# CHAPTER - 3 STATE RESPONSIBILITY AND ITS FOUNDATIONS

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3.1 State Responsibility: Legal Views

The doctrine of state responsibility is one of the core tenets of international law. Legally speaking state responsibility is ‘simply the principle which establishes an obligation to make good any violation of international law producing injury’. State responsibility arises out of the legal maxim stated by Grotius in 1646 that ‘every fault creates the obligation to make good the losses’. As states are the conventional subjects of international law, technically the principle of state responsibility applies only on the state-to-state level. Duties owned to citizens are left out. The ILC Articles on State Responsibility affirm this traditional, state centric definition of state responsibility; crystallize customary international law on state responsibility and set out reparation, restitution, compensation, satisfaction and guarantees of non-repetition as the basic legal tools states have to remedy injuries. Although the ILC Articles took forty years to negotiate, ‘the greatest relevance of the articles may ultimately lie outside the scope, as many states have now taken on new legal obligations that the unilateral or vertical, in the sense that they concern duties owed by the states to individuals breach of these duties is unlikely to injure another state directly or give to a classic claim for reparations’. Nonetheless, many jurists argue that the principles underlying the ILC articles also pertain to the obligations states owe their citizens, and the articles have been referenced in the judgments of influential human rights bodies such as the Inter-American Court of Human Rights.

These developments reflect the relatively recent but fundamental shift in the international law towards recognition of the rights and duties of individuals agreements including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights clearly delineate individual human rights the state is bound to respect, if not for moral reasons then because by signing these conventions, states have created binding legal responsibilities for themselves. The progress made in codifying the state’s responsibilities to individuals has prompted some progressive scholars and governments to argue that a state’s claim to sovereignty is dependent upon the state effectively shall during its primary responsibilities, including safeguarding human rights. According to Deng, when a state grievously fails to behave responsibility

towards its citizens, the state temporarily forfeits its claim to sovereignty and the international community is permitted to intervene\(^2\).

Although morally compelling and legally innovative, the notion of sovereignty as responsibility has unfortunately not translated into the development of strong enforcement mechanisms to curtail the sovereignty of irresponsible states and guarantee respect for individual rights. The judges at Nuremberg famously concluded that ‘international wrongs are committed by individuals and not by abstract entities’\(^3\).

In the modern context the International Criminal Tribunals for Rwanda and the Former Yugoslavia and the International Criminal Court help to ensure individual criminals are held responsible for egregious human rights violations. While the importance of individual accountability cannot be underestimated, it is equally crucial that states be held liable for abuses, particularly as an individual, no matter how far beyond the moral pale, cannot shoulder sole responsibility for large-scale crimes such as genocide. Individual leaders may mastermind atrocities, but both the individual and the institution must be held accountable for state-sanctioned crimes only because of the duty to make amends for these crimes cannot be discharged by an individual. Even if a war criminal had extensive financial resources that could be appropriated to fund the reconstruction and restitution programs necessary to remedy their crimes, it would be profoundly inappropriate for that person to be responsible for the delivery of these programs. This duty rightfully falls upon the more abstract political entity of the state. Yet states can often evade this duty because although the principle of state responsibility, ‘is well established in law and functions reasonably well in practice’ on an inter-state level, ‘with regard to individual victims of violation of human rights law the position remains much more uncertain’ and needs to be enhanced through more robust enforcement mechanisms\(^4\).

3.2 Contracted Responsibility: A Theoretical Perspective

Feeble as legal instruments for ensuring state responsibility may be, moral arguments often hold even less way over states. Nonetheless, social contract theory offers a compelling explanation of the origins of the state’s responsibilities to its


citizens and may be used in concert with international law to mount a forceful case for the State’s obligations to establish just conditions of return. Philosophers including Hobbies, Locke, Rousseau, Kant and Rawls appeal to the idea of a social contract to justify the institution of the state and illuminate what qualities political institutions should have. In its most basic form, social contract theory suggests that individuals sacrifice a significant degree of their personal liberty to the state in return for increased security and well-being, which individuals could not guarantee for them if acting alone. Thus, the social contract creates mutual obligation between the citizen, who promises to respect the rule of the sovereign, and the state, which pledges to protect its citizens. Part of the appeal of the social contract for theorist such as Rawls is that it conceives of the individuals as conceptually prior to political or social units, and is therefore compatible with notions of individual rights.5

Albeit a powerful explanatory device, classical social contract theory struggles to address the problem of consent. ‘There is no denying the attractiveness of the doctrine of personal consent, as the notion of consent highlights the reciprocal nature of the contract and the individual agency of the ‘signatories’6. Yet the contract is a fiction. At the best, consent is therefore tacit or hypothetical, but ‘a hypothetical promise is no promise at all, for no one has undertaken an obligation’7. Furthermore, ‘the nature and consequences of expressing dissent, namely emigration, seem to be far too serving’ for it to be maintained that the contract was undertaken voluntarily8.

Ironically, however, it is in addressing cases of forced migration that social contract theory is most persuasive; when the state transforms from a protector to a persecutor, it is difficult if not impossible to forward a convincing moral justification for the state’s existence. If the state fails in its primary duty to guarantee the people’s well being, the contract is void. Yet the significance of the contract is illustrated by its very invalidation: although the contract between citizen and state is only a ‘moral artifice’, the citizen turned refugee soon discovers that this link is ironclad compared to the ephemeral relationship the refugee has with foreign states, a relationship based on little more than unenforceable international laws and fleeting compassion.

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8  Supra Note 6, pp. 280-281
3.3 Basis of State Responsibility

Violation of international law constitutes the general basis of the international legal responsibility of states. In order to establish the existence of a violation of international law, it is necessary to establish, firstly, that there is a specific behavior consisting in action or inaction, that may, according to international law, be imputed to a given state, and secondly that such behavior constitutes a violation of that states in international obligations.9

Accordingly, a violation of international law is an action or failure to act on the part of a state that violates its international obligation as established by a norm of international law. When sovereign states recognized each other as free and equal, international relations were necessarily based upon reciprocity of rights and duties. Here, again, certain rules were picked out for enforcement by the community of nations, and to the accepted norms of international law, states may now be forced to submit. The machinery of enforcement for international law is essentially different from that for private law. Recognizing no common superior, states have mutual consent as the basis for their rules of conduct, and no new rule may be enforced upon a state without its own individual agreement to that rule. Membership in the community of nations, however, presupposes the acceptance, of the existent rules of that community; and it is upon this agreement to observe the rules of the community that international responsibility is founded.10

In England criminal law, tort and contract all contain examples of major issues, which have remained unresolved over long periods. Indeed, there is a good reason to suspect that count may prefer the flexibility, which a degree of uncertainty allows. Such a practical considerations are thought to be equally applicable to the rules relating to state responsibility.11

States may perform actions or fail to act only through natural persons (individuals) acting as their organs or officials. A state can be liable only on the grounds of the behavior of persons possessing specific legal relations with that state, in those who are its organs or officials. Thus the term “liability” is employed in international practice to denote a specific relationship between a persons or a group of

persons that commit a certain action or inaction, on the one hand, and the state that is responsible for their activities, on the other. This means that, from the point of view of international law, they must be viewed as activities, on the other. This means that, from the point of view of international law, they must be viewed as activities of that state.

The position of corresponding state bodies within that states organizational structure does not pay a substantial role in the emergence of the states international legal responsibility. The actions of legislative bodies leading to international responsibility include primarily the adoption of laws or any other normative acts that contradict the state’s international obligations. In such cases it becomes liable immediately upon the promulgation of the law. The failure to pass a law needed to carryout an international obligation gives rise to international liability only when there have been unlawful acts resulting from the failure to pass such laws\textsuperscript{12}.

The state is also subject to international legal responsibility for actions by its executive organs (ranging from the government itself to representatives of lower levels of the executive power), these bodies account for the majority of violations, there have been numerous instances of diplomats of imperialist states committing a variety of hostile acts against host countries, including direct violations of their laws, helping to organize conspiracies and coups d’etat, engaging in an espionage etc.,

A state’s international obligations may also be violated by the actions or failures to act of national courts since them, too, are organs of the state. The principle of the independence of the juridical power does not preclude the state responsibility, for this principle refers to the independence of courts in relation to governments, not to states.

State responsibility also arises for actions by its organs or official persons committed outside their formal competence, i.e. if they have exceeded their powers or violated instructions. Acts by an official person who uses his official position or service equipment to harm a foreign state or its citizens are viewed as actions by the state itself, for which it is held responsible.

A state’s responsibility may arise as a result of acts committed on its territory by private persons (its own citizens or foreigners) and their organizations. States are

\textsuperscript{12} Supra Note 9, p. 225
not responsible for the actions of private individuals, but for the behavior of their organs in failing to prevent such action or to punish the guilty parties, as they are obliged under the law. This is especially serious in the case of such acts by private individuals as international terrorism, war propaganda, racial discrimination and genocide.

It is generally recognized in international relations that a state cannot avoid international responsibility by referring to its domestic law, i.e. by arguing that its organs acted in full compliance with the prescriptions of domestic law. A state’s responsibility under international law relates exclusively to inter-state relations, and a state is responsible for the non-fulfillment of its international obligation independently of legislative acts relating to its domestic law.\(^{13}\)

It has already been noted earlier that, in principle, as a subject of international law, the state bears international legal responsibility only for its own actions, i.e. those of its own organs. This also applies to cases in which the responsibility of a state arises from actions by organs of other states that contradict international law and are initiated on its territory, or else from its territory against third states.

Two categories of such actions should be distinguished, namely, actions by another state carried out on the territory of the given state within its consent, and actions performed without its consent.

If actions of another state, directed against a third state and violating international law, are conducted on the territory or from the territory of the given state with its consent it becomes a party to the foreign states unlawful actions. This consent may be either adhoc or general. This issue often arises when there are imperialist military bases on the territory of another state. The state on whose territory there exist foreign military bases which are used for unlawful activities, in relation to a third state is an accomplice in such actions and bears responsibility for them since they are conducted with its consent, expressed in the agreement on the establishment of these bases.

