State Responsibility

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Today’s lecture

I. Nature of State responsibility

II. Conduct involving State responsibility

III. Consequences of State responsibility
I. Nature of State responsibility

- Breach involves obligation to make reparation (*Chorzów Factory*)
- Secondary rules
- *lex generalis*
- Unitary system
SR vs. the law of treaties

Breach of a treaty:

- **Law of Treaties**
  - termination
  - (end of treaty relationship)

- **Law of State Responsibility**
  - reparation
  - (new obligation)
What is State responsibility?

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

Article 1 ARSIWA/ILC Articles
II. Elements of an IWA

“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 2 ARSIWA
Conduct involving State responsibility

- conduct/IWA
- breach
- attribution

circumstances precluding wrongfulness
Internationally Wrongful Act

- Act or omission
- Governed by international law
- Legal status of an act under national law is not relevant (Art. 3)
Attribution

• A State is responsible for the conduct of its organs (Art. 4)

• ... even when those organs are acting in excess of authority (Art. 7, Mallén case).

• 6 special cases
State organ

• “A State organ is one which carries out State functions — this includes any organ with that status under national law” (Art. 4).

• However, national law cannot be decisive (Art. 3).
State responsibility for the conduct of private persons/entities

1. Persons or entities empowered to exercise elements of governmental authority (Art. 5)
2. Foreign State organs placed at another State’s disposal (Art. 6)
3. Persons or entities acting under the direction and control of the State (Art. 8, Nicaragua)
4. Persons or entities exercising elements of governmental authority in default of the official authorities (Art. 9)
5. Successful revolutionary movements which become the government (Art. 10)
6. Where and to the extent that the State acknowledges and adopts the conduct (Art. 11, Teheran Hostages)
Breach

• Breach of an international obligation by a State is an “act of that State is not in conformity with what is required of it by that obligation” (Art. 12).

• The obligation must be in force for the State at the relevant time (Art. 13).

• Breach may be continuing (Art. 14; Rainbow Warrior) or consist of a composite act (Art. 15).
Aggravated responsibility

- Article 40 and 41: “serious breaches of obligations under peremptory norms of international law”.

- Dual criterion: obligation and breach

- Consequences: all other States under a duty
  - To co-operate and bring breach to an end
  - Not to recognise its legal consequences
  - Not to aid or assist the continuing breach

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (ICJ 1971)*
Circumstances Precluding Wrongfulness (CPW’s)

• Consent (Art. 20)

• Force majeure (Art. 23)
  - An irresistible force or an unforeseen event
  - Beyond the control of the State (i.e., the State was “unable to avoid or oppose (it)”),
  - Making performance of the obligation materially impossible (note “impossible” not “difficult”)

• Distress (Art. 24)
  - Where a person whose acts are attributable to the State has “no other reasonable way... of saving (his/her)... life or the lives of other persons entrusted to... (his/her) care”.
CPW’s (2)

- **Necessity (Art. 25)**
  - “Necessity may not be invoked... unless the act:
    - is the only way for the State to safeguard an essential interest against grave and imminent peril; and
    - 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.”

- **Self-Defence (Art. 21)**

- **Countermeasures (Art. 22)**
III. Consequences of State responsibility

• Content of State responsibility
• Invocation
• Countermeasures
Content State responsibility

• Continued duty of performance (Art. 29)
• Cessation of IWA and appropriate assurances and guarantees of non-repetition (Art. 30)
• Obligation to make full reparation (Art. 31)
Reparation

- Restitution (*status quo ante*, Art. 35)
- Compensation (Art. 36)
- Satisfaction (Art. 37)
Invocation (standing)

• **Injured States (Art. 42)**
  - if the obligation breached is owed to that State individually, or
  - Group of States/internat. community if breach (i) specially affects or (ii) radically changes position of all other States to which the obligation is owed

• **Non-injured States (Art. 48)**
  - erga omnes or collective interest
  - call for (a) cessation and non-repetition and (b) performance of the obligation of reparation

• **Why distinction? Countermeasures**
Countermeasures

• Suspension of performance of an international obligation in order to induce a wrongdoing State to resume compliance with legal obligations (Art. 49)
• Injured States
• Non-injured States and jus cogens breaches (Art. 54 and State practice significant human rights breaches)
Countermeasures (2)

• **Preconditions (Art. 52)**
  - call upon responsible State, notice, negotiate
  - urgent measures to preserve rights
  - cease with end of wrongful conduct or court/tribunal

• **Form of action (Art. 49)**
  - non-performance of obligation
  - directed at wrongdoing State only
  - generally, must be readily reversible

• **Limitations (Art. 50, 51)**
  - no threat or use of force (Art. 2(4) UN Charter), respect fund. HR, no reprisals, and proportionality (with original injury, wrongful act, rights in question)
Summary

- IWA: breach, attribution, CPW’s (consent, force majeure, distress, necessity, self-defence, countermeasures)
- Content (a.o. reparation = restitution, compensation, satisfaction), invocation, countermeasures
Any questions?