Chapter 40

THE OBLIGATION TO MAKE REPARATION

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A new legal relationship arises on the commission of an internationally wrongful act attributable to a State. Where a State has been recognized as the author of an internationally wrongful act—whether the conduct consists of an act or an omission—it is not contested that the State has an obligation to make reparation for the injury caused by its conduct. This is not unique to international law. As in all legal systems, the notion of responsibility implies the substitution of a primary obligation by a secondary or subsidiary obligation, which is to make reparation for the consequences of the breach. This subsidiary character of international responsibility has been emphasized on many occasions: according to Roberto Ago:

> The rules relating to State responsibility are complementary to other substantive rules of international law—to those giving rise to the legal obligations which States may be led to violate.[1]

Similarly, Paul Reuter stressed that: 'one of the dominant characteristics of responsibility is its non-autonomous character'.[2]

1 Affirmation of the reparation principle

The basic idea that breach of a primary obligation gives rise on the part of the responsible State to a secondary obligation to make reparation for the injury caused was clearly affirmed by the Permanent Court of International Justice in the *Factory at Chorzów* case, where it stated:

[1] R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol. II(1), 219 (para 61).
[2] P Reuter, 'Principes généraux du droit international public' (1961-II) 103 *Recueil des Cours* 595.

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, consequently differences relating to its application.[3]

In a subsequent judgment given in the same case, the Court reaffirmed this fundamental principle: '[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'[4] Having stated this, the Court gave a concrete expression to this principle, when it rendered its decision on the extent of the obligation to make reparation:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which serve to determine the amount of compensation due for an act contrary to international law.

The *Dictionnaire Basdevant* is consistent with these principles: it defines the obligation of reparation as the performance that has to be executed in favour of a State or an international organization to compensate the loss suffered. It consists of the restoration of the state of affairs that existed prior to the wrongful act (*restitutio in integrum*) or the payment of a pecuniary indemnity.[6] More recently, the *Dictionnaire Salmon* has taken the same approach: it states that 'in its more general meaning, reparation leads to the restoration of the state of affairs prior to the occurrence of the loss by either putting things back as they were or by compensating the loss suffered'.[7]

The reparation should in principle 'erase', insofar as possible—because irreversible violations do occur—the wrongful act and restore the state of affairs that existed prior to it. Today, things are not so simple, as is indicated by the *Dictionnaire Salmon*:

following the work of the ILC, many commentators now consider the responsibility of a State for internationally wrongful acts as a complex situation created by a breach, which generates a set of rights in favour of the victim and of obligations owed by the wrongdoer, of which the obligation to make reparation is one.[8]

The new relations which result from an internationally wrongful act of a State are complex as is stated in Articles on State Responsibility, obligations additional to the one to make reparation. A first 'consequence'—which, it appears to us, is only the continuation of the situation anterior to the breach as opposed to one of its consequences—is that the existence of the internationally wrongful act does not affect as such the continued existence of the duty of the responsible State.[9] A second consequence is that the State is under an obligation to cease the internationally wrongful act, as long as it is continuing, and to

[3] *Factory at Chorzów, Jurisdiction, 1927, PCIJ Reports, Series A, No 9*, p 4, 21.
[4] *Factory at Chorzów, Merits, 1928, PCIJ Reports, Series A, No 17*, p 4, 47.
[5] Ibid, 47. [6] *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), 52[illegible]
[7] *Dictionnaire de droit international public* (Brussels, Bruylant/AUF, 2001), 975.
[8] Ibid, 999. [9] ARSIWA, art 29.

progressive developments introduced by the ILC, to 'offer appropriate assurances and guarantees of non-repetition if circumstances so require'.[10] Finally, the main consequence is the obligation to make full reparation.[11] As has been discussed in Chapter 17, this split in the notion of responsibility into different obligations could have been avoided had the ILC insisted on the concept of legal injury, but this is not the place to reconsider this question. The following discussion focuses solely on the obligation to make reparation of moral and material injury, as enunciated by the ILC.

