## CHAPTER - 1 INTRODUCTION

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Preliminary Note</td>
<td>2</td>
</tr>
<tr>
<td>1.2</td>
<td>Background</td>
<td>3</td>
</tr>
<tr>
<td>1.3</td>
<td>General Remarks on State Responsibility</td>
<td>6</td>
</tr>
<tr>
<td>1.3.1</td>
<td>Principles of State Responsibility</td>
<td>6</td>
</tr>
<tr>
<td>1.3.2</td>
<td>The Relevance of Guilt in Determining a State’s Responsibility</td>
<td>7</td>
</tr>
<tr>
<td>1.3.3</td>
<td>The Responsibility of States for the Harmful Consequences of Legitimate Activities</td>
<td>8</td>
</tr>
<tr>
<td>1.4</td>
<td>The General Rules of International Law on State Responsibility</td>
<td>9</td>
</tr>
<tr>
<td>1.4.1</td>
<td>Concept of State Responsibility</td>
<td>9</td>
</tr>
<tr>
<td>1.4.2</td>
<td>State Responsibility for Private Acts or Omissions</td>
<td>11</td>
</tr>
<tr>
<td>1.5</td>
<td>Kinds of State Responsibility.</td>
<td>15</td>
</tr>
<tr>
<td>1.5.1</td>
<td>Direct State Responsibility.</td>
<td>15</td>
</tr>
<tr>
<td>1.5.2</td>
<td>Indirect State Responsibility.</td>
<td>18</td>
</tr>
<tr>
<td>1.6</td>
<td>Consequences of State Responsibility</td>
<td>19</td>
</tr>
<tr>
<td>1.7</td>
<td>Scope of the Study</td>
<td>21</td>
</tr>
<tr>
<td>1.8</td>
<td>Problem Stated</td>
<td>22</td>
</tr>
<tr>
<td>1.9</td>
<td>Hypothesis</td>
<td>22</td>
</tr>
<tr>
<td>1.10</td>
<td>Research Questions</td>
<td>23</td>
</tr>
<tr>
<td>1.11</td>
<td>Objectives of the Study</td>
<td>24</td>
</tr>
<tr>
<td>1.12</td>
<td>Research Significance</td>
<td>24</td>
</tr>
<tr>
<td>1.13</td>
<td>Methodology</td>
<td>25</td>
</tr>
<tr>
<td>1.14</td>
<td>Structure of the thesis</td>
<td>25</td>
</tr>
</tbody>
</table>
1.1 Preliminary Note

By looking at the world today, it becomes clear that a large number of states are repeatedly violating their international obligations. Since there is no effective international policies, states at times act as if they are above the law. The basic principle of “State Responsibility” in international law provides that any state that violates its international obligations must be held accountable for its acts. More concretely, the notion of state responsibility means that states, which do not respect their international duties, are responsible immediately to stop their illegal actions, and make reparations to the injured.

This is a fundamental principle, which forms part of international customary law, and is binding upon all states. The rules on “state responsibility” do not specify the content of a state’s obligations under international law, for example torture is forbidden, or that a state must provide medical services to the civilian population. These obligations are specified in numerous international law treaties and in international customary law.

The laws of state responsibility are the principles governing when and how a state is held responsible for a breach of an international obligation. Rather than set forth any particular obligations, the rules of state responsibility determine, in general, when an obligation has been breached and the legal consequence of that violation.

In this way, they are “secondary” rules that address basic issues of responsibility and remedies available for breach of “primary” or substantive rules of international law, such as with respect to the use of armed force. Because of this generality, the rules can be studied independently of the primary rules of obligation. They establish (i) the conditions for an act to qualify as internationally wrongful, (ii) the circumstance under which actions of officials, private individuals and other entities may be attributed to the state, (iii) general defenses to liability and (iv) the consequences of liability.

Until, the theory of the law of state responsibility was not well developed. The position has now changed with the adoption of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC) in August 2001\(^1\). The Draft Articles are of a combination of

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Introduction

codification and progressive development. They have already been cited by the International Court of Justice \(^2\)(ICJ) and have been well received.