When, on the other hand, illegitimate actions by a foreign state directed against a third state are conducted on the territory or else from the territory of a given state without its clearly expressed or tacit consent, then it is responsible for such

\(^{13}\) Ibid p. 227
activities only if its organs have not shown’ due diligence in taking measures to end
such activities by foreign states.

When a state permits on its territory activities by a foreign state that are, by
their very nature, directed against another state the problem of due diligence’ does not
arise, and such a state is responsible as an accomplice for any illegitimate activities by
the foreign state initiated on its territory or else from its territory against a third
state.

As a rule, responsibility arises when actions by the state violating the law
cause material or non-material damage to the legitimate interests of another state.
However, in the case of violations that are especially dangerous, responsibility may
arise on the grounds that the damage affects the international community as a whole.
Liability arises only when there is a direct causal relation between the damage that is
experienced and the illegitimate behavior of a given state.

3.3.1 Circumstances Precluding a State’s Responsibility

The theory and practice of international law takes note of the existence of
specific situations in which in spite of the apparent violation of international law,
liability on the part of a given state does not arise. Some of these circumstances
allow that the government undertaking these measures was realizing its rights, while
others point to the absence of guilt on the part of the state. These juridical facts and
factual situations indicate that there has been no violations of international law and
hence preclude state responsibility. Circumstances that preclude international state
responsibility should be distinguished from circumstances that free a state from
responsibility in which a states responsibility exists but is not acted upon.

3.4 International Law and the Doctrine and Theories of State
Responsibility

International Law is the body of law that governs relationships between
sovereign states. One of the conceptual foundations underlying international law is
that every state is sovereign and equal. Each state has equal standing under

14 Ibid, p.228
A/CN. 4.318/Add. 1-7); Reports of the ILC on the work of its XXXI and XXXII Sessions, New
17 Ian Brownlie, Principles of Public International Law, (5th Ed. 1998), p. 289
international Law and all international organizations are based on this inherent equality\textsuperscript{18}. Because states are regarded as equal entities under international Law, there exist rights and duties necessary to protect that equality. These rights and duties comprise the obligations under international law to which each state is held responsible\textsuperscript{19}.

Although states acknowledge their consent to be bound by some rules through signing and ratifying treaties and other agreements\textsuperscript{20}, there are certain rules that states must follow regardless of any express consent to do so\textsuperscript{21}. Such rules are contained in the body of international law know as custom. Customary international law is formed where there is (1) a widespread uniform state practice that (2) states follow out of belief that international law demands their conformity with that practice, a belief known as \textit{opinio Juris}\textsuperscript{22}. Customary international law is binding upon a state because the state is a part of a community of nations and does not depend on the express consent of the state: “membership in the community of nations presupposes the acceptance of the existent rules of that community and is upon this agreement to observe the rules of the community that international responsibility is founded\textsuperscript{23}.”

The doctrine of state responsibility is a fundamental principle of international law, the substance of which has developed through the customary practices of states.\textsuperscript{24} Thus, as a form of customary international law, it is binding on every nation, regardless of the nation’s consent. The law of state responsibility is based on the notion that because the state is a person under international law it can be held responsible for its actions as such\textsuperscript{25}. Like any other person when a state breaks a law it must receive some form of punishment.

The difficult question, however, is when exactly the state has broken international law. A state can only act through individuals whether officials of the

\begin{itemize}
\item \textsuperscript{18} U.N. Charter Art.2, Para 1 ("the (United Nations) is based on the principle of the sovereign equality of all its members").
\item \textsuperscript{19} \textit{Fordham Law Review}, 2002, p. 2
\item \textsuperscript{20} Supra Note 17, p. 436
\item \textsuperscript{21} Oppenhein’s, \textit{International Law}, (9th Ed. 1992) p. 29
\item \textsuperscript{22} Ibid p. 31
\item \textsuperscript{23} Supra Note 10, p. 6
\item \textsuperscript{24} Philip. C. Jessup, \textit{A Modern Law of Nations: An Introduction} ,(1968) ("the history of (the responsibility of states)- exemplifies the way in which a body of customary Law develops."). p. 95
\item \textsuperscript{25} Supra Note 21, pp. 500-01
\end{itemize}
state like its military or police forces or unofficial auxiliary forces of the state\textsuperscript{26}. Therefore determining when a state as opposed to the individual in her own right has violated international law is complicated the law of state responsibility provides a basis for determining what actions by an individual constitute a state’s violation of international law. Although many authors have written on the subject from a scholarly position, this body of law has been authoritatively codified by the ILC of the United Nations in the Articles on State Responsibility\textsuperscript{27}.

3.4.1 State Responsibility and the Fault Theory

It is often said that a state is not responsible to another state for unlawful acts committed by its agents unless such acts are committed willfully and maliciously or with culpable negligence\textsuperscript{28}.

It is difficult to accept so wide a conclusion and so invariable requirement. A general floating condition of malice or culpable negligence rather contradicts the scientific and practical considerations underlying the law as to state responsibility. Few rules in treaties imposing duties on states contain anything expressly in terms relating to malice or culpable negligence, and braches of those treaties may without more involve the responsibility of a state party. It is only in specific cases when particular circumstances demand it that willfulness or malice or negligence may be necessary to render a state responsible; for example, if the state knowingly connives in the wrongful acts of insurgents or rioters, it would become liable, although not generally otherwise, or if it were negligent in failing to provide adequate police protection for diplomatic premises against the injurious acts of demonstrators or rioters, and damage occurred\textsuperscript{29}.

There are contending theories as to whether responsibility of the state for unlawful acts or omissions is strict or whether it is necessary to show some fault or intention on the part of the officials concerned. The principle of objective responsibility maintains that the liability of the state is strict. Once an unlawful act has taken place, which has caused injury and which has been committed by an agent of

\textsuperscript{26} Bin Cheng, \textit{General Principles of Law as Applied by International Courts and Tribunals}, (1953), p. 183-84
\textsuperscript{27} Year Book of International Law Commission (1973), p. 169
\textsuperscript{28} J.G.Strake, \textit{Introduction to International Law}, (10th Ed. 1994), p. 312
\textsuperscript{29} Report of the International Law Commission on the work of its 25th session, 1973, Paragraph 58, in notes on Draft Article 3 on State Responsibility, referring to this case of negligence
the state, that state will be responsible in international law to the state suffering the
damage irrespective of good or bad faith. To be contrasted with this approach is the
subjective responsibility concept (the ‘fault’ theory) which emphasizes that an
element of international (dolus) or negligent (culpa) conduct on the part of the person
concerned is necessary before his state can be rendered liable for any injury caused\(^\text{30}\).

The relevant cases and academic opinions are divided on this question,
although the majority tends towards the strict liability, objective theory of
responsibility.

In the *Neer Claim*\(^\text{31}\) in 1926, American superintendent of a Mexican mine was
shot. The USA, on behalf of his widow and daughter, claimed damages because of the
lackadaisical manner in which the Mexican authorities pursued their investigations.
The general claims commission dealing with the matter disallowed the claim, in
applying the objective test.

In the *Caire Claim*\(^\text{32}\), the French-Mexican claims commission had to consider
the case of a French Citizen shot by Mexican soldiers for failing to supply them with
5,000 Mexican dollars. Verzijil, the presiding Commissioner, held that Mexico was
responsible for the injury caused in accordance with the objective responsibility
doctrine that is ‘the responsibility for the acts of the officials or organs of a state,
which may devolve upon it even in the absence of a “fault” of its own’.

A leading case adopting the subjective approach is the *Home Missionary
society claim*\(^\text{33}\) in 1920 between Britain and the United States. In this case, the
imposition of a ‘hut tax’ in the protectorate of Sierra Leone triggered off a local
uprising in which society property was damaged and missionaries killed. The Tribunal
dismissed the claim of the society (presented by the US) and noted that it was
established in international law that no government was responsible for the acts of
rebels where it itself was guilty of no breach of good faith or negligence in
suppressing the revolt. It should, therefore, be noted that the view expressed in this
case is concerned with a specific area of the law, viz the question of state
responsibility for the acts of rebels.

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31 4. RIAA, p. 60 (1926); 3 ILR, p. 213
32 5 RIAA, p. 516 (1929); 5 ILR, p. 146
33 6 RIAA, p. 42 (1920); 1 ILR, p. 173
In the *Corfu Channel Case*\(^\text{34}\), the International Court appeared to tend towards the fault theory\(^\text{35}\) by saying that:

“it cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima-facie* responsibility nor shifts the burden of proof.”

On the other hand, the Court emphasized that the fact of exclusive territorial control had a bearing upon the methods of proof available to establish the knowledge of that state as to the events in question. Because of the difficulties of presenting direct proof of facts giving rise to responsibility the victim state should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.

However, it must be pointed out that the Court was concerned with Albania’s knowledge of the laying of mines\(^\text{36}\) and the question of *prima facie* responsibility for any unlawful act committed within the territory of the state concerned, irrespective of attribution, raises different issues. It cannot be taken as proof of the acceptance of the fault theory. It is suggested that doctrine and practice support the objective theory and that this is right, particularly in view of the proliferation of state organs and agencies.

### 3.4.2 Imputability

“*Imputability*’ in the context of state responsibility means ‘attributable’. A state is only responsible for acts or omissions which can be attributed to it as its own. In international law, a state is responsible for the actions of:

(a) the government,

(b) any political sub division of the state,

(c) any organ, agency official employee or other agents of its government or of any sub division acting within the scope of their employment\(^\text{37}\).

Immutability is a legal fiction assimilating the acts of those identified above to the state as if they were its own. A state is not responsible for acts committed by one of its nationals (provided, that is, he is a private individual and is not for example a

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34 ICJ Reports, 1949, P.4; 16 ILR, p.155
35 Supra Note 21, p. 509
36 Supra Note 17, p. 442
policemen) against a foreigner. The individual may, of course, be liable to prosecution in the domestic courts and indeed the government, concerned may be held internationally liable if it fails to discharge its duty “of diligently prosecuting and properly punishing”\(^{38}\). Acts of private personal performed on their own initiative in an emergency, for example a natural disaster, are attributable to the state\(^{39}\).

A state cannot deny responsibility for an international wrong on the grounds that the act is under its domestic law, *ultravires*. A state can be held liable for the conduct of an official even when official competence has been exceeded, provided that is, the officials acted with apparent authority as competent officials or organs and the powers or methods used were appropriate to this official authority\(^{40}\).

