A. International Law Commission Report

A. International Law Commission Report, A/56/10 August 2001

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), available at http://www.un.org/law/ilc/. Footnotes partially omitted.]

[**N.B**.: The UN General Assembly took note of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001.]

International Law Commission Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001) General Assembly Official Records Fifty-fifth Session Supplement No. 10 (A/56/10) [...]

CHAPTER IV: STATE RESPONSIBILITY [...]

E. Text of the draft articles on Responsibility of States for internationally wrongful acts [...]

2. Text of the draft articles with commentaries thereto [...]

Responsibility of States for Internationally Wrongful Acts

PART ONE THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I GENERAL PRINCIPLES

Article l Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

a. Is attributable to the State under international law; and
b. Constitutes a breach of an international obligation of the State.

Article 3 Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II ATTRIBUTION OF CONDUCT TO A STATE

Article 4 Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5 Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6 Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7 Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the

governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary [...]

1. [...] “International responsibility is incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.”
2. The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists. It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, which provides that: “A Party to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces” this clearly covers acts committed contrary to orders or instructions. [...]

Article 8 Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary [...]

1. The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the Military and Paramilitary case. [162] The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analysed by the Court in terms of the notion of “control”. On the one hand, it held that the United States was responsible for the “planning, direction and support” given by United States to Nicaraguan operatives. [163] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. [... Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.
2. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues. [**See** ICTY, The Prosecutor v. Tadic (C. Appeals Chamber, Merits)] In *Prosecutor v. Tadic*, the Chamber stressed that: “The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control”. (emphasis in original)

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these

armed forces required by international law for considering the armed conflict to be international was "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations". [167] In the course of their reasoning, the majority considered it necessary to disapprove the International Court's approach in *Military and Paramilitary activities*. But the legal issues and the factual situation in that case were different from those facing the International Court in Military and Paramilitary activities. The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law. [168] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it. [...]

Article 9 Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

1. Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.
2. The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces: [176] [...] and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War [...] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. [...]

Article 10 Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Commentary [...]

1. At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals [...] and it is [...] not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. [...]
2. A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in Additional Protocol II of 1977 may be taken as a guide. Article 1, paragraph 1 refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character (article 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”. [...]
3. No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin. Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law. [...]
4. A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. [...]

Article 11 Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III BREACH OF AN INTERNATIONAL OBLIGATION

Article 12 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, regardless of its origin or character.

Article 13 International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15 Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16 Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

a. That State does so with knowledge of the circumstances of the internationally wrongful act; and
b. The act would be internationally wrongful if committed by that State.

Commentary [...]

1. The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it [...] provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations. [300] Where the allegation is that the assistance of a State has

facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct. [...]

Article 17 Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

a. That State does so with knowledge of the circumstances of the internationally wrongful act; and
b. The act would be internationally wrongful if committed by that State.

Article 18 Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

a. The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
b. The coercing State does so with knowledge of the circumstances of the act.

Article 19 Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20 Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21 Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary [...]

1. Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war. In the Charter period, declarations of war are exceptional and

military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other. The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty [...] from the outbreak of hostilities between States".

2. This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law. Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct. [...]

Article 22 Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23 *Force majeure*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
    a. The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
    b. The State has assumed the risk of that situation occurring.

Article 24 Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
    a. The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
    b. The act in question is likely to create a comparable or greater peril.

Article 25 Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

   a. Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   b. Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   a. The international obligation in question excludes the possibility of invoking necessity; or
   b. The State has contributed to the situation of necessity.

Commentary [...]

1. [...] *Subparagraph* (2) (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule. [...]
2. As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity"[,] [...] [a] doctrine [...] which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law. [435] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.

Article 26 Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27 Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

a. Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
b. The question of compensation for any material loss caused by the act in question.

PART TWO CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I GENERAL PRINCIPLES

Article 28 Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Commentary [...]

1. Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. [...]

Article 29 Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

a. To cease that act, if it is continuing;
b. To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32 Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33 Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This part is without prejudice to any right, arising from the international responsibility of a State, which

may accrue directly to any person or entity other than a State.

Commentary [...]

1. [...] The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State". [...]