1.2 Background

The doctrine of state responsibility developed over the centuries from general principles derived from ancient texts\(^3\). Traditionally, the term referred only to state responsibility for injuries to aliens. It included not only “Secondary” issues such as attribution and remedies, but also the primary rights and duties of states, for example the asserted international standard of treatment and the right of diplomatic protection. Early efforts by the League of Nations and private bodies to codify the rules of “state responsibility” reflected to the traditional focus on responsibility for injuries to aliens\(^4\). The League’s 1930 Codification Conference in The Hague was able to reach an agreement only on “Secondary” issues such as imputation, not on substantive rules regarding the treatment of aliens and their property. Traditional international law regarded that it was a consequence of breach or non-performance of an international obligation a duty to make reparation arose and it was in this sense that the term “responsibility” was identified with the liability\(^5\). At the same time it also required that for the existence of an internationally wrongful act, which arose out of breach or non-performance of an international obligation, conduct of the state must permit the wrongful act imputable to it\(^6\).

Attempts to codify and develop the rules of state responsibility have been continued throughout the life of the United Nations. It took nearly 45 years, more than thirty reports and extensive work by five Special Rapporteurs in order for the ILC to reach agreement on the final text of the Draft Articles as a whole, with commentaries\(^7\). At the same time, the customary international law of state responsibility concerning matters such as detention and physical ill-treatment of aliens and their right to a fair trial has been rendered less important than formerly by the development of international human rights law, which applies to all individuals,

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\(^2\) ICJ Reports 1997, p. 7
\(^5\) Year Book of International Law Commission, 1956, Vol 2, 174, p. 180
\(^7\) International and Comparative Law, 2005 Oct. Vol .54, Issue 4, p. 960
whether aliens or nationals. The concept of a general regime of legal responsibility, which the rules of state responsibility have taken on, is an inception of the civil law system and is largely foreign to the common law tradition.

The topic of state responsibility was one of the first 14 areas provisionally selected for the ILC’s attention in 1949. When the ILC listed the topic for codification in 1953, “state responsibility” was distinguished from a separate topic on the “treatment of aliens”, reflecting the growing view that state responsibility encompasses the breach of an international obligation.

The ILC’s first special rapporteur on state responsibility, F.V. Garcia Amador of Cuba, appointed in 1955 noted, “It would be difficult to find a topic be set with greater confusion and uncertainty”. Garcia Amador attempted to return to the traditional focus on responsibility for injury to aliens but it was essentially abandoned by the ILC when his membership ended in 1961.

His successor, Roberto Ago of Italy, reconceptualised the ILC’s work in terms of the distinction between primary and secondary rules, and also established the basic organizational structure of what would become the Draft Articles. According to him to make a distinction between “primary” rules which imposed specific obligation and “secondary” rules which are only concerned with determining the legal consequences of failure to fulfill obligations established by the ‘primary’ rules. The field of responsibility according to him covered only the ‘secondary’ obligations. From the very beginning Ago affirmed the distinction between “responsibility of states” for internationally wrongful acts and “liability of states” arising out of the performance of lawful activities.

He once again clearly pointed out that the area of responsibility covered only wrongful acts leaving the field of injurious consequences arising out of lawful activities to be studied separately. In fact this may be regarded as the beginning of the

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10 Report to the General Assembly, 1949, Year Book of the International Law Commission 277, p. 281
11 1949 Year Book of International Law Commission, 46, 49-50, UN DOCA/ CN.4/SER;A/1949
formal growth of the concept of liability in international law for injurious consequences, arising out of acts not prohibited by international law.

By focusing on general rules, stated at a high level of abstraction, Ago created a politically safe space within which the ILC could work a largely avoid the contentious debates of the day. From 1969 until his election to the ICJ in 1980, Ago completed work on part 1 of the Draft Articles, addressing the origin of state responsibility. Most of the thirty-five articles adopted during his tenure are reflected in the Final Draft.\(^{17}\)