In the *Youmans Claim*\(^{41}\) Mexico was held liable for the conduct of certain members of its military who acted in defiance of orders and instead of offering protection to a group of Americans, opened fire on the house where the latter were seeking refugee. The United States Mexican General Claims Commission maintained that the Mexican Government was liable for the soldier’s unlawful acts, even though the soldiers had exceeded their powers.

A state is responsible for the acts of all its officials irrespective of their rank\(^{42}\) and as is illustrated by the *Rainbow Warrior Case*\(^{43}\), a state is responsible for the acts of its security services. It is not responsible for the conduct of either foreign states or international organizations within its territory\(^{44}\). A state is not held liable for the activities of insurrectionaries\(^{45}\), but should the insurrectionaries be successful in their objective and become the subsequent government they will be held liable for any wrongful act committed during their struggle for power\(^{46}\).

State responsibility covers many fields. It includes unlawful acts or omissions directly committed by the state and directly affecting other states, for instance, the breach of a treaty, the violation of the territory of any other state or damage to state
property\textsuperscript{47}. An example of the latter heading is provided by the incident in 1955 when Bulgarians fighter planes shot down an Israeli civil aircraft of its state airline, E1A1\textsuperscript{48}. Another example of state responsibility is illustrated by the \textit{Nicaragua Case}\textsuperscript{49}, where the ICJ found that acts imputable to the US include the laying of mines in Nicaraguan internal or territorial waters and certain attacks on Nicaraguan Ports, oil installations and a naval base by its agents.

Imputability is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien.

3.4.3. The “Calvo Clause”

During the Nineteenth Century the tendency of European powers to intervene in the affairs of the states of South and Central America was greatly resented by the states concerned. The excuse for such interventions was usually to safeguard, or to redress damage to, the interests of foreign nationals\textsuperscript{50}. Calvo the Argentinean Jurist propounded the doctrine that European powers should not intervene on such grounds either militarily or diplomatically, and that claims for damage or injury should be presented by the foreign nationals themselves in the local courts.

The validity of the Calvo Clause has been refuted by international tribunals, which have maintained that an individual is not competent to fetter its state in such a way and that the right of diplomatic protection and of its exercise belong exclusively to the state nationality\textsuperscript{51}.

The Calvo Clause ordinarily incorporated in a contract, which was adjudicated upon in the \textit{North American Dredging Company Case}\textsuperscript{52} before the United States Mexico General Claims Commission:

The contractor and all persons, who as employees or in any other capacity, may be engaged in the execution of the work either directly or indirectly, shall be considered as Mexicans in all matters, with in the Republic of Mexico, concerning the executions of such work and the fulfillment of this contract. They shall not claim, nor

\textsuperscript{47} Supra Note 30, p. 547
\textsuperscript{48} 91 ILR, p. 287
\textsuperscript{49} Nicaragua \textit{v.} United States, ICJ Reports, 1986, p. 14; 76 ILR, p. 349
\textsuperscript{50} D.W. Grieg, \textit{International Law}, (1976), p. 592
\textsuperscript{51} Supra Note 37, p. 182
\textsuperscript{52} Annual Digest of Public International Law Cases, 1925-1926, No.218
shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the republic to the Mexicans, nor shall they enjoy any other rights than those established in favour of the Mexicans. They are consequently deprived of any rights as aliens and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.

The authorities are, however, divided on the question whether the insertion of the Calvo Clause in an agreement precludes the alien from appealing to the Home Government for taking diplomatic action against the state of guilty of breach of contract. Some regard the Calvo Clause to be a bar to any diplomatic intervention; others maintain that it does not operate as a bar.

It would appear that such Clauses cannot fetter the discretion of the Home Government to intervene. Firstly, a state has a right under the international law to do all that is possible to safeguard the interests of its subjects and this right cannot be taken away by the insertion of the Calvo Clause in an agreement to which it is not a party. Secondly, the right of a state to press diplomatically the claim of its subject, who as alien suffered losses by reason of breach of contract and who failed to get proper redress by a manifestly unjust decision of the municipal court cannot be taken away by the Calvo Clause.

Perhaps the better opinion as to the Calvo Clause may be summed up as follows:

1. In so far as such Clause attempts to waive in general the sovereign right of a state to protect its citizens, it is to that extent void.
2. But, to quote a statement of the British Government, “there is no rule to prevent the inclusion of a stipulation in a contract that in all matters pertaining to the contract, the justification of the local tribunals shall be complete and exclusive”. In other words, it would be obviously improper for the individual to treat the state against which he seeks redress as an inferior and untrust worthy country, and to apply for his government’s intervention without making any claim in the local courts.
3. Where such a stipulation purports to bind the claimant’s government not to intervene in respect of a clear violation of international law, it is void.

To sum up, it may be said that the Calvo Clause is in effective to bar the right of states to protect their nationals abroad or to release states from their duty to protect foreigners on their territory.

3.4.4 Claims

The subject of state responsibility is founded upon one state having the capacity to make a claim against another state in respect of acts or omissions that are attributable to that other state. Claims asserting the responsibility of a state for debts more frequently arise in cases of state succession where an annexing or successor state seeks to evade the financial obligations of its predecessor. Such claims also occur however, in many other cases where governments fail in the service of loans or default in contributions to international institutions of which they are members.

Three theories have been advanced as to the right of a state to protect subjects, creditors of another state:

1. Lord Palmerston’s Theory enunciated in 1848, that the former state is entitled to intervene diplomatically, and even to resort to military intervention as against a defaulting debtor state.
2. The “Drago Doctrine” (so called after the Argentinean Minister of foreign affairs who first affirmed it in 1902) that states are duty bound not to use against a defaulting debtor state compulsory measuring such as armed military action. This doctrine was intended to apply in favour of Central and South American states as a virtual corollary to the Monroe Doctrine; accordingly, in its later form, it laid down that the public debts of such American states could not “occasion armed intervention nor even that actual occupation of the territory of American nations by a European Power”. Drago’s objections were principally confined to the use of armed force in the collection of public debts; he was not directly opposed to diplomatic intervention or to claims before international tribunals.

Subsequently, the Hague Convention of 1907 for limiting the employment of force for the recovery of contract debts provided that the states parties to the Convention would not resort to armed force in order to recover contract debts due to

their nationals by another state, except where the state refused to accept arbitration or
to submit to an arbitral award\textsuperscript{55}.

3. According to the most generally accepted theory, the obligation of a debtor
    state is similar in all respects to obligations under international agreements in
general. Therefore no special rules or special methods of redress are applicable
where a debtor state defaults\textsuperscript{56}.

A state is under a duty to protect its nationals and it may take up their claims
against other states. However, there is under international law no obligation for states
to provide diplomatic protection for their nationals abroad\textsuperscript{57}. In addition, once a state
does this claim then becomes that of the state. This is a result of the historical
reluctance to permit individuals the right in international law to prosecute claims
against foreign countries, for reasons relating to state sovereignty and non-
interference in internal affairs\textsuperscript{58}.

This basic principle was elaborated in the \textit{Mavrommatis Palestine
Concessions Case}\textsuperscript{59}. The Permanent Court of International Justice pointed out that:

“by taking up the case of its subjects and by resorting to diplomatic action or
international judicial proceedings on his behalf a state is in reality asserting its own
rights, its right to ensure, in the person of its subjects, respects for the rules of
international law”.

Indeed, diplomatic protection was an elementary principle of international
law. Once a state has taken up a case on behalf of one of its subjects before an
international tribunal, in the eyes of the latter the state is sole claimant.

The corollary of this is that the right of a state to take over claims is limited to
intervene on behalf of its own nationals. Diplomatic protection may not extend to the
adoption of claims of foreign subjects. Such diplomatic protection is not a right, but
merely a discretion exercised or not by the state as an extra legal remedy. On the other

\textsuperscript{55} Having regard to the obligations of states members of the United Nations to settle their disputes
peacefully, and to refrain from the threat or use of force against other states (Art 2 of Charter), the
“Drago Doctrine” has lost much of its importance and application.
\textsuperscript{56} Supra Note 28, p. 330
\textsuperscript{57} \textit{HMHK .V. Netherlands}, 94 ILR, p.342
\textsuperscript{58} Supra Note 30, p. 563
\textsuperscript{59} PCIJ, Series A, no.2. 1924, p.1
hand, its exercise cannot be regarded as intervention contrary to international law by the state concerned.

According to the decision of the International Court of Justice in the *Nottebohm Case (second phase)*\(^{60}\) where the person, whose claim was being propounded by the claimant state, was a national of it by naturalization, the claimant state will not be entitled to proceed, if such person has not close and genuine connection with that state at least against a respondent state in which he was habitually resident. A somewhat similar principle applies if the person is of dual nationality; the ‘real and effective nationality’ must be that of the claimant state\(^{61}\).

In the *I'm Alone Case*\(^{62}\) between Canada and the United States, the Canadian Government was held entitled to claim although only the nominal or *dejure* owner of the vessel the I’m alone was of Canadian nationality, the real or *defacto* owners being Americans. Counsel for the United States urged that the damages awarded would ultimately go into the pockets of American citizens, but this was treated as an irrelevant consideration.

This doctrine of ‘nationality of claims’ has with some justification been condemned as artificial, and the theory that a claimant state injured through it subjects has been described as a pure fiction, but they are both supported by the weight of state practice and arbitral decision\(^{63}\).

The general rule is that it is only injured states, which are able to bring international claims against other states for a breach of some international obligation\(^{64}\). The principle was strictly applied in the second phase of the *South West Africa Case (1966)*\(^{65}\) when the ICJ held that Liberia and Ethiopia had no legal interest in South Africa’s treatment of the inhabitants of Namibia. Although both states had been original members of the League of Nations and therefore had certain rights under the mandate agreement between the League and South Africa, the Court held that enforcement of the mandate was a matter for the League alone and individual

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60 ICJ, 1955, p. 4
62 See United Nations Reports of International Arbitral Awards, Vol III, p. 1609
65 (1966) ICJ Rep, at p. 6
members suffered no injury and therefore had no independent right to bring claims arising out of breaches of its provisions.