CHAPTER II REPARATION FOR INJURY

Article 34 Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35 Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

a. Is not materially impossible;
b. Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36 Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37 Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38 Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39 Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Commentary [...]

1. In line with this approach, despite the trial and conviction by the Nuremburg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals. As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the United Nations Security Council. Both tribunals are concerned only with the prosecution of individuals. In its decision relating to a *subpoena duces tecum in Prosecutor v Blaskic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems". The Rome Statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole", but limits this jurisdiction to "natural persons" (art. 25 (1)). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law". [673]
2. Accordingly the present Articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole [674] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law.

Article 40 Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary [...]

1. [...] In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory. [**See** ICJ, Nuclear Weapons Advisory Opinion [para. 79]]. [...]

Article 41 Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary [...]

1. Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.
2. Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. [...]
3. [...] In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

PART THREE THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42 Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

a. That State individually; or
b. A group of States including that State, or the international community as a whole, and the breach of the obligation:
    i. Specially affects that State; or
    ii. Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43 Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
    a. The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
    b. What form reparation should take in accordance with the provisions of part two.

Article 44 Admissibility of claims

The responsibility of a State may not be invoked if:

a. The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
b. The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45 Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

a. The injured State has validly waived the claim;
b. The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46 Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47 Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of

each State may be invoked in relation to that act.

2. Paragraph 1:
    a. Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
    b. Is without prejudice to any right of recourse against the other responsible States.

Article 48 Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
    a. The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
    b. The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
    a. Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
    b. Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary [...]

1. Paragraph 1 refers to “[a]ny State other than an injured State”. [...] [T]he term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. [...]
2. Under subparagraph (1) (b), States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”. The provision intends to give effect to the International Court’s statement in the Barcelona Traction case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”. [768] With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes”.
3. [...] The Court itself has given useful guidance: in its 1970 judgment it referred by way of example to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”. [769]. [...]

CHAPTER II COUNTERMEASURES

Article 49 Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of

performance of the obligations in question.

Article 50 Obligations not affected by countermeasures

1. Countermeasures shall not affect:
    a. The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
    b. Obligations for the protection of fundamental human rights;
    c. Obligations of a humanitarian character prohibiting reprisals;
    d. Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
    a. Under any dispute settlement procedure applicable between it and the responsible State;
    b. To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary [...]

1. Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. [...]
2. In its General Comment 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present Articles, as well as with measures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights", [805] and went on to state that:

"it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country". [806]

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited". [807]. Likewise, the final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that "In no case may a people be deprived of its own means of subsistence". [808]

1. Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties. [**See** Quotation, Part I, Chapter 13, IX., 2., c), dd), but no reciprocity] The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted. [...]

Article 51 Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52 Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
    a. Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
    b. Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
    a. The internationally wrongful act has ceased; and
    b. The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53 Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54 Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary [...]

1. As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law. [...]

PART FOUR GENERAL PROVISIONS

Article 55 *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56 Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57 Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58 Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59 Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Footnotes

- [162] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14. [**See** ICJ, Nicaragua v. United States [para. 115]].
- [163] *Ibid.*, p. 51, para. 86.
- [167] *Ibid.*, at p. 1546, para. 145 (emphasis in original).
- [168] **See** the explanation given by Judge Shahabuddeen, *ibid*., at pp. 1614-1615.
- [176] This principle is recognized as legitimate by article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land - **See**
  The Hague Regulations
- [300] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, 14 December 1982, A/37/745, p. 50..
- [435] **See** e.g. art. 23 (g) of the Hague Regulations Respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war” [...]. Similarly, art. 54 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), appears

to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.

- [673] Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 25 (4). See also art. 10: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute” - **See** The International Criminal Court [A. The Statute]
- [674] According to the International Court of Justice, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34. **See also** *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at pp. 615-616, paras. 31-32.
- [768] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, and see commentary to Part Two, chapter III, paras (2)-(6).
- [769] *Ibid*., at p. 32, para. 34.
- [805] E/C.12/1997/8, 5 December 1997, para. 1 [**available on** http://www.un.org]
- [806] *Ibid*., para. 4.
- [807] [...] See also arts. 54 (2) (“objects indispensable to the survival of the civilian population”), 75. See also Protocol II [...] art. 4.
- [808] Art. 1 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, [...] and art. 1 (2) of the International Covenant on Civil and Political Rights, United Nations, [...] [**available on** http://www.un.org]

B. Commentary to Article 10 adopted on first reading

[**Source**: Commentary of the International Law Commission on Article 10 of the Draft Article on State Responsibility, adopted on first reading at its twenty-seventh session, para 26, Yearbook of the International Law Commission, 1975, Vol. II, p. 69.]