2 Reparation in the Articles on State Responsibility

a The principles

The content of the obligation to make reparation

Article 31 states the well-established principle relating to the obligation to make reparation for the consequences of an internationally wrongful act. Entitled 'Reparation', it reads as follows:

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.

These two paragraphs more or less demonstrate that there are two points of view: the first paragraph is drafted so that the focus is on the obligations of the responsible State, whereas the second paragraph deals with the extent of the rights of the injured State. The obligation to make *full reparation* is affirmed, even if this affirmation of the obligation to make full reparation is relatively succinct.[12]

The text of draft article 42 adopted in first reading in 1996 was far more comprehensive:

Article 42
Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.
2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of

[10] Ibid, art 30. [11] Ibid, art 31.
[12] The ICJ affirmed the obligation to make full reparation (citing article 31) in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 460. See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), ICJ Reports 2002*, p 3, 31–32 (para 76); *Avena and Other Mexican Nationals (Mexico v United States of America), ICJ Reports 2004*, p 12, 59 (para 119); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 168, 257 (para 259); *Reports and Recommendations made by the Panel of Commissioners concerning Part Three of the Third Instalment of 'F3'* (UNCC, 18 December 2003 (UN Doc S/AC.26/2003/15), para 220(c); *ADC Affiliate Limited and ADC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16), Award of 2 October 2006, para 484; *CME Czech Republic BV v Czech Republic, Partial Award of 13 September 2001*, para 616; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentina* (ICSID Case No ARB/02/1), Decision on Damages of 25 July 2007, para 31.

(a) the injured State; or
(b) a national of that State on whose behalf the claim is brought.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.
4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide reparation.'[13]

Whilst the text of 1996 was more detailed, it was also more heteroclite, since in addition to affirming the principle of full reparation, it dealt with, on the one hand, the modalities of this reparation, and on the other hand, particular and limited aspects of the question of the causal link—in the case of a contribution to the injury—as well as two specific aspects: the limits of reparation and the impossibility of invoking domestic law as a justification to avoid making full reparation. In relation to the limits on reparation, the 1996 draft article was innovative as it proposed a principle according to which the reparation could not result in depriving the people of a responsible State of its means of subsistence. It is clear that this limitation was introduced as a result of the justified concerns arising out of the humanitarian situation in Iraq following the UN embargo imposed in 1990. While the principle was justified, certain members of the ILC advocated a principle according to which the limitations on reparation should equally not deprive the population of the victim State of its means of subsistence! The subsequent political debate led to the removal of the limitation in the final articles. However, it is interesting to note that in its recent Damages Awards, the Eritrea-Ethiopia Claims Commission noted that article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which applied to both States, provided that 'in no case may a people be deprived of its means of subsistence'.[14] The Commission noted that it considered whether it was necessary to cap the amount of compensation to ensure that the financial burden on the State would not be so excessive as to compromise its ability to meet its people's basic needs; but ultimately held that it need not do so in claims on that basis.[15]

Reliance upon domestic law by a State in order to avoid full reparation is also excluded; but neither is it permissible in order to avoid the other 'legal consequences' of an internationally wrongful act: the ILC therefore elected to enunciate this principle in general form in article 32.

The modalities of reparation can be diverse and it is not necessary to comment on them here.[16] By way of summary, the primary form of reparation is restitution but the obligation to make reparation can also take the form of compensation or a measure of satisfaction. These three forms of reparation may be used separately or may be combined to ensure full reparation of the loss suffered.[17]

It should be noted that while adopting the principle of full reparation, the ILC introduced limitations so as to avoid disproportionality. More precisely, whatever the chosen modality of reparation, it should be proportionate to the loss: restitution must not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation;[18] compensation should be limited to the injury actually suffered as a result of the internationally wrongful act and with a sufficient causal link (implicitly provided for in article 31); and satisfaction 'shall not be out of proportion to the injury and may not take a form humiliating to the responsible State'.[19]

[13] *ILC Yearbook 1996*, Vol II(2).

[14] International Covenant on Civil and Political Rights, 16 December 1966, 999 *UNTS* 171; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 *UNTS* 3.

