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-The law of State responsibility is customary and residual. It applies only if the State breaching the obligation and the State to which the obligation is owed have not made legally binding alternative arrangements.

-ILC's **Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles)**- reflects both the customary rule of international law and the general principles of law.

- *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex (*Responsibility of States for Internationally Wrongful Acts*) art .

- *Draft Articles on State Responsibility* art .

Existence of responsibility

The Art 1 of the DASR proclaims that every internationally wrongful act of a State entails the international responsibility of that State. It reflects both a customary rule of international law and a general principle of law recognised by civilised nations.

DASR Article 1: Responsibility of a State for its internationally wrongful acts

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

-A state's responsibility for an action in international law is never affected by the fact that the state's internal laws permit the state to take the said action.

- The law of State responsibly gives supremacy to the obligation under international law- the fact that an obligation under international law is inconsistent with domestic law is not, a defence to an alleged breach of international obligation- **Article 3**

Internationally wrongful act

In order to establish an internationally wrongful act of a State, there must be conduct consisting of an action or omission which is attributable to the State under international law and must constitute a breach of international obligation of the State.

DASR 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.

- Both elements must be satisfied.

Attribution

The conduct of organs of a State shall be considered an act of that State under international law.

DASR 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.
- All persons holding public office under a States laws and all collective bodies performing official functions under a States' laws, will engage the responsibility of the State when they perform an internationally wrongful act.
 - Official acts of any level of government- central, regional or local are also attributable to the State.
 - The acts of organs of the constituent territorial elements of a federal state ('states' in Australia) are attributable to the federal State. A constituent territorial unit's conduct may not, however, be attributable to the federal State where that territorial unit as entered into an international agreement on its own account and the wrongful act consists of a non-observance of that agreement. Similarly, the federal States responsibility may be limited by a treaty clause exempting the federal state from responsibility for breaches committed by its constituent territorial units. – *Yearbook of the International Law commission* (2001)

Other persons exercising official authority

The conduct of persons or entities exercising elements of governmental authority are attributable to their State, provided the person or entity is acting in that capacity in the particular instance.

DASR 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.

- Applies to privatised state services, eg security companies running prisons, etc
- Includes **public corporations, semi-public entities, public agencies, private companies**, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.

State organs at disposal of another State

DASR 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.

- Eg: Australia sends police officers to assist in the aftermath of an overseas earthquake
 - The scope is relatively narrow. It is not enough that the organs of State B are performing functions for State A's benefit. Rather, the loaned organs must truly be 'placed at the disposal of' State A before State A will be responsible for their conduct. The loaned organs must be acting with the consent, under the authority, and for the purposes of State A- *ILC Commentaries*
 - Further, in performing the functions entrusted to it by State A, the organs must act in conjunction with State A's machinery and under its exclusive direction and control, rather than on instructions from State B. Draft Article 6 does not apply to ordinary instances of international cooperation or collaboration.
 - If it can be established that the loaned organs are covered by Article 6, then only state A will be responsible for their internationally wrongful conduct, State B will not be concurrently responsible. – *ILC Commentaries*

Ultra vires acts

DASR 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.

- Eg: police officers assault an overseas tourist in a police cell, even though they have been explicitly told not to.
 - A State will be liable if an official exceeded their authority under domestic law- this remains so even if the conduct was overtly or manifestly unlawful.
 - In determining whether a person is acting in an official capacity (*Caire Claim*) he or she either:
 - i) holds himself or herself out as performing official functions; or
 - ii) uses powers, methods or means placed at his or her disposal by virtue of an official capacity
 - In both situations, the person's conduct is attributable to the State.

Direction or control of a State – where a private person (individuals or organisations) will be attributed to a State.

DASR 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.

- Eg: volunteers assisting at a major sporting event are instructed to submit suspicious-looking foreigners to degrading body searches. Employed as **auxiliaries or volunteers**.

The conduct of private persons is attributable to a State under Draft Article 8 if they are either **i) acting on the States instructions or ii) acting under the States direction or control.**

Conduct will be attributable to the State only if the State directed or controlled the specific operation and the conduct complained of was an integral part of that operation- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14

Lack of due diligence

A state may also be responsible for the consequences of unlawful conduct by private persons where the State has failed to exercise due diligence in preventing that conduct, such as where the States police forces fail to take reasonable steps to prevent mob violence or the activities of insurrectionaries:

Absence or default of official authorities – Where private persons perform elements of governmental functions without the authority of the State.

DASR 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.