The Legal Basis for Compensation – State Responsibility

Claims for relief under international law always begin with the law of state responsibility, which is considered to consist of the “secondary rules” that determine the legal consequences of failure to fulfill substantive legal obligations, which are considered the “primary rules”. (Examples of “Primary” rules include the obligation not to persons to become refugees and the obligation not to use force to invade the territory of another state). According to the ILC’S 1996 Draft Rules on State Responsibility; every act by a state which is wrongful under some “primary” rule of international law imposes international responsibility on that state. Wrongful acts occur when an injury is (a) caused by conduct consisting of an action or omission which is attributable to the state under international law, and (b) that conduct constitutes a breach of an international obligation of the state. It does not matter whether the “primary” international obligation is found in customary law or treaty, nor does it matter whether the “primary” international obligation is not found in customary law or treaty, nor does it matter whether the same act is considered lawful by the state’s own international law. However, a breach only occurs “if the act was performed at the time when the obligation was in force for that state”.

A state that has committed such an internationally wrongful act is obliged to (a) discontinue the act and restore the situation to the status quo ante, (b) apply remedies provided under its international law (if they exist) and to pay appropriate compensation if restoration of the pre-existing status is impossible, and (c) provide guarantees that the act will not recur. A state to which a claim is made must negotiate in good faith to reduce it. “Failure of a state to respond in good faith to a request for negotiation may itself constitute a breach of an international obligation”.

66 Articles 1, 3, 4, 17, 18(1), Report of the International Law Commission on the work of its Forty-Eight Session, 6 MAY – 26 July 1996
68 Ibid
Injury to Nationals and Stateless Persons

Traditionally, international law has applied only to the relation between states. Thus, when a state causes an injury to a private person who is an alien (whether a natural person or a corporation), it is deemed to be an injury to the foreign state of which the alien is a national (or where the company is incorporated). The injury can be to the national’s human rights, personal safety, property or other interests. When a state, for example, expropriates the property of foreign investors, the state of which the investors are nationals has the option to diplomatically espouse the alien’s claim. A state’s “espousal” can take the form of negotiation, mediation, conciliation (including by conciliation commission), arbitration, adjudication, all of which require the respondent state’s consent, or under limited circumstances, non-forceful and proportional unilateral countermeasures. The claimant state maintains control over the espoused claim and can, in fact, waive it, payment of reparations is made to the state, which would normally then turn it over to the injured national.69

What happens in the case of stateless persons, such as refugees, or members of a nation which does not have its own state? In general, they are left without such diplomatic protection. (This is one of the reasons that international law prefers to avoid the condition of statelessness). In some situations, a state may espouse a claim on behalf of permanent residents or other non-nationals with which it has a territorial nexus. In the case of refugees (stateless or not) Luke Lee has argued that “since the United Nations is the guardian of the interests of refugees, the conclusion is inescapable that it has not only the capacity to bring an international claim against a refugee generating country on behalf of refugees, but even the duty to do so as guardian”70. Moreover human rights law imposes obligations on all states to protect the right of all individuals, whether nationals, aliens or the stateless. (Nevertheless, actual international mechanisms for claiming remedies under human rights law are limited in application and scope. Regional human rights courts do not exist for persons living outside of Europe and North and South America).71

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Form and Standards of Compensation

It has long been a general and undisputed principle of international law, going back to Blackstone as well as Grotius that where there is a legal right, is also a legal remedy or action at law whenever that right is invaded. This is the flipside of the principle that states have the obligation to make restitution for their wrongful acts and violations of international law. Resolving issues over the nature or extent of the reparation to be made for the breach of an international obligation is, in fact one of the functions of the ICJ. Ordinarily, emphasis is on forms of redress that will undo the effect of the violation”.

In the landmark 1928 Chorzow Factory case involving polish expropriation of German owned industrial property inside Poland, the PCIJ (Predecessor to the ICJ) stated: “reparation must as for as possible, wipeout 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”. The court then ruled that this can be accomplished through restitution in kind or if that is not possible, through just compensation, meaning “payment of a sum corresponding to the value which a restitution in kind would bear” and the award, if need be, of damages for loss sustained which would not be recovered by restitution in kind or payment in place of it”, such as lost profits.

Until about 1974, this general standard, codified in 1938 as the “Hull formula”, which called for “promote adequate and effective compensation”, predominated. In the 1970’s the “Calvo Doctrine”, under which non-industrialized states sought to immunize themselves against alien property claims, recognizing only “appropriate” compensation, was supported by the UN General Assembly in this charter of economic rights and duties of states. Since the end of the cold war, the Hull formula is more or less back in favor. However, the ILCs 1996 Draft Rules on State Responsibility provide three conditions in which either full monetary reparations or restitution in kind might be limited : 1) where reparation could “result in depriving the

73 Chorzow Factory Case (Germany V Poland), 1928 PCIJ (Ser. A) No. 17 (Judgment of Sept. 13. 1928)
population of a state of its own means of subsistence”, 2) where in kind restitution would involve “a burden out of all proportion to the benefit which the injuring state would gain from obtaining restitution in kind instead of compensation”, and 3) where in kind restitution would “seriously Jeopardize the political independence or economic stability of the state which has committed the wrongful act, where as the injured state would not be similarly affected if it did not obtain restitution in kind”.

The ILC recognized in its own official commentary to these provisions that they were controversial, involved admittedly extreme cases, and had been rejected by some ILC members. Nevertheless, these exceptional provisions have “nothing to do with the obligation of cessation, including the return to the injured state, for example, of territory wrongfully seized.  

3.4.5. Exhaustion of Local Remedies

There is a well recognized rule of customary international law that holds that before a state may bring a claim on the international plane on behalf of the one its citizens then that individual must be shown to have exhausted all internal remedies in the respondent state.

Under customary international law that before diplomatic protection is afforded, or before recourse may be made to international arbitral or judicial processes, local remedies must be exhausted. The reason of this rule is:

(1) to allow the state concerned the opportunity to afford redress within its own legal system for the alleged wrong;
(2) to reduce the number of possible international claims;
(3) respect for the sovereignty of states.

Local remedies means:

“not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law.”

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75 Article 42 and 43 and commentary 8(a) and (b) Report of the International Law Commission on the work of its Forty Eight Session
76 Supra Note 54, p. 376
77 Supra Note 37, pp. 188-187
78 Ambatielos Arbitration (Greece V. U.K), 12 R.I.A.A. 83 (1956); 23 ILR 306 (1956)
The term local remedy applies only to available effective remedies. It will not be sufficient to dismiss a claim merely because the person claiming had not taken the matter to appeal where the appeal would not have affected the basic outcome of the case. This was stressed in the *Finnish Ships Arbitration*\(^79\). Where Ship owners brought a claim before the Admiralty Transport Arbitration Board, but did not appeal against the unfavorable decision. It was held that since the appeal could only be on point of law, which could not overturn the vital finding of fact that there had been a British requisition of ships involved, any appeal would have been ineffective. Accordingly, the claims of the ship owners would not be dismissed for non-exhaustion of local remedies.

An important rule applicable to indirect injuries to state is that a claim will not be admissible on the international plane unless the individual or corporation has exhausted the remedies provided by the local state. The rule is justified by political and practical considerations. It allows the local state to redress any wrong that has been committed before the matter reaches the level of international dispute settlement\(^80\). In the *Norwegian Loans Case* \(^81\) (1957) Judge Lauterpacht commented that:

The requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity.

There may be a limited number of cases where local remedies may not need to be exhausted. Example would be:

(i) where the municipal court is compelled by law to reject the claim or where the jurisdiction of the municipal court has been ousted by legislation;

(ii) where the municipal courts are corrupt;

(iii) where the municipal courts discriminate against foreign claims or are subservient to the executive branch;

(iv) where an appeal from a lower court would be manifestly futile because of the limited scope of the appellate function;

(v) where the claim concerns a diplomatic agent;

\(^79\) 2 RIAA, P. 1479 (1934); 7 ILR, p. 231
\(^80\) Supra Note 64, p. 360
\(^81\) (1957) ICJ Rep. at p. 9
(vi) Where the claim itself is brought pursuant to a treaty provision and that treaty expressly excludes the local remedies rule. Such exceptions will be limited indeed and it would seem that a party who asserts that the local remedies rule does not operate would bear the onus probandi in displacing a well-established rule of international law.  

The question of the local remedies rule arose again for consideration in the *Elettronica Sicula (ELSI) SPA* case, the facts of the case were as follows,  

This was case brought by the United States against Italy in respect of damage to a company (ELSI), which was wholly owned by two United States corporations. The claim was brought under the 1948 Treaty of Friendship, commerce and navigation which provided for the jurisdiction of the ICJ but made not reference to the local remedies rule.  

The United States argued that the local remedies rule did not apply because the treaty was silent on the matter. This argument was rejected by the Court, who held that such a well established rule of customary international law could only be displaced by express words in a treaty. The Chamber of the Court rejected the Italian argument that the remedies had not in fact been exhausted in respect of the application of the rule, the Chamber held that the party alleging non-compliance with the rule bears the onus probandi. It was held further that a party will comply with the rule if he can show that he has in substance exhausted the available remedies. It was also held that, as exhaustion is a matter of inference it is to be determined by looking at all the circumstances of the case including the obligation of states to act in good faith.  

Thus, it would seem that a party alleging that the local remedies rules do not apply will bear the onus probandi. On the assumption that it does apply, then the party alleging non-compliance with the rule will bear the onus.  

### 3.5 Principles of State Responsibility  

State responsibility is composed of two fundamental principles. Firstly, the principle of the international minimum standard of treatment, aliens are entitled to a certain minimum standard of treatment that is invariant across international frontiers. Under the second principle of state responsibility, non-nationals may not be

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82 FCO International Claims Rules (1985), rr 7 and 8  
83 Supra Note 54, p. 379
discriminated against in their basic human rights as compared to the treatment of nationals.  