Work on the remainder of the articles proceeded slowly throughout the 1980s and early 1990s. William Riphagen of the Netherlands, who served as special rapporteur to 1986, stressed that particular primary rules may specify the consequences of their breach an idea conveyed by the articles through the recognition of *Lex Specialis*. Gaetano Arangia-Ruiz Special rapporteur from 1988, helped to clarify the consequences of breaches of international obligations. Over the next eight years, the ILC Completed it’s first reading of part 2 and 3. In 1995, the United Nations General Assembly adopted a resolution in effect pressing the Commission to make progress on the state responsibility articles and other long pending projects.\(^{18}\)

James Crawford of Australia, appointed as Special rapporteur in 1996, approached the task pragmatically. The process of codifying this vast body of law began more than fifty years ago, and culminated in the General Assembly of the United Nation’s adoption of the ILC’s Articles on state Responsibility in the fall of 2001.\(^{19}\) On 12 December 2001, the United Nations General Assembly adopted resolution 56/83 which commended to the attention of governments without prejudice to the question of their future adoption or other appropriate action.\(^{20}\)

The ILC and the special rapports have been indicating generally that the stretch of “Responsibility” reaches the areas like nuclear activities, space activities and activities depleting the environment.\(^{21}\) However, in his actual working, the

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18. GARCS 50/45, Para 3 (Dec 11, 1995)
Commission has proceeded generally without committing itself to any kinds of activities keeping open the possibility of modifying the scope\textsuperscript{22}.

1.3 General Remarks on State Responsibility

1.3.1 Principles of State Responsibility

All Sovereign states are equal in rights as well as in corresponding duties to respect the rights of other states. When a state violates the rights of another state and causes injury to the latter, as a result, it is responsible for said injury and has compensated fully for all damages. As the Permanent Court of International Justice (PCIJ) has appropriately found, “it is a principle of international law and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation”\textsuperscript{23}. In simple words, the state is responsible for the breaches of its international obligations and becomes subject to whatever remedial action is legally permissible in the circumstances.

The rules covering state responsibility were recently codified into the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)\textsuperscript{24}, which reflect customary international law binding upon all states\textsuperscript{25}. These provide that “every internationally wrongful act of a state entails the international responsibility of that state”\textsuperscript{26}. The responsibility arises from conduct, an action, or an omission that (1) is attributable to that state under international law and (2) constitutes a breach of an international law of the state\textsuperscript{27}. Article 12 explains that such a breach occurs when an act of state is not in conformity with what is required of that state by the particular obligation in question, regardless of its origin or character. For the sake of objectiveness, it is exclusively for international law to determine what constitutes an internationally wrongful act, irrespective of municipal law\textsuperscript{28}. If any of these requirements is not duly satisfied, there is no internationally wrongful act and the state cannot be held legally responsible for the action in question.

\textsuperscript{22} Year Book of International Law Commission, 1986, Vol 2, part 2, p. 56
\textsuperscript{23} Judgment, The Factory Charzow (Germany V Poland) Permanent Court of International Justice, Series A, No.17 (1928) 4, p. 29
\textsuperscript{24} General Assembly Resolution 56/83, 28-01-2002, Annex (Draft Articles)
\textsuperscript{25} R.Wolfrum, State Responsibility for Private Actors; An Old Problem of Renewed Relevance, M Ragazzi (Ed), International Responsibility Today, leiden, Brill 2005, p. 424
\textsuperscript{26} Ibid Article 1
\textsuperscript{27} Ibid Article 2
\textsuperscript{28} Ibid Article 3
The law of state responsibility is based on the concept of agency. States are political abstractions and act not as such but through persons. So, the key question is whether a person has acted as an agent of a particular state and his acts qualify as action of that state. This is particularly true in cases involving formal state organs, especially their officials that have been authorized to exercise public functions and, as a result, represent the state in question. If it is established that an act is indeed attributable to a state, the latter is considered to have itself committed that act, without further regard to the identity of the person who actually carried it out.

The traditional rule is that the conduct of private actors, both persons and entities, is not normally attributable to the state under international law. However, it is equally well settled that the acts of de facto state agents are attributable to the state, i.e., the conduct of apparently private actors may in fact be sufficiently connected with the exercise of public functions that otherwise private acts may be deemed state action instead. The rules of state responsibility have gradually developed to hold a state answerable for its own wrongdoings also in relation to private violence. Where the state has a duty to prevent private harm or to abstain from any support for it, its responsibility is engaged when it violates these obligations. In these cases, it is often difficult to make a determination. It is however, less likely that it is going to be possible to demonstrate that a state is responsible for the private acts itself (direct responsibility) than it is proved that the state is responsible for its own related wrong i.e., its inadequate efforts to prevent the private action in question (indirect responsibility). The fact of whether the state bears direct or indirect responsibility usually determines also what kind of countermeasures may be appropriate and lawful in the case in question.