- Eg: acts committed by the Revolutionary Guards in the immediate aftermath of the Iranian Revolution in 1979

Insurrectional and secessionist movements – p 266

- Movements for the purpose of either overthrowing a States government and replacing it with a new government, or securing the secession of part of a States territory so that a new State may be established on that territory.
- Ordinarily, the State against which the insurrection are directed is not responsible for the conduct of such movements because they are considered to be acts of private persons. Draft article 10, however prescribes some exceptional circumstances where a State will be responsible for the conduct of insurrectionaries or unlawful secessionist movements.

DASR 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.

- Will be attributable only if that movement becomes the States new government- otherwise will remain acts of private persons for which the State is not responsible. The rule involves, in effect, a retrospective imposition of responsibility on a State for the conduct of a successful insurrectional movement.
- ‘insurrectional movement’ – refers to ‘dissident forces or other organised armed groups which, under responsible command, exercise control over territory as to enable them to carry out sustained and concerted military operations’ - *protocol to the Geneva Convention* . Contrasted to ‘situations of internal disturbances and tensions such as riots, isolated sporadic acts of violence and other acts of a similar character.
- The conduct of successful secessionist or independence movements which are peaceful, or which use force short of actual insurrection are capable of being attributed to the new State- art 10(2).

Adoption

States may ‘acknowledge and adopt’ the conduct of another entity with the consequence that the conduct is attributed to the State.

DASR 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.

- Requires more than expression of mere approval.
 - State must do more than merely express support and approval of conduct.
 - What is required is something more than a general acknowledgment of a factual situation but rather that the State identifies the conduct in question and makes it its own- *ILC Commentaries*

Aiding or Assisting- A state will be responsible if it aids or assists another State in the commission of an internationally unlawful act.

DASR 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.
 - Eg: assisting the USA in the rendition of suspected terrorists
 - Eg knowingly providing an essential facility or financing the activity in question
 - Facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country
 - **The assisting State will be responsible only to the extent that its conduct has caused or contributed to the wrongful act.**

Reparation

Once it has been established that conduct constituting an internationally wrongful act has been committed and is attributable to a State, a question arises as to the appropriate consequences for that State. **Draft article 30** requires that the State cease the act if it is continuing and offer appropriate assurances of non-repetition if circumstances so require. Second, there is an obligation to make reparation, as indicated by **Draft article 31**.

DASR 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.

In *Chorzow Factory* case: the claim made by Germany was in respect of financial losses. Hence the court mentioned only restitution and monetary compensation or damages as entailments of an obligation to make reparation. (*Factory at Chorzów (Germany v Poland) (Merits)* [1928] PCIJ (ser A) No 17, 31).

Restitution

- Is the primary form of reparation

DASR 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.

Compensation

Where restitution is not available, or it not sufficient to effect full reparation, compensation may be payable.

DASR 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.
 - Compensation is secondary to restitution and is available only where damages is not made good by restitution.
 - Compensation covers any financially assessable damage. The term ‘damage’ embraces both material and moral/mental damage’ - feelings, humiliation, shame, loss of social position etc.

Satisfaction

- When restitution and compensation is not possible.

- States employ satisfaction as a remedy in circumstances where an internationally wrongful act is not financially assessable and constitutes an affront to the dignity of the victim State.

DASR 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.

DEFENCES- circumstances precluding wrongfulness

Consent

- An act by a State will not be internationally wrongful if the State said to be the victim of that act has validly consented to it, and provided the act remains within the limits of any such consent.- **DASR Article 20**

Self-Defence

- An act of self-defence, taken in conformity with the United Nations Charter will not be internationally wrongful- **DASR Art 21.**

Countermeasure

- To the extent that an act by a State is a legitimate countermeasure against another State, the act will not be internationally wrongful against that other State- **DASR Art 22.**
- Countermeasures taken by a state must be proportionate and taken only in order to induce another State which is in breach of its obligations to comply with those obligations. (**DASR art 51, 49(1)**)
- The countermeasures adopted must, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.(art 49(3)) Where the breach has already ceased, a countermeasure taken in response will be unlawful.

UN Charter

Art 2(4)

‘All Members shall refrain in their international relations from the **threat or use of force** against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’

Art 51:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an **armed attack** occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security.

(...)

Rights in international law arising from hostile action



RCMSSD = right to counter-measures short of self defence
RSD = right to self defence

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Force Majeure

- If an act is performed due to *force majeure*, its wrongfulness is precluded.
- Force majeure 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.' - **DASR Art 23(1)**.
- May be due to a **natural or physical event** (stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or **human intervention** (e.g. loss of control over a portion of the States territory as a result of an insurrection or devastation of an area by military operations carried out by a third State).

DASR 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.

Distress

- A State may rely on distress where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. Draft article 24(1) precludes the wrongfulness of conduct adopted by a State agent in circumstances where the agent had no other reasonable way of saving life.

DASR 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