3.5.1 **International Minimum Standard of Treatment.**

The principle of the international standard of treatment stands for the proposition that non-nationals are entitled to a certain minimum standard of treatment by the host state. The principle evolved from their norm referred to as ‘denial of justice’, applied in egregious cases involving gross denials of justice; denying the accused the right to defend himself, not allowing the accused to call witnesses in his own behalf, double jeopardy, and control of the tribunal by the executive. Later cases transmuted the ‘denial of justice’ norm into ‘ordinary standards of civilization’ and extended it beyond the courtrooms.

The concept of denial of justice was broadened considerably by the inclusion of acts by legislative and administrative branches of government. However, the standard for finding an administrative denial of justice was quite high. The majority in the *Neer Case* stated that ‘the treatment of an alien should amount to an outrage, to bad faith, to willful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.’ The Concurring Commissioner, Nielsen from the United States, favoured an easier standard: ‘the propriety of governmental acts should be determined according to ordinary standards of civilization even though standards differ considerably among members of the family of nations, equal under the law.’

Although the General Claims Commission in the *Neer Case* found the police conduct internationally sufficient, the Commission has found otherwise in numerous cases employing the tests set forth by the majority and the concurrence. In the *Faulkner Case*, for example, the Mexican treatment of an American Prisoner was found to be internationally insufficient. In the *Mallen case*, the U.S. was held liable for injury to a Mexican consul because U.S failure to execute the penalty imposed

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85 *Neer Case*, 4 R.Int’l Arb. Awards, p. 61-62
86 Ibid, p. 65
88 *Faulkner Case*, 4 R.Int’l Arb. Awards 67
upon the American responsible for the injury constituted a denial of justice\textsuperscript{89}. Other cases establish that a state can incur liability for illegal custody, failure of police to control a civilian riot, and arbitrary control of individual property. These administrative cases exemplify the proposition that adequate police protection, such that an alien is neither harassed by the authorities nor left to the mercy of unruly mobs, and respect for land ownership, are necessary for compliance with the international minimum standard.

The foregoing cases illustrate a gradual broadening of the principle of the international minimum standard of treatment from its genesis in the earliest egregious examples of denial of justice to the more inclusive doctrine now known as the international minimum standard of treatment of non-nationals\textsuperscript{90}. The principle is still limited by a certain notion of non deprivation of ‘justice’ to such persons, but the concept of ‘Justice’ itself has been expanded, in accordance with gradually evolving norms of responsibility to others. Its content is no longer confined to the judicial context, but can now embraces legislative and administrative denial of Justice. The term ‘Justice’ is gaining content, as the international community perceives a greater degree of civilized treatment as part of its standard conception of ‘Justice’.

3.5.2 Standard of Non-discrimination

In conjunction with the principle of the international minimum standard of treatment, the law of state responsibility has from the outset included a second principle that of non discriminatory treatment of non nationals. But it has had the operative effect of raising the rights of aliens, because if the level of treatment accorded an alien falls significantly below the level of national treatment, the alien can claim a denial of Justice. Hence, due to the relationship between the non-discriminatory standard and the international minimum standard, an alien is entitled to whichever standard is higher.

Thus we might infer the court’s reasoning that the non discriminatory treatment standard in the law of state responsibility creates a presumption in favour of according aliens equal treatment with nationals, except when a ‘reasonable basis’ can be adduced for according aliens a lower levels of treatment. In this fashion, the principle

\textsuperscript{89} Supra Note 87, 4 R.Int’l Arb. Awards 178
\textsuperscript{90} Virginia Law Review, September 1988, p. 7
of non-discrimination appears to give a certain progressive element to the principle of the international minimum standard. A nation may accord international minimum treatment to an alien and nevertheless violate the alien’s rights if the alien is blatantly discriminated against in comparison to citizens. In this manner, the content of the international minimum standard itself might be raised over time, progressively affected in the utilization of the non-discriminatory treatment standard\(^91\).

Similarly, a nation may be guilty of falling below the international minimum standard even though it has complied with the non-discrimination standard. Accordingly, it is not an adequate defense to a charge of failing to meet the international minimum standard to say that aliens have received the same treatment as that accorded to nationals. In this respect, one is better off under the classical view of state responsibility, being an alien than being a citizen. The alien is entitled to the international minimum standard of treatment, even though a citizen under exactly the same circumstances is without standing to claim an entitlement to the international minimum standard.

3.5.3 Attribution

Before a state can be held responsible for any action, it is necessary to prove a causal connection between the injury and an official act or omission attributable to the state alleged to be in breach of its obligations. This has become an increasingly significant contemporary issue, as non-state actors such as Al-Qaeda, multinational corporations, and non-governmental organizations play greater international roles, and as governments privatize some traditional functions.

The state is responsible for all actions of its officials and organs, even if the organ or official is formally independent\(^92\) and even if the organs or officials are acting *ultravires*. Persons or entities not classified, as organs of the state may still be imputable, when they are otherwise empowered to exercise elements of governmental authority, and act in that capacity in the particular instance. Persons or entities not performing public functions may equally be imputable, if they in fact acted under the

\(^{91}\) Ibid p. 8

direction or control of the State\textsuperscript{93}. Where there is a breakdown of normal governmental authority and control, such as in so-called “failed States”, the actions of those acting as the “government” in a defacto sense will be acts of the state\textsuperscript{94}. The acts of an “insurrectional or other movement that becomes the new government of an existing state or succeeds in establishing a new state” can also be attributed to the state\textsuperscript{95}. This is also the case where a state acknowledges and adopts the conduct of private persons as its own\textsuperscript{96}.

Despite their apparent concreteness, the standards state in some rules involve important ambiguities, and their application will often require significant fact-finding and judgment. Most rules on state responsibility involving private acts already arise under primary rules. For example, environmental and human rights agreements require states to prevent abuses by private parties.

The traditional law of State responsibility makes no distinction between attribution of acts of heads of state or other high officials, on the one hand, and attribution of acts of lower ranking officials, on the other. Acts of all state organs are attributed to the state\textsuperscript{97}.

In short, the element of attribution consists of a set of principles that specify which links with the wrongdoer are relevant for allocating legal responsibility to a particular subject of international law. The most important link in forming the rules of attribution is (1) the institutional link, (2) the control link and (3) the territorial link.

The institutional link refers to acts performed by organs of an international subject, provided they were acting in their official capacity. An alternative is the control link which addresses the actions of individual persons or entities (both non-organs) whose conduct has a significant connection with the international subject to which the particular act is being attributed. Lastly, the territorial link refers to an international legal subject exercising full control over the territory and bearing responsibility for acts of private individual in that territory. A caveat with regard to the territorial link, though here the act itself is not attributed to the international subject, but the latter is held responsible for its own failure in connection with it (also

\textsuperscript{93} Note 82, Article 8
\textsuperscript{94} Note 82, Article 9
\textsuperscript{95} Note 82, Article 10
\textsuperscript{96} Note 83, Article 11
\textsuperscript{97} International and Comparative Law (Quarterly), 2003 July, Vol no 52, Issue no-3, p. 632
known as indirect responsibility). The territorial link will generally not be relevant for international organizations since, unlike states, they do not have control over territory.\(^98\)

### 3.6 Principles of General International Law

Article 2 of the United Nations provides that the organization and its members, in pursuit of the purposes enshrined in Article 1, shall act in accordance with the following principles:

#### 3.6.1 The Principle of the Sovereign Equality of All members

The first principle of the United Nations is that the organization is based on the principle of the sovereign equality of all its members. According to this principle, all the members of the United Nations are equal in the eye of law irrespective of their size or strength. They are all equal in the eye of law and no discrimination can be made on any basis. Undoubtedly it is an important principle and the framers of the Charter deserve credit for having included this principle in the Charter.

Besides, there are several other provisions in the character, which provide some special rights to the permanent members. Thus the United Nations Organization is based on the principle of sovereign equality of states but the great powers are legally and actually unequal to the smaller states.\(^99\) In fact, the great powers were given the special powers in the Charter under the presumption and with the hope that they would co-operate in the same was as they did during the second world war and would thereby establish peace and security in the world. But unfortunately, immediately, after the establishment of the United Nations, conflicts started among the permanent members and they did not fulfill their responsibilities and obligations, which the Charter imposed upon them.

#### 3.6.2 The principle of Good Faith in International Law

The principle of good faith, as a legal principle, is not only an integral part of the rule *pacta sunt servanda*, but also applies generally throughout international law. As the International Court of Justice stated in the *Nuclear Test Case*: one of the basic

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principles governing the creation and performance of legal obligation, whatever their source is the principle of good faith\textsuperscript{100}.

The extent to which the principle of good faith pervades international relations has also been remarked on by the International Court of Justice in the following terms:

The Court observes that the principle of good faith is a well established principle of international law. It is set forth in Article 2, Paragraph 2, of the Charter of the United Nations. It is also embodied in Article 26 of the Vienna Convention of the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the North Atlantic Fisheries case. It was, moreover, upheld in several Judgments of the Permanent Court of International Justice\textsuperscript{101}.

The principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

Every state has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every state has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law.

Every state has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law\textsuperscript{102}.

The principle of good faith is thus among the ‘basic principles of international law’. As virally state, ‘it is not a simple ethical principle, when applied to law, even though it is also an ethical principle and was borrowed by law from the ethical realm. The essentially legal character of good faith in international law has also been recognized by the ILC and by modern commentators. Herch Lauterpacht, when dealing with the related issue of ‘abuse of rights’, noted in 1958:

“it is possible to see an indirect approach to the principle prohibiting abuse of rights in the frequent affirmation of the duty of states to act in good faith in the exercise of their rights”\textsuperscript{103}.

\textsuperscript{100} Nuclear Tests (Australia V France) case, ICJ Report 1974, p. 253
\textsuperscript{101} Malgosia Fitzmaurice and Dan Sorooshi, Issues of State Responsibility before International Judicial Institutions, (2004), Volume 7, p. 85
\textsuperscript{102} Ibid p. 86
In the *Norwegian Loans case*, Judge Lauterpacht observed that, ‘unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.’

Fitzmaurice, a former special Rapporteur on the law of treaties and judge of the International Court of Justice, defined the principle as follows:

The essence of the doctrine is that although a state may have a strict right to act in a particular way it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise in good faith and with a sense of responsibility; it must have bonafide reasons for what it does, and not act arbitrarily and capriciously.