1.3.2 The Relevance of Guilt in Determining a State Responsibility

The comprehensive evaluation of a given state’s behavior in international relations includes, among other things, an evaluation of its aims and subjective intentions. This also applies to behaviour that contradicts international law. The

proposition that the concept of guilt applies in international law is shared by most international lawyers

The concept of guilt as a specific psychological relationship does not apply to a state. A State’s guilt can refer only to a socio-political phenomenon whose essence is that a given state- that is its organs deliberately engages in actions that violate international law. Guilt is presumed to exist whenever a state violates its international obligations. In the case of simple violations of law (delicts), however, states have a right to prove their innocence (for instance, in the case of border incidents). But in the case of international crimes (for example, armed aggression, a policy of apartheid and of racial discrimination) the very nature of their actions is such that guilt is unavoidable.

The use of the concept of guilt in international law has a specific characteristic, namely that its extent does not always influence the scope of consequent responsibility. In the case of violations of law resulting exclusively or primarily in material damage, the level of responsibility like in domestic, and especially civil law is determined primarily by the extent of the damage caused. In the case of other types of violations, however, and especially of aggression and other international crimes, the extent of guilt of a state can play a major role in defining its responsibility. For example in the peace treaties of 1947 with Bulgaria, Hungary, Italy and Romania, the extent of their responsibility was defined with due consideration of the fact that they had eventually broken off relations with Nazi Germany and joined in the war on the Allied side. The Peace Treaty of 1947 with Finland also gave due consideration to the fact that it had broken off relations with Nazi Germany.31

1.3.3 The Responsibility of States for the Harmful Consequences of Legitimate Activities

While recognizing that the general grounds for determining the responsibility of states are violations of international law, one cannot ignore the fact that the revolution in science and technology has brought with it the problem of compensating for damage caused by the legitimate activities of states. This results from the discovery of nuclear energy and the rapid development of various forms of its exploitation, the further development of rocket and missile technology, and the

31 Supra Note 9, p. 229
exploration and use of outer space. Here the reference is to what is called liability for risk, which has different grounds than do violations of law. In fact, it merely involves compensation for damage caused by the use of high-risk technologies. The ILC, and also the Sixth Committee of the 28\textsuperscript{th} Session of the UN General Assembly, has recognized that, in view of these differences in the grounds for liability, these situations should be considered separately. On the basis of reports prepared by a special rapporteur, Professor R. Q. Quentin-Baxter (New Zealand), the UN ILC has been working since 1980 on the subject of “International injuries consequences arising out of not prohibited by international law”.\textsuperscript{32}

Such international agreements as the Conventions on International Liability for Damage Caused by Space Objects (1972) provide for compensation for material damage arising not as a result of a given state’s violations of its international obligations but simply on the fact of damage associated with legitimate activities. Art.2 of the Convention provides that “a Launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.”

1.4 The General Rules of International Law on State Responsibility

1.4.1 Concept of State Responsibility

State responsibility is an age-old principle of international law that was developed to protect the rights of aliens\textsuperscript{33}. It arises when a state commits an international wrong against another state\textsuperscript{34}. This rule has now been elevated to the status of a general principle of international law\textsuperscript{35}. In Chorzow Factory (Germany V Poland)\textsuperscript{36}, the Permanent Court of International Justice defined it not only as a principle of international law but also as a ‘greater conception of law’ involving an obligation to make reparation for any breach of an engagement\textsuperscript{37}. According to the Court, ‘reparation is therefore the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself’. The principle of state responsibility emanates from the nature of the international legal