[15] Eritrea-Ethiopia Claims Commission, *Final Damages Award, Eritrea's Damages Claim*, 17 August 2009, 6–7 (paras 19–23); Eritrea-Ethiopia Claims Commission, *Final Damages Award, Ethiopia's Damages Claim*, 17 August 2009, 6–7 (paras 19–23).

[16] See below, Chapters 41–42.

[17] ARSIWA, art 34.

The beneficiary of the obligation to make reparation

Article 33(1) states:

> 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 the circumstances of the breach.

In the introductory Commentary to Chapter III of Part Two, which deals with 'Serious breaches of obligations under peremptory norms of general international law', the ILC states that 'all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole'.[20]

Nevertheless, while some of the consequences of a breach can be invoked by diverse States, the obligation to make reparation can only benefit the injured State, and also possibly private individuals protected by the primary obligation which has been breached, this latter possibility having been introduced in the text due to concern for the protection of human rights.[21]

On closer consideration, one can note that the obligation to make full reparation may only be invoked by—or possibly for—the 'injured State'. The definition of injured State is complex. The Articles distinguish between three categories of injured States. First, a State is injured when an obligation which is owed to it individually is breached:[22] the Commentary explains this by indicating that while this situation arises under a bilateral treaty, it may also arise under a multilateral treaty such as the Vienra Convention on Diplomatic Relations, which in effect establishes a bundle of bilateral obligations (even if this does not exclude that all States parties have a legal interest with regard to diplomatic immunities).[23] Second, a State is injured if it is specially affected by an obligation owed to a group of States including the international community as a whole.[24] The Commentary discusses collective obligations and gives as an example the case of pollution of the high seas in breach of the United Nations Convention on the Law of the Sea, breach of which may particularly affect one State, although all States have a legal interest in the application of the Convention.[25] It is not clear why the ILC drew a distinction between these two situations, as in both cases there is both a State specially injured and other States whose legal interest is affected: it appears that there is no practical utility in the distinction. Third and finally, a State is injured if it is party to a multilateral treaty or bound by a customary rule which includes integral or

[18] ARSIWA, art 35(b).

[19] Ibid, art 37(3).

[20] Commentary to Part Two, Chapter III, para 7.

[21] On responsibility in relation to human rights, see below, Chapters 51.1–51.4. In his separate opinion in *Armed Activities on the Territory of the Congo*, Judge Simma suggested that Uganda's second counterclaim should have been considered by the Court on the basis that Uganda had standing to raise claims relating to international human rights and international humanitarian law even if the victims were not Ugandan nationals: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, Separate Opinion of Judge Simma, p 334 at 348–349 (para 37).

[22] ARSIWA, art 42(a).

[23] Commentary to art 42, para 6.

[24] ARSIWA, art 42(b)(i).

[25] Commentary to art 42, para 12.

interdependent obligations: in these circumstances the breach of such an obligation
such a character as radically to change the position of all the other States to which th
gation is owed with respect to the further performance of the obligation'.[26] More
this provision refers to obligations whose breach has an impact on all the States to
this obligation is owed: the Commentary gives as an example a disarmament treaty

A 'State other than the injured State' may only insist on the performance of the
tion to make full reparation in the interest of the injured State or of the benefic
the obligation breached.[28] An interesting point can be made here. In the Comm
article 48, the ILC specifies why the formula 'State other than the injured State'
rather than 'State with a legal interest'. According to the ILC:

> Although the Court [in *Barcelona Traction*] noted that 'all States can be held to have a legal
> in' the fulfilment of these rights, article 48 refrains from qualifying the position of the State
> fied in article 48, for example by referring to them as 'interested States'. The term 'legal
> would not permit a distinction between articles 42 and 48, as injured States in the sense of
> 42 also have legal interests.[29]

It seems that this is a confirmation of the criticisms previously discussed (in Chapter
of the uncertain character of the distinction between the two categories of States
results from the refusal to take into account the notion of a legal injury. If the State
tioned in article 48 do not have a legal interest and if they are not even interested
we can question what gives them a cause of action?