Schwarzenberger included good faith among the ‘seven fundamental principles of international law’ commenting on the ‘prohibitory or mandatory character of the rules underlying the principle of good faith, he observed:

It is possible to hold that, within the limits in which the principle of good faith is incorporated in international law, any deviation from these rules constitutes a breach of rules prohibiting the interpretation of legal duties of abstention as jus strictum or in outright bad faith. It is however, equally permissible to put the emphasis on the positive regulative functions which the rules underlying the principle of good faith fulfill in delimiting the respective spheres of competing rights.

### 3.6.3 Principles of International Law Concerning Friendly Relations and Co-operation among States

The General Assembly recalling its resolutions 1815(xvii) of 18 December 1962, 1966(xviii) of 16 December 1963, 2103(xx) of 20 December 1965 2118(xxi) of 12 December 1966 23 27(xxii) of December 1967 2463(xiii) of 20 December 2968 and 2533(xxiv) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law

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104 ICJ Reports, 1957, p. 53
106 Supra Note 91, pp. 87-88
concerning friendly relations and co-operation among states. Having considered the report of the special committee on principles of international law concerning friendly relations and cooperation among states, this met in Geneva from 31 March to 1 May 1970.

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among states, deeply convinced that the adoption of the declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations on the occasion of twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among states, in promoting the rules of law among nations and particularly the universal application of the principles embodied in the Charter.

Considering the desirability of the wide dissemination of the text of the declaration,

(1) Approves the declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the character of the United Nations, the text which is concerned to the present resolution,

(2) Expresses the declaration to the special committee on principles of international law concerning friendly relations and cooperation among states for its work resulting in the elaboration of the declarations.

(3) Recommends that all efforts be made so that the declaration becomes generally known\(^{107}\)

**The duty of states to cooperate with one another in accordance with the Charter**

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discriminated based on such differences.

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\(^{107}\) Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the charter of the United Nations resolution 2625 (XXV)
To this end:

(a) States shall cooperate with other states in the maintenance of international peace and security.

(b) States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance.

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non intervention.

(d) States members of the United Nations have the duty to take joint and separate action in cooperation with the United Nations in accordance with the relevant provisions of the Character.

States should cooperate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world especially that of the developing countries.

3.6.4 Principle of Non- Intervention

The term ‘intervention’ has been defined by Oppenheim in the following words: “intervention is dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things”\textsuperscript{108}.

In principle, international law prohibits intervention. No state or group of states has the right to intervention, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law.

No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the

\textsuperscript{108} Oppenheim’s, \textit{International Law}, p. 265
exercise of its sovereign rights and to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of regime of another state, or interfere in civil strife in another state.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non intervention. Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state. Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states\textsuperscript{109}. Intervention is prohibited where it bears upon matters in which each state is permitted to decide freely by virtue of the principle of state sovereignty\textsuperscript{110}. This includes, as the International Court of Justice noted in the Nicaragua case\textsuperscript{111}, the choice of political, economic, social and cultural systems and the formulation of foreign policy. Intervention becomes wrongful when it uses methods of coercion in regard to such choices, which must be free ones.

There was ‘no general right of intervention in support of an opposition within another state in international law. In addition, acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of the non use of force in international relations. The principle of respect for the sovereignty of states was another principle closely allied to the principles of the prohibition of the use of force and non intervention.

3.6.5 Principle of Non-use of Force

Every state has the duty to refrain in its 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 purpose of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of setting international issues.

Art 2(4) was elaborated as a principle of international law in the 1970 declaration on principles of international law and analyzed systematically.

First, a war of aggression constitutes a crime against the peace for which there is responsibility under international law. In accordance with the purposes and principles of the United Nations, states have the duty to refrain from propaganda for war aggression.

Secondly, every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state or as a means of solving international disputes including territorial disputes and problems concerning frontiers of states. Every state like wise has the duty to refrain from the threat or use of force to violate international links of demarcation, such as armistice fines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concern with regard to the status and effects of such one’s under their special regimes or as affecting their temporary character.

Thirdly, states have a duty to refrain from acts of reprisal involving the use of force.

Fourthly, every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self determination of their rights to self determination and freedom and independence.

Fifthly, every state has the duty to refrain from organizing or encouraging the organization of internal forces or armed bands, including mercenaries, for incursion into the territory of another state.

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorists acts in other state or acquiescing in

112 Article 2(4) of the Charter
113 Supra Note 30, p. 781
organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force\textsuperscript{114}.

The territory of a state shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the charter. The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized legal. Nothing in the foregoing shall be constructed as affecting:

\begin{itemize}
  \item[a)] Provisions of the charter or any international agreement prior to the charter regime and valid under international law, or
  \item[b)] The powers of the Security Council under the Charter,
\end{itemize}

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force in lawful.

Important exceptions to article 2(4) exist in relation to collective measures taken by the United Nations and with regard to the right of self defense. It is to be noted that article 2(4) covers treat of force as well as use of force. This issue was addressed by the International Court in its Advisory Opinion to the General Assembly on the legality of the threat or use of nuclear weapons\textsuperscript{115}. The Court stated that a signalled intention to use force if certain events occur could constitute a threat under article 2(4) where the envisaged use of force would itself be unlawful.

3.6.6 Permanent Sovereignty over Natural Resources

The principle of permanent sovereignty over natural resources was reaffirmed by the Charter and further elaborated. “Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities”. In the exploitation of natural resources shared by two or more countries, each state must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others.

In this connection each state has the right to regulated and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and

\textsuperscript{114} Ibid p. 782
\textsuperscript{115} ICJ Reports, 1996, pp.47-48
regulations and in conformity with its national objectives and priorities”. The corresponding duty is not to compel any state “to grant preferential treatment to foreign investment”116.

When the number of newly independent developing countries grew, these states sought to assert their complete economic sovereignty by proclaiming that they had complete and permanent sovereignty over their national resources regardless of any arrangements made by their previous colonial administrations. Consequently, a resolution was introduced in the U.N. General Assembly to this effect and was passed by an overwhelming majority of states. Paragraphs 1 and 2 of the famous 1962 UN General Assembly Resolution on the Permanent Sovereignty over Natural Resources (PSNR) state:

1. The right of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well being of the people of the state concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions, which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

Accordingly the Resolution goes on to outline the rights of states with regard also to the expropriation and nationalization of the assets of foreign companies:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, which are recognized as overriding purely individual or private interest, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of it sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties’ concerned settlement of the dispute should be made through arbitration or international adjudication.

The concluding paragraph of the resolution seeks to assure investor countries and foreign investors that the provisions of bilateral investment agreements will be respected:

Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith, states and international organizations shall strictly and conscientiously respect the sovereignty of people and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present reduction.

The provision of the PSNR resolution (Resolution 1803 of 1962) has been held widely as representing customary international law because of:

- the unanimous support it received at the UN
- its declaratory nature of the rules of customary international law on the subject matters.

**The Stockholm Declaration 1972**

The Stockholm Declaration of the United Nations Conference on the Human Environment of 1972 was perhaps the first major interaction environmental law instrument that introduced the idea of conserving natural resources to the agenda of international economic law.

Principles 2, 3 and 5 of the Stockholm Declaration speak of the need to conserve natural resources.

Principle 2: The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3: The capacity of the earth to produce vital renewable resources must be maintained and wherever practicable restored or improved.

Principle 5: The non renewable resources of the earth must be employed in such a way as to ground against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

118 11 ILM 1416 (1972), adopted on 16 June 1972
The Stockholm Declaration sought for the first time to limit the right of states to exploit their natural resources (especially those which are non-renewable). As stated earlier, until this point international economic law had sought to define and strengthen the rights of sovereign states to exploit their national resources (whether renewable or non-renewable) through various instruments such as the concept of permanent sovereignty over natural resources.

However, while endorsing this right of states, principle 21 of the Stockholm Declaration sought to reconcile it with the need for environmental protection:

State have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.\(^{119}\)

**World Charter for Nature 1982**

The preamble to this Charter declares that ‘man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources’.

The Charter then goes on to state that:

The degradation of natural systems owing to excessive consumption and misuse of natural resources, as well as to failure to establish an appropriate economic order among peoples and among states, leads to the breakdown of the economic, social and political framework of civilization.

**3.6.7. Principle of Reciprocity**

A man be willing, when others are too, as for forth for peace and defense of himself be contented with so much liberty against other man as he would allow other men against himself\(^{120}\).

The concept of reciprocity assumes peculiar importance in a world where there is no external authority to enforce agreements, that is, in a world that exists in

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119 Supra Note 106, p. 28
120 The second law of nature, according to Hobbes, THOMAS HOBES, LEVIATHAN (1958), p. 110
Hobbesian State of nature. Historically, norms of reciprocity have been vital in escaping lives that would otherwise be “solitary, poor, nasty, brutish and short”.\textsuperscript{121} Reciprocity generally involves returning like behavior with like. In Robert Axelrod’s terminology, reciprocity is a tit-for-tat strategy. Such a strategy permits co-operation in a state of nature, when no authority for enforcement of agreements exists.

International Law, in this sense, exists in a state of nature; there is no overarching legal authority with compulsory jurisdiction to enforce agreements. Inevitably, reciprocity has become an important element in the practice of sovereign nations and in the body of existing international law.

A key concept in international law is reciprocity. Basically, the principle of reciprocity is that any favours, benefits, or penalties granted, promised, or threatened by one state to the citizens of another should be returned in kind. Perhaps the most common legal usage of the concept is in the penalty or negative sense, where under international law, an accuser engaging in the same conduct, as the accused shall be disqualified from asserting a legal violation.

Keohane (1986) and others have argued that reciprocity should be considered a golden rule or “meta-rule” in international law because, in part the foreign policy actions of states almost always correlate highly with the actions others take towards them, at least at one time or another. There are many related mathematical concepts, such as Dupreel’s theorem which holds that as rivalries mature, states are more and more likely to imitate each other’s behavior\textsuperscript{122}.

Reciprocity is informal Justice at best, but it points to the Honfeldian problem of how fulfilling obligations or duties are some times more important than exercising or not exercising rights. Reciprocity is important because it refers to international perceptions of what is compensatory and fair, but it is difficult to determine when something is fair without a common, standardized measure of value. Most exchanges between nations are only reciprocal in the sense that something is matched, but that does not mean that the magnitude of the match is equivalent.