\textsuperscript{32} Ibid p. 230  
\textsuperscript{34} Ian Brown lie, Principles of Public International Law, (5th Ed 1998), p. 435-436  
\textsuperscript{35} Ibid p.436  
\textsuperscript{36} PCIJ, (Ser A) No.13, (1928), p. 28  
\textsuperscript{37} Ibid, p. 29, see also Corfu Channel (United Kingdom V Albania), (1949) ICJ Rep. 4, p.23
system, which relies on states as a means of formulating and implementing its rules, and arises out of the twin doctrines of state sovereignty and equality of states.\(^{38}\)

The Draft Articles represent an attempt by the ILC to codify international rules on state responsibility. The ILC was created in 1949 with a mandate to draft the articles. However, it did not fulfill its task until 9 August 2001, when it adopted the entire set of Draft Articles. Since the Draft Articles have not been adopted as a treaty, they are clearly not binding. However, the fact that the Draft Articles codify existing case law and state practice in this area has prompted Viljam Engstrom to contend that they generally provide evidence of established and developing customary international law.\(^{39}\) Other commentators have even suggested that the Draft Articles could have authoritative force considering that they represent the views of highly recognized publicists in international law.\(^{40}\)

In terms of the Draft Articles, state responsibility is incurred when two elements are proved. The first is that there must be a conduct consisting of an act or omission, which is attributable to the state under international law. The second is that the conduct must constitute a breach of an international obligation of the state. It is clear, therefore, that state responsibility is dependent on the link between the state and the wrongful act the conduct of a private actor must qualify as an 'act of a state'.\(^{41}\)

The doctrine of State Responsibility is a fundamental principle of international law, the substance of which has developed through the customary practices of States.\(^{42}\) 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 like any other person, when a state breaks a law, it must receive some form of punishment.

\(^{40}\) For a brief survey of the views of prominent academics on the Draft Articles, see David Caron, ‘The ILC Articles on State Responsibility. The Paradoxical Relationship between form and Authority’ *American Journal of International Law*, p. 857  
\(^{41}\) Draft Articles on Responsibility of States for Internationally Wrongful Acts, as contained in Report of the International Law Commission on the work of its 53rd Session, UN Doc A/ 55/10 (2000) (Draft Articles), art 2. These elements were also specified by the Permanent Court of International Justice in *Phosphates in Morocco (Italy V France) (Preliminary Objections)* (1938) PCIJ (Ser A/B) No-74, p.28  
\(^{42}\) Supra Note 3, p.25  
1.4.2 State Responsibility for Private Acts or Omissions

It follows from the above discussion that the question of whether a state can be found liable for violations of international law by private actors is dependent on the definition of an ‘act of a state’. According to Art 3 of the Draft Articles, International Law not internal law governs the characterization of an act of the state as internally wrongful\textsuperscript{44}. The Draft Articles articulate a number of rules under which state responsibility can be imputed some of them expressly or impliedly envisage the liability of the state for the wrongful acts or omissions of private actors.

Firstly, Art 5 of the Draft Articles stipulates that the conduct of a person or entity- which is not an organ of the state ‘empowered by the law of that state to exercise elements of the governmental authority’ can give rise to state responsibility provided that the person was acting in that capacity in the particular instance in issue. It has submitted that this rule encompasses a wide range of bodies, which are not state organs, but are empowered by state law to exercise elements of governmental authority, such as public corporations, quasi-public entities, and private companies\textsuperscript{45}. Thus, for example, acts or omissions of private security companies contracted to provide security service to prisons, or private airlines exercising delegated powers relating to immigration control or quarantine, may be attributed to the state\textsuperscript{46}.

Secondly, in terms of Art 8 of the Draft Articles, the conduct of a person or group of persons acting on the instructions of or under the direction or control of, a state can be attributed to the state in question. Where conduct is authorized by the state, liability is incurred regardless of whether the person to whom authorization is given is a private individual\textsuperscript{47}. It also does not matter whether the conduct involves public functions or governmental activity\textsuperscript{48}. What is required is proof of state authorization. Under this principle, therefore, acts or omissions of private actors will

\textsuperscript{44} See Treatment of Polish Nationals and other persons of Polish origin or Speech in the Danzig Territory (Plond V Free city of Danzig) (Advisory Opinion) (1938) PCIJ (Ser A/B) No 44, 23

\textsuperscript{45} James Crawford, The International Law Commission’s Articles on State Responsibility: Introduction, text and Commentary. (2002), p.100

\textsuperscript{46} Ibid p.102, In Hyatt International Corporation V Government of the Islamic Republic of Iran (1985) of Iran USCTR, 94-5, Iran established an autonomous foundation which held property on trust for certain charitable purposes, but the state kept close control of the foundation. The Iran-United States Claims Tribunal held that the foundation was controlled by the government such an entry would be covered by Art 5 of Draft Articles as regards the execution of its charitable functions’.