[...]

1. On the other hand, with regard to actions or omissions which persons with the status of State organs may have committed in their capacity as private individuals, the Commission considered that they had no connexion whatsoever with the fact that the persons in question were part of the machinery of the State and accordingly could not be attributed to the State under international law. [...] That naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case for instance, of the Convention IV respecting the laws and customs of war on land (The Hague,

1907), article 3 of which attributes to the State responsibility for “all acts committed by persons forming part of its armed forces” in violation of the regulations annexed to the Convention, whether they acted as organs or as individuals. [...]

Discussion

1. *(Art. 7 and Commentary to Art. 10 adopted on first reading)* Is a State responsible for all acts committed by members of its armed forces? Even if those members contravened the orders given? Even if they acted in their private capacity? Does the rule found in IHL reflect the general rule or is it more demanding for States? (Hague Convention IV, Art. 3; P I, Art. 91)
2. *(Art. 8)*
    a. When and in what circumstances may an individual engaged in an armed conflict against his government be considered as an agent for a foreign Sate? According to the International Court of Justice (ICJ) in the case of *Nicaragua v. United States*? [**See** ICJ, Nicaragua v. United States] According to the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic case*? [**See** ICTY, The Prosecutor v. Tadic] According to the International Law Commission (ILC)? In your opinion?
    b. Did the ICTY have to answer the same question as the ICJ in the *Nicaragua case*? According to the ICTY? According to the ILC? What do you think? Is the fact decisive that the ICJ considered the behaviour of a State and the ICTY that of an individual?
3. *(Art. 9)*
    a. Is a State whose authority disintegrates during a conflict responsible for the behaviour of groups or individuals trying to restore order? What are the practical consequences of such a responsibility? Are the acts committed by participants in a *levée en masse* attributable to the State? (HR, Art. 2; GC III, Art. 4(A)(6))
    b. When is a State whose authority disintegrates during a conflict responsible for violations of IHL committed by a group or individuals who are not trying to restore order? What are the practical consequences of such responsibility? Are the Articles adapted to this problem?
4. *(Art. 10)*
    a. In what circumstances is a State responsible for violations of IHL committed by a rebel movement? Is the rebel movement itself responsible for the violations it commits? Is the rebel movement responsible if it does not become the new government of a State? (GC I-IV, Art. 3)
    b. Is it acceptable that responsibility for violations of IHL by a rebel movement depends on that movement’s success? Does it also depend on the legitimacy of its struggle?
    c. When can we say that a movement is sufficiently organized for the State, of which it later becomes the government, to be responsible for the violations of IHL committed by that movement before obtaining power? From what level of organization does the movement itself become responsible for its violations? (GC I-IV, Art. 3; P II, Art. 1)
5. *(Art. 16)* When can we consider that a State is aiding or assisting another State to commit violations of IHL? Are the obligations contained in Art. 1 common to the Geneva Conventions and to Protocol I the same as those contained in Art. 16 of the Articles? Is the supplying of weapons, when the supplier knows that they will be used in violations of IHL, itself a violation of IHL? Is the supplying of weapons whose use is banned by IHL a violation of IHL? For it to be a violation, must both States be subject to the ban? Is there illegal aid if only the supplier State is subject to the ban? Is there wrongful aid if only

the buyer State is subject to the ban, but not the supplier State?