As a legal principle, reciprocity is a powerful weapon at work in international law and international relations generally. Quite often, states do not pursue certain

\textsuperscript{121} Cornell International Law Journal, Vol 36, No.1, Spring 2003, p. 93
\textsuperscript{122} Keohane, R., “Reciprocity in International Relation’s”, International Organization, (1986), p. 1
short-term courses of action (that would be in their best interests) out of concern for reciprocity in the long-run. This ability of reciprocity to modify the behavior of nation-states as well as individuals is remarkable, and can encompass various circumstances such as the enforcement of foreign judgments, asset protection, diplomat protection, etc. Take, for example, the case of *Boos V Barry* (1998), which dealt with the appropriateness of protest in front of a government building but not in front of a foreign embassy on US soil. This extension of privilege to foreign embassies carries with it an expectation that American embassies on foreign soil will be reciprocally protected from protest. Reciprocity is also involved in the law of extradition. For example, *Factor v. Laubenheimer* (1933) set the precedent for using reciprocity as the legal principle of choice when conflicting interpretations of a treaty exist.\(^{123}\)

### 3.6.8. Principle of Repatriation

Repatriation (to restore someone to his homeland) is the process of return of refugees or soldiers to their homes, most notably following a war.

In the 20\(^{th}\) century, following all European wars, several repatriation commissions were created to supervise the return of war refugees, displaced persons, and prisoners of war to their country of origin. Repatriation hospitals were established in some countries to care for the ongoing medical and health requirements of returned military personnel. In the Soviet Union, the refugees seen as traitors for surrendering were often killed or sent to Siberian concentration camps.

Issues surrounding repatriation have been some of the most heatedly debated political topics of the 20\(^{th}\) and 21\(^{st}\) centuries. Many forced back to the Soviet Union by allied forces in World War II still hold this forced migration against the United States of America and the United Kingdom. Expulsion from the Soviet Union (previously known as Russia) was called repatriation in communist propaganda. Poles born in annexed lands were deported to former German lands and told they returned to their Motherland.

Opponents of immigration have advocated various types of repatriation measures for immigrants. Illegal immigrants are frequently repatriated a matter of government policy. Those who would go further suggest measures of voluntary

\(^{123}\) Ibid p. 27
repatriation, with financial assistance, and also measures of compulsory repatriation. Such measures are highly controversial, especially if based on any kind of racial criterion, and encounter vocal political opposition in most democracies.124

Most countries in Central and Eastern Europe as well as Germany, Greece, Armenia, France, China, Japan, Norway, Finland, Philippines, Ireland, Turkey and Israel have repatriation laws. This gives non-citizens foreigners who are part of the titular majority group the opportunity to immigrate and receive citizenship. Ethnic nation states are practiced repatriation laws. The most famous repatriation law is Israel’s Law of Return.

3.6.9 Principle of Rehabilitation

The oxford Dictionary provides a standard but limited definition of rehabilitation. According to the dictionary, rehabilitation is “a course of treatment, largely physical therapy, designed to reserve the debilitating effects of an injury”.125 The definition reflects one of the most common but narrowed concepts of rehabilitation, one that is focused on physical care. A second understanding of rehabilitation, also narrowed and predominant in law, is the one connected to helping “a person who has been released from prison (or is still in prison) to readapt to society.” 126 Both of these concepts have had an impact on the way rehabilitation is understood under international law.

Although these definitions are more encompassing to the ones found in standard dictionaries, they also fail to cover other important communal dimensions of rehabilitation, such as when people experience extreme violence, genocide or conflict situations. It is the report of the WHO expert committee on Disability Prevention and Rehabilitation (1981) that takes even further the definitions just introduce by considering its community dimension.127 It states that “community based rehabilitation involves measures taken at the community level to use and built on the resources of the community, including the impaired, disabled and handicapped persons themselves, their families and their community as a whole” and also

124 International and Comparative Law (Quarterly) 2003, Vol no.52, Issue no.3, p. 616
highlights the active role that communities should play in the rehabilitation of individuals.

International law does not delineate a working definition of rehabilitation as a form of reparation under international law. The closest expression of such a definition is found in the Basic principles that indicate that in certain situations persons who have suffered certain types of serious human rights or humanitarian law violations should be redressed by way of, among others, rehabilitation, meaning physical and psychological care as well as social and legal services. So, although the concept of rehabilitation set out in the Basic principles spells out some other forms of rehabilitation beyond health, it mentions these other aspects without fully indicating what each one of them means or includes.

The leading scholar on reparation Dinah Shelton defines rehabilitation according to its objective and function. For her it is a right of “all victims of serious abuse and their dependents”. It is “the process of restoring the individual’s full health and reputation after the trauma of a serious attack on one’s physical or mental integrity. It aims to restore what has been lost. Rehabilitation seeks to achieve maximum physical and psychological fitness by addressing the individuals, the family, local community and even the society as a whole”.128

There when considering rehabilitation under international law there is a tendency to fluctuate between two possible concepts.

1. A holistic one that encompasses all sets of processes and services states should have in place to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as for as possible, the harm that has been suffered. Such processes/services should allow the victim to gain independence and to make use of his/her freedom. The processes should not be defined in advance as they would depend on the particular circumstances of each case. Nevertheless, states should be obliged to establish a rehabilitation system that incorporates at least physical and psychological services, and social, legal and financial services, which should be available to any person

who might need them, depending, of course, on the individual circumstances of each case.

2. A narrow concept, meaning rehabilitation only related to physical and psychological care. The Basic principles stand somewhere in between.

3.6.10. Consequences for the Principles of State Responsibility

With the emergence of concurrent responsibility, the development of international law of state responsibility takes a dialectical turn. Individualization of responsibility, in itself a reaction to the monolithic and sometimes powerless principles of state responsibility, influences the nature and contents of the pre-existing law on state responsibility.

However, it would not be correct to say that it is the emergency of individual responsibility that induces changes in the principles of state responsibility. The true causal variable is the emergence of a hierarchy of norms in international law and more in particular the recognition of a limited number of norms that are of fundamental importance for the international community\(^\text{129}\). The emergence of this category of norms under lays both the individualization of responsibility and the disruption of the unity of state responsibility. The main features of the concurrence of individual and state responsibility, notably the transparency of the state, the role of the international community in defining and implementing responsibility and the potentially systematic consequences of state responsibility can indeed only be understood as a function of the recognition of a category of peremptory norms in international law and their \textit{erga omnes} character.

With the recognition of a set of fundamental norms recognized by the international community and the related emergence of individual responsibility, the traditional dualities between state and individual that characterize the law of state responsibility cannot be upheld in their strict form. The increasing transparency makes it possible to revisit some of the classic principles of state responsibility\(^\text{130}\).

3.7. Peremptory Norms (\textit{Jus Cogens})

A peremptory norm is a fundamental principle of international law, which is accepted by the international community of states as a norm from which no

\(^{129}\) Ibid p. 631
\(^{130}\) European Journal of International Law (1999), p. 432
derogation is ever permitted. There is no clear agreement regarding precisely which norms are neither Jus Cogens nor how a norm reaches that status, but it is generally accepted that Jus Cogens includes the prohibition of genocide, maritime piracy, slaving in general (to include slavery as well as the slave trade), torture, and war of aggression.

**Status of Peremptory norms under International Law**

Unlike ordinary customary law, this has traditionally required consent and allows the alteration of its obligations between states through treaties. Peremptory norms cannot be violated by a state “through international treaties or local or special customs or even general customary rules not endowed with same normative force”\(^\text{131}\). Under the Vienna Convention on the Law of Treaties, any treaty that conflicts with a peremptory norm is void\(^\text{132}\). The treaty allows for the emergency of new peremptory norms, but does not it self specify any peremptory norms.

“A treaty is void if, at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”\(^\text{133}\).

The number of peremptory norms is considered limited but not exclusively catalogued. They are not listed or defined by any authoritative body, but arise out of case laws and changing social and political attitudes. Generally included are prohibitions on waging aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, apartheid, slavery and torture\(^\text{134}\).

Despite the seemingly clear weight of condemnation of such practices, some critics disagree with the division of international legal norms into a hierarchy. There is also disagreement over how such norms are recognized or established. The relatively

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134 *International Law Reports, 213, (2002)*
new concept of peremptory norms is at odds with the traditionally consensual nature of international law considered necessary to the state sovereignty.

Some peremptory norms define criminal offences, which are considered to be enforceable against not only states, but individuals as well. This has been increasingly accepted since the Nuremberg Trials (the first enforcement in world history of international norms upon individuals) and now might be considered uncontroversial. However, the language of peremptory norms was not used in connection with trials rather the basis of criminalization and punishment of Nazi atrocities was that civilization could not tolerate their being ignored, because it could not service their being repeated.

There are often disagreements over whether a particular case violates peremptory norms. As in other areas of law, states generally reserve the right to interpret the concept for themselves. The case of *Michael Dominguez V United States* provides an example of an international body’s opinion that a particular norm is of a *Jus Cogens* nature. Michael Dominguez has been convicted and sentenced to death in Nevada, United States for two murders committed when he was 16 years old. Dominguez brought the case in front of the Inter American Commission of Human Rights, which delivered a non-legally binding report. The United States argued that there was no *Jus Cogens* norm that “establishes eighteen years as the minimum age at which an offender can receive a sentence of death”\(^\text{135}\). The Commission concluded that there was a “*Jus Cogens* norm not impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age”\(^\text{136}\). The United States has subsequently banned the execution of juvenile offenders, although not necessarily in response to the above non-binding report.

While the principle was being formulated by the ILC, majority of jurists from the developing and Europeans countries favored the incorporation of the principle of *Jus Cogens* and attached great importance to it. They expressed the view that a treaty conflicting the existing or new rule of *Jus Cogens* should be regarded void; on the other hand majority of international lawyers from Western Europe expressed considerable alert.