\textsuperscript{47} Supra Note 43, p. 110

\textsuperscript{48} Ibid p.113
give rise to state responsibility as long as it can be proved that such actors were acting on the instructions of, or under the direction and control of, the state.

However, where it is argued that conduct is carried out under the direction or control of a state, the scope for founding state responsibility for acts or omissions of private actors is narrower than under Art 5 of the Draft Articles. In this case, conduct is attributable to the state if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.\(^\text{49}\) If conduct is merely incidental to the operation, or was carried out in a manner that exceeded the state’s direction or control, the state will not be responsible.

In Military and Paramilitary Activities in and against Nicaragua (Nicaragua V United States of America)\(^\text{50}\), the government of Nicaragua alleged before the ICJ that the US was responsible for violations of international law committed by the contras, a revolutionary rebel force, against the Nicaraguan Government. The latter alleged, among other things, that the US founded the contras and directed their strategies and tactics. The ICJ did find as a fact that the US Planned, directed and supported the activities of the contras\(^\text{51}\). However, it refused to hold that all activities of the contras were carried out under the control of the US. According to the Court, there was ‘no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf\(^\text{52}\). The Court took the view that for conduct to give rise to state responsibility; it must be proved that the US “had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”\(^\text{53}\). Such a high threshold for the test of control means that it is practically difficult to find a state responsible for acts or omissions of private actors under Art 8 of the Draft Articles.

In the recent case of Prosecutor V Tadic (Appeals Chamber Judgment)\(^\text{54}\), the International Criminal Tribunal for the Former Yugoslavia indicated that a lesser standard of control could be applied depending on the facts of each case\(^\text{55}\). It stated that, for the purposes of imputing criminal responsibility on state authorities for acts of armed forces allegedly acting under their control the required level of control

\(^{49}\) Ibid p.115
\(^{50}\) (1986) ICJ Rep 14 (‘Nicaragua Case’)
\(^{51}\) Ibid pp. 58-62
\(^{52}\) Ibid p.63
\(^{53}\) Ibid p.64
\(^{54}\) Case IT-94-1-A (15 July 1999) (‘Tadic’)
\(^{55}\) Ibid p.117
would be ‘overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations’.56

Although this case sought to reduce the threshold of control, it can be argued that many wrongful acts of private actors might still not be attributed to the state under the proposed lesser standard of state control. For example, financial and other assistance, and advice offered to private actors by the state with the knowledge that it might be used, or is used, for committing gross violations of human rights, might not result in the liability of the state.

A separate question on state control relates to whether the conduct of state-controlled or state-owned corporations or enterprises can be imputed to the state. International law is clear on this issue. The rule recognizing the separate legal personality of corporations, common in domestic jurisdictions, is also valid in international law57. Unless such, corporations exercise elements of governmental authority, their conduct cannot be attributed to the state. However, the state incurs liability for the corporations that it owns or controls where the veil of incorporation is used as an engine for fraud58, or where it can be shown that the corporation was exercising public powers59, or being used by the state to achieve a particular purpose60.

Under Art 9 of the Draft Articles, the conduct of private persons or groups exercising elements of governmental authority ‘in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority’ can be attributed to the state. Accordingly, the conduct must relate to the exercise of public functions or governmental authority, there must be absence or default of official authorities, and the circumstances must have justified the exercise of those powers.

