditions for reprisals where they are admissible:

[CIHL, Rule 145]

Cases and Documents

- United Kingdom and Australia, Applicability ofProtocol I (Part C.)
- ICTY, The Prosecutor v. Martic (Part B., Paras. 464-468)

- aimed at compelling the enemy to cease violations
- necessity – proportionality
- preceded by a formal warning
- decided at the highest level

ff) IHL obligations are erga omnes obligations
SPECIFIC BIBLIOGRAPHY

Suggested reading:


Cases and Documents

• ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory (Part A., paras 155-157)

Footnotes

• [1] See GC I-IV, Arts 52/53/132/149 respectively
• [3] As of December 2010, 71 States Parties have made such a declaration comparable to the optional clause of compulsory jurisdiction under Art. 36(2) of the Statute of the International Court of Justice.
• [5] See supra for nuances, Implementation Mechanisms V. The Obligation to Ensure Respect (Common Article I, with references to the Articles on State Responsibility, adopted by the International Law Commission, see International Law Commission, Articles on State Responsibility
• [6] See notes 360 and 361 above
• [7] See P I, Art. 89, which is analogous to Art. 56 of the UN Charter
• [8] See Hague Convention IV, Art. 3; P I, Art. 91
• [9] See Hague Convention IV, Art. 3; P I, Art. 91
• [10] See GC I-IV, Arts 46/47/13(3)/33(3) respectively; P I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)
• [12] See GC I-III, Art. 7; GC IV, Art. 8
• [13] See, e.g., GC I, Art. 33(2); GC IV, Arts 49(2) and (5), 53, 55(3), and 108(2); P I, Art. 54(5)
• [14] See International Law Commission, Articles on State Responsibility (Part A., Arts 21, 26 and para. 3 of the commentary of Art. 21; Art. 25(2)(a) and para. 19 of the commentary of Art. 29