In any case, the right of action of a State other than the injured State arises from
breach of an obligation owed in the collective interest of a group of States (*erga*
partes obligations) or the international community as a whole (*erga omnes* obligation

The difference between an injured State and a State which only has a legal interest
in the words eventually chosen by the ILC, a State other than the injured State
the former can insist on the fulfilment of all aspects of international responsibility,
ing the taking of countermeasures, whereas the latter can only claim the reinstatement
the breached legal order, that is, cessation of the breach and possibly guarantees of
repetition, and—but this hypothesis appears quite theoretical—seek reparation
name of the injured State if the latter cannot or does not want to do so, or the
beneficiaries of the obligation.[31] Further, States other than the injured State have
to take countermeasures.

If, as the ICJ has rightly stated in *Barcelona Traction*, 'all States can be held to have
interest' in case of breaches of *erga omnes* obligations,[32] it would have been more
to consider, as the ILC did in its 1996 draft, that in this case all States are injured
and that they may, by invoking the injury suffered, claim reparation of the breach
thus seek the reinstatement of the lawful situation. In the Articles as adopted, it is not
where the right of action of the States other than the injured States originates.

The idea of creating a right to reparation—a right to obtain the reinstatement
breached legal order—for all States on the commission of an international crime
to use the concept ultimately accepted, on the serious breach of an obligation

[26] ARSIWA, art 42(b)(ii). [27] Commentary to art 42, para 13. [28] ARSIWA, art 48(2).
[29] Commentary to art 48, para 2.
[30] See above, Chapters 29–31, and further below, Chapters 45–50. [31] ARSIWA, art 48(2).
[32] *Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970*, p 3, 32 [para 33].
[33] See above, Chapter 29.

an imperative norm of general international law—is not a bad idea in itself, as it
in the framework of the traditional mechanism of responsibility, to institute a
of legality of the legal order. The real problem comes from the possibility of tak-
countermeasures: it was certainly not desirable to make this available to a wide range
. It would however have been sufficient to provide that a legal injury does not
on a right to take countermeasures. This is indeed the solution reached by the
since the breach of an *erga omnes* obligation towards a State other than an injured
essentially enables the other State, although on an unspecified basis, to claim the
ment of the legal order and nothing else; the obligation to make reparation only
the injured State even if it can be requested on its behalf by a State which is not
articles 42 and 48); and countermeasures may only be taken by the injured State
49).

The undiscoverable difference between injury and damage

LC's text, stating that 'injury includes any damage, whether material or moral'[34]
to indicate a distinction between two concepts: injury and damage. But is there
a difference between the two? The report of the Drafting Committee is not illumi-
as it is stated that:

> had been some discussion as to whether there was any distinction between the terms 'injury'
> damage'. Some members of the Drafting Committee had held the view that there was a diffe-
> ween the two terms, but had not agreed what that difference was. The Committee had
> decided to define injury as consisting of any damage.[35]

ce could not have said it better. We therefore believe that there is no difference
en the two terms.

me clarifications are however possible in relation to the substance of injury and
. On this point, the debates which took place within the drafting Committee are
native. They state that:

> ference to 'moral' damage in addition to 'material' damage was meant to allow a broad inter-
> on of the word 'injury'. 'Moral' damage could be taken to include not only pain and suffering,
> the broader notion of injury, which some might call 'legal injury' suffered by States.[36]

nevertheless, despite this affirmation with which we can only agree, as has been indicated in
ter 17 the notion of legal injury as such was not taken into account by the ILC.

The ghost of causation

the determination of compensable loss is at the heart of the question of responsibil-
said is of crucial importance, the most that can be said is that the ILC is particularly
on causation. The only assertion is that the injury can only be repaired if it is 'caused
internationally wrongful act'.[37] Nothing more. It is therefore left to States and

[34] ARSIWA, art 31(1). [35] *ILC Yearbook 2000*, Vol I, 388 (para 16).
[36] Ibid, 388 (para 16). The French text being more explicit, it is reproduced here: 'L'idée de dommage
a été ajoutée à celle de dommage "matériel" pour permettre une interprétation plus large du terme
". En effet, le dommage "moral" peut être entendu comme désignant non seulement la douleur et
ffrance, mais aussi des atteintes plus générales, que certains peuvent qualifier de "préjudice juridique",
aux États.'
[37] ARSIWA, art 31.

judges to give some content to the causal link which is necessary for international sibility to arise.