\(^{135}\) Digest of United States Practice in International Law 2001, p. 303

Prof. Schwarzenberger expressed the view that international law ‘does not know of any *Jus Cogens*’. But diametrically opposite view was expressed by Prof. Verdoss, who contended that certain principles embodied in Article 2 of U.N. Charter possess the character of *Jus Cogens*. It may be noted that great difficulty will be experienced in the application of the rule of *Jus Cogens*.

Thus, there was a controversy in respect of the formulation of the rule of *Jus Cogens*. A compromise formula was brought forth by a group of African and Asian delegations led by Nigeria, and this is now embodied in Article 66 of the Vienna Convention. Article 66 provides that if, under paragraph 3 of Article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, any one of the parties to a dispute concerning the application or the interpretation of Article 53 or 64 may, by a written application, submit it to the International court of justice for a decision unless the parties by common consent agree to submit the dispute to arbitration. This is undoubtedly a great achievement.

**Serious breaches of peremptory norms (*Jus Cogens*)**

One of the major debates taking place with regard to state responsibility concerns the question of international crimes. A distinction was drawn in Article 19 of the ILC Draft Articles 1996 between international crimes and international delicts within the context of internationally unlawful acts. It was provided that an internationally wrongful act which results from the breach by a state of an international obligation of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole constitutes an international crime. All other internationally wrongful acts were termed international delicts. Examples of such international crimes provided were aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas. However, the question as to whether states can be criminally responsible has been highly controversial. Some have argued that the concept is of no legal value and cannot be justified in principle, not least because the problem of exacting penal sanctions from states, while in principle possible, could only be creative of instability.

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137 Supra Note 30, p. 720
Others argued that, particularly since 1945 the attitude towards certain crimes by states has altered so as to bring them within the realm of international law. The Rapporteur in his commentary to draft Article 19 pointed to three specific changes since 1945 in this context to justify its inclusion; First, the development of the concept of *Jus Cogens*, as a set of principles from which no derogations is permitted; Secondly, the rise of individual criminal responsibility directly under international law; and thirdly, the U.N. Charter and its provision for enforcement action against a state in the event of threats to or breaches of the peace or acts of aggression.

However, the ILC changed its approach in the light of the controversial nature of suggestion and the articles as finally approved in 2001, omit any mention of international crimes of states, but rather seek to focus upon the particular consequences flowing from a breach of obligations *erga omnes* and of peremptory norms (*Jus Cogens*).

Article 41 provided that states are under a duty to co-operate to bring to an end, through lawful means, any serious breach by a state of an obligation arising under a peremptory norm of international law and not to recognize as lawful any such situation.\(^{139}\)

### 3.7.1. Pacta Sunt Servanda

It is doctrine borrowed from the Roman law and has been adopted as a principle governing treaties in international law.\(^{140}\) In the view of Italian Jurist Anzilotti, *pacta sunt servanda* is the basis of the binding force of international law. This principle means that states are bound to fulfill in good faith of the obligations assumed by them under agreements.

According to Prof. Oppenheim, “treaties are legally binding because there exists a customary rule of international law that treaties are binding. The binding effect of that rule rests in the last resort on the fundamental assumption. This is neither consensual nor necessarily legal of the objectively binding force of an international law.” This assumption is frequently expressed by the norm or principle, *‘pacta sunt servanda’*. The International Court of Justice has described it as ‘a time knowned basic principle’.

\(^{139}\) Supra Note 30, p. 721  
Accordingly to Fenwick, “philosophers, theologians and jurists have recognized with unanimity that unless the pledged word of a state could be relied upon the relation of the entire international community would be imperiled and law itself would disappear”.

The PCIJ has consistently held that the provisions of municipal law cannot prevail over these of treaty. The Court observed in the case concerning the Treatment of Polish National in Danzig: “a state cannot adduce as against another state its own constitution with a view to evading obligation incumbent upon it under international law or treaties in force”. Again it was observed in the Free Zone case; “it is certain that France cannot rely on her own legislation to limit the scope of international obligations”. The same view was repeated in the Greco Bulgarian Communities by the PCIJ in its Advisory Opinion; “it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”.

Article 26 of the Vienna Convention on the Law of Treaties 1969, specifically embodies the doctrine of Pacta Sunt Servanda when it lays down that every treaty in force is binding upon the parties to it and must be performed by them in good faith.141

It is not hard to see why this is so. In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.

In Paul Reuter’s words, the principle can be translated by the following formula: treaties “are what the authors wanted them to be and only what they wanted them to be and because they wanted them to be the way they are”.

A party is not authorized to invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27). Generally speaking, this solid legal link neither is nor even weakened in the case severance of diplomatic relations between the parties to a given treaty (Article 63). But apparently states expect increasingly out of realism that the treaties they conclude in certain areas, in particular with regard to the protection of the environment, will not be properly implemented by all states parties just out of respect for the “Pacta Sunt Servanda” rule.

141 Ibid p.251
3.7.2 En Masse

According to Strake, “international law does not prohibit the expulsion en masse of aliens, although this is resorted to usually by way of reprisal. It may, however, be treated as an unfriendly act and certainly would represent a breach of human rights”\(^\text{142}\).

The general proposition that international law does not prohibit the expulsion of aliens doesn’t appear to be correct in view of the recent developments in the field of human rights and elsewhere. Article 1 of the European Convention of Human Rights Provides: “the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention”.

As aptly remarked by Fawcett, “This marks the great departure taken by the Convention from traditional form of international protection of individual, for it is dispense with nationality as a condition of protection”\(^\text{143}\).

Article 1 of the American Convention on Human Rights prohibits discrimination on the ground of national or social origin. Article 22(6) of the American Convention permits expulsion of aliens only pursuant to a decision reached in accordance with law. Article 22(8) is almost similar to Articles 13 of the Covenant on Civil and Political Rights 1966. Article 13 of the Covenant provides: “An alien lawfully in the territory of a state party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall except where compelling tensions of national security otherwise required, be allowed to submit the reasons against his expulsion and to have his case reviewed by and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority”. The most important provision for the purpose of present discussion is enshrined in article 22(9) which says; “the collective expulsion of allies is prohibited”.

In view of these developments, it would be wrong to say that international law does not prohibit the expulsion en masse of aliens the correct statement of law would rather be that expulsion en masse of aliens is not justified. In exceptional cases, it may be justified provided that it is not contrary to international customary and treaty law.

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(including the Law of the United Nations) and norms and principles developed in the field of human rights. Moreover in the exercise of this right, there must be no discrimination against the citizens of a particular foreign state as such.

### 3.7.3 Peaceful Use of Natural Resources

Natural resources are simply free uncaptured gifts of nature that are useful to man. They fall into two groups, renewable and non-renewable resources. Renewable resources are resources that can be replaced, and are products of non geologic short term resource cycles such as fish, timber etc, non renewable resources products of much longer resource cycles, e.g. crude oil. For any naturally occurring stock of material to qualify to be called a natural resource, it must be physically and technologically accessible.\(^{144}\)

Natural resource management is similar to environmental management and focuses on a scientific and technical understanding of resources and ecology as well as the capacity of these resources to support life. It also refers to the management of natural resources (such as land, water, soil, plants and animals) and how it affects the quality of life for both present and future generations as stated by the sustainable development.

Sustainable development is a concept that ensures the wide global land management and environmental governance to conserve and preserve natural resources. Usually five principles, are very essential to states to, use natural resources peacefully, namely

1. Mutual respect for each others territorial integrity and sovereignty.
2. Mutual non aggression.
3. Mutual non – interference in each other’s internal affairs.
4. Equality and mutual benefit.
5. Peaceful co-existence.

By adopting the above five principles of peaceful co-existence and mutual respect the exploitation of natural resources can be done without conflict. This approach would not only ensure security of lives and property but, will result to the conservation and protection of the environment.

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Aston – Jones (1998) listed four kinds of conflicts arising from the demand for resources beyond the ability of an ecosystem to supply, namely.

1. Conflicts between the ways resources are used,
2. Conflicts about resource ownership,
3. Conflicts between present and future needs, and
4. Conflicts between development methods.

The government should create situations or enabling environments that make people less and less dependent on primary commodities that have tremendous impacts to reduce the risks of natural resources related conflicts. Therefore, the state and federal governments should do everything to adopt economic policies and institutions that can stimulate growth and reduce poverty, improve governance and transparency, and reduce to reasonable degree of natural resources related grievances, and very importantly diversification of the economy.

3.8 Conclusion

We are in the process of seminal change. The half century since World War II has seen remarkable developments in international law adapting to the challenges of our increasingly interactive, interdependent and vulnerable world. In these developments international law has extended into areas once thought to be exclusively of internal concern. We have seen developments become binding on states without their consent contrary to the premise once thought to be fundamental. The roots of these developments, as of international law itself, are pragmatic we have responded in the tradition of law by developing principled solutions having the capacity to serve as norms applicable to all states and all peoples and to command the respect of all. Even those governments, which deny and conceal the violations they commit accept and proclaim the principles.

International law developed in part as natural law and as such was accepted and recognized as law through the seventeenth, eighteenth and even nineteenth centuries without the benefit of our twentieth century cannon or of its premise that international law arises by an exercise of state sovereignty. The traditional canon of the twentieth century several originally to provide a supporting rationale for international law, but it reflected a premise which failed to accommodate the realities of our time.
It is now time to recognize that in the dramatic developments in international law over the last fifty years, we have been acting on insights that change the way we have to think about the process by which international law is created. Although the concept of state sovereignty rightly continues to play an historic and legitimate fundamental role as defined by international law, what has come to drive and must drive the development of much of international law are not the sovereign consents of states but the recognition that fundamental interests of the international community give rise to necessary obligations. In a world of independent states, where states are still the principal actors, it is the responsibility of state as instruments of the common interest, needs, purposes and values of the international community to assure that these obligations are shaped and formulated and recognized in a responsible *opinio juris* of the international community as a whole.

The traditional twentieth century canon has had to give way to new foundations capable of addressing the realities of our time and to do so forthrightly and in a framework of state responsibility that continues to assure the legitimacy of international law. Ours is a world today in which the interests of stake for all states have redefined the role of states in the development of international law from one of sovereign consent to one of responsibility in an international process.

These are insights that directly and simply account for the dramatic developments that have taken place and provide a legitimate basis for addressing fortnightly the issues that are the ongoing agenda of international law.