6. *(Art. 21)* May self-defence ever be a circumstance which precludes wrongfulness of what would otherwise be a violation of IHL by a State? Does the same apply to a grave breach committed by an individual? [ICC Statute, Art. 31(1)(c), **See** The International Criminal Court [A. The Statute]]
7. *(Art. 25)*
    a. May necessity be a circumstance precluding wrongfulness of what would otherwise be a violation of IHL by a State? If yes, in what circumstances? Why may it generally not be invoked for this purpose? Is it because IHL implicitly excludes this possibility?
    b. Which rules of IHL allow certain behaviour in the case of military necessity? Are they primary or secondary rules?
    c. May necessity be a defence for a grave breach of IHL by an individual? [ICC Statute, Art. 31(1)(c), See The International Criminal Court [A. The Statute]] In what circumstances? Are the answers to questions a. and c. the same? Are they determined by the same rules?
8. Does Art. 26 in itself not imply that Arts 21 and 25 of the Articles can never be invoked to justify a violation of IHL?
9. In the case of a violation of IHL, does the responsible State have duties towards the individuals who are victims of the violation (GC I-IV, Arts 6/6/6/7, 7/7/7/8 and 51/52/131/148 respectively)? Even if the individuals are nationals of the responsible State? How can these victims invoke this responsibility? Do Art. 3 of Hague Convention IV and Art. 91 of Protocol I imply that victims may seek compensation?
10. What duties does a State have when it is responsible for a violation of IHL?
11. Are the general rules on forms and content of reparation all fully applicable in the case of violations of IHL? Who must pay compensation to whom?
12. *(Arts 40 and 41)*
    a. Which violations of IHL come under Chapter III of Part Two of the Articles?
    b. What is the relationship between Art. 41(1) of the Articles, Art. 1 common to the Geneva Conventions and to Protocol I, and Art. 89 of Protocol I? Does this first provision mean that Art. 89 is also valid in non-international armed conflicts?
    c. What are the lawful means to be used in order to put a stop to violations of IHL? Must they have been prescribed by IHL? By international law? Is it sufficient that they are not contrary to a prohibition in international law? May the legality of a method also flow from the legality of countermeasures that violate rules other than IHL? Are the conditions of Arts 49-51 of the Articles applicable to countermeasures taken by third States under Art. 41(1) of the Articles? Under Art. 1 common to the Conventions and to Protocol I?
    d. Is Art. 54 of the Articles applicable for violations covered by Chapter III of Part Two of the Articles?
13. *(Arts 42 and 48)*
    a. Which is the injured State in the case of a violation of IHL? Of a violation of the IHL of non-international armed conflict? Do Art. 1 common to the Conventions and Art 1(1) of Protocol I mean that all States Parties are injured in the case of a violation of IHL?
    b. If not, which violations of IHL entitle States other than the injured State to invoke State responsibility? All violations of IHL? Must these States act together?
    c. What is the relationship between Art. 48 of the Articles and Art. 1 common to the Conventions and to Protocol I?
    d. What is the relationship between Art. 48(1)(b) and Art. 41(1) of the Articles?

14. *(Arts 49-51)*
    a. May a State injured by a violation of IHL take countermeasures? If yes, which ones? What are the limits?
    b. May a State injured by a violation of international law (humanitarian or other) take countermeasures that consist in the temporary non-execution of its obligations under IHL? At least obligations that do not preclude their violation as a reprisal? (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); CIHL, Rules 145-147)
    c. Are reprisals that are not banned by IHL but which consist in the non-performance of obligations under IHL (for example the use of certain weapons against combatants) prohibited by Art. 50(1)(d) of the Articles?
    d. Is the use of famine as a countermeasure against a civilian population prohibited? In an armed conflict, does this prohibition come from IHL or from Art. 50(1)(b), (c) or (d) of the Articles? (P I, Art. 54; CIHL, Rule 53)
15. *(Art. 54)*
    a. What measures does Art. 54 allow a third State to take in response to a violation of IHL by another State? In this case are countermeasures allowed? Does Art. 54 preclude countermeasures which violate international law (other than humanitarian)?
    b. Is Art. 1 common to the Conventions and to Protocol I *lex specialis* with regard to Art. 54 of the Articles and if so, does it authorize countermeasures by all States if IHL is violated?
16. *(Art. 55)* List some special rules of IHL on State responsibility.