The ILC justified the fact that the issue of causal link has not been dealt with that '[t]he need for a causal link was usually stated in primary rules'.[38] Nevertheless clear that this is not the case and that, even if in certain cases the primary rule some causal link problems, it cannot be the same causation as the one which the primary rule is breached. It is regrettable that the ILC did not clarify the difficu relating to the causal link.

Supplementary information, although non-exhaustive, is given at article 39 'Contribution to the injury' which states that:

> [i]n the determination of reparation, account shall be taken of the contribution to the injury ful or negligent action or omission of the injured State or any person or entity in relation reparation is sought.

It is not clear why only the contribution to the injury of the injured State or any relation to whom reparation is sought is taken into account. In order to examine the link properly, it would have been necessary to take into account the possible contribution to the injury of all actions which do not constitute wrongful acts, such as a legal act mitted by the State which has committed a wrongful act, *force majeure*, or the action third party State which contributes to the final injury.[39]

Moreover, article 39 gives rise to another problem. Not all actions or omissions State or injured individuals are taken into account: only actions or omissions which wilful or negligent are taken into account.[40] The idea of fault is introduced here though it has no role in the theory of international responsibility, to determine the tum of damages. We believe that only the existence or non-existence of the causal should be relevant.

Further reading

A Bissonnette, *La satisfaction comme mode de réparation en droit international* (Thèse, Genev
B Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone 1973)
C Dominicé, 'De la réparation constructive du préjudice immatériel souffert par un Etat
C Dominicé (ed), *L'ordre juridique international entre tradition et innovation. Recueil d'*
(Paris, PUF, 1997), 354
P-M Dupuy, 'Observations sur la pratique récente des "sanctions" de l'illicite' (1983) *RGDI*
B Graefrath, 'Responsibility and Damages Caused, Relationship between Responsibility and Damages' (1984-III) 185 *Recueil des cours* 9
CD Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987)
M Iovane, *La riparazione nella teoria e nella prassi dell'illecito internatzionale* (Giuffré, Milan 1990)

[38] *ILC Yearbook 2000*, Vol I, 388 (para 17).

[39] On these questions of causation, one can usefully refer to the detailed developments in B Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité international* (Paris, Pedone, 1973), in particular entitled 'Dommage et lien de causalité', 177–359.

[40] Article 39 was approved by the annulment committee in *MTD Equity Sdn Bhd and MTD Republic of Chile* (ICSID Case No ARB/01/17), Decision on Annulment of 21 March 2007, para the claimants had made decisions which increased the risk of the investment.

Reparation for Gross Violations of Human Rights Law and International Law at the International Court of Justice', in C Ferstman, M Goetz & Stephens (eds), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Place and Systems in the Making* (Leiden, Martinus Nijhoff, 2009), 283
La réparation du préjudice en droit international public (Paris, Sirey, 1939)
Mazzeschi, 'La riparazione per violazione dei diritti umani nel diritto internazionale e la Convenzione Europea' (1998) 53 *La Comunità Internazionale* 215
Bothe & C Tomuschat (eds), *State Responsibility and the Individual. Reparation in Cases of Grave Violations of Human Rights* (The Hague, Nijhoff, 1999)
La réparation comme conséquence de l'acte illicite en droit international (Paris, Sirey,
'La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux' (1929-III) 28 *Recueil des cours* 231
Remedies in International Human Rights Law (2nd edn, Oxford, Clarendon Press, 2007)
'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 *AJIL*
'La pluralité des causes de dommages et la responsabilité civile (La vie brève d'une équation: causalité partielle = responsabilité partielle)' (1970) I *JCP* 2339