Professor James Crawford has suggested that the circumstances under which the state would be found liable under this head are rare. They include situations

56  Ibid p.145
57  Supra Note 43, p.112
58  Barcelona Traction, Light and Power Company, Ltd, (Belgium V Spain) (Second Phase)(1970) ICJ REP 3, p.39
60  Foremost Tehran, Inc V Government of the Islamic-Republic of Iran, (1986) 10 Iran-USCTR 228, 240-2
during a revolution, armed conflict or foreign occupation where regular authorities have been dissolved or are incapable of carrying out their normal duties\(^{61}\). The case of *Yeager V Islamic Republic of Iran*\(^{62}\), Illustrates the application of the principle under Art 9. In this case, certain individuals performed immigration, custom and similar function at Tehran airport immediately after a revolution. The Iran United States Claims Tribunal held that the conduct of these individuals, though not explicitly authorized by the government, was attributable to the Islamic Republic of Iran\(^{63}\). Article 10(1) of the Draft Articles also provides that ‘the conduct of an insurrectional movement which becomes the new government of a state shall be considered an act of that state under international law’.

Similarly, ‘the conduct of a movement, insurrectional or other, which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration’ amounts to an act of the new state\(^{64}\), these provisions clearly envisage state responsibility for acts or omissions of private actors. As long as a rebellion is successful, all wrongful acts or omissions committed by or its members are attributed to the new state. However, where the insurrection or rebellion is not successful, the state will not be responsible for violations of international law by the members of the insurrection. In such an instance, the state is only liable if it is guilty of a lack of good faith or negligence in suppressing the insurrection\(^{65}\). Lastly, under Art 11 of the Draft Articles, a state may be responsible for conduct which is otherwise not attributable to it where the state acknowledged such conduct or adopted it as its own.

Thus, where a state acknowledge or adopts the conduct of private actors, the state will be responsible. For example, in the *Diplomatic and Consular Staff Case*,\(^{66}\) certain militants seized the US embassy and its staff in Iran without the authority of the Iranian Government. However, the government issued a decree, which expressly and effectively approved the conduct of the militants. Furthermore, the government continued with the occupation of the embassy. It was held considering the subsequent

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\(^{61}\) Supra Note 43, p.114
\(^{62}\) (1987) 17 Iran –USCTR, p. 92
\(^{63}\) Ibid p. 103-5
\(^{64}\) Draft Article on Responsibility of States for Internationally wrongful Acts, as contained in Report of the International Law Commission on the work of its 53rd Session, UN Doc A/55/10 (2000) (Draft Article) Art 10(2)
\(^{65}\) *G.L.Solis(USA) V United Mexican States*, (1928) 4 RIAA- 358, 361
\(^{66}\) (1980) ICJ Rep 3
conduct of the Iranian Government that it was responsible even for the acts of the militants. The thrust of this discussion is that the general rules of international law do recognize that state responsibility can be incurred, not only for violations committed by the state itself and its servants, but also for those committed by non-state actors. However, there must be a sufficient nexus between the state and the acts of the private actors for the state to assume liability, the conduct of the private actor must constitute an ‘act of a state’.

1.5 Kinds of State Responsibility

State Responsibility may incur in two ways that is either by the act of the state or by the act of its individuals. When an act, which constitutes a breach of an international obligation, is committed by the government of a state, or by any person at the government’s command or with its authorization, the act is called the act of states and it is held responsible for such wrongful acts. A State may be held responsible for acts other than of its own; namely, certain unauthorized injurious acts of its agents, of their subject, and even such aliens as are for the time being lived within their territory. Responsibility of a state of the former kind, has been termed by Oppenheim as ‘original responsibility and to the latter ‘vicarious responsibility.’ It is true that legal consequences of the two categories of acts may not be the same but there is no fundamental difference between the two categories of state responsibility. The use of the expression vicarious responsibility is ‘surely erroneous’.

The act of a state is called as direct state-responsibility and the act of its individuals is called ‘as indirect state responsibility

1.5.1 Direct State Responsibility

When the breach of an international obligation is caused by a state, it becomes responsible to that state whose right has been infringed. State performs its function through different organs and agencies, and if any wrongful act is done by any of them, state becomes responsible directly on their behalf. It was provisionally adopted by the ILC on first reading that the conduct of an organ of that state under international law,

67  Ibid pp.34-37
69  Oppenheim’s, *International law*, vol.1, (9th Ed), pp. 501-502
whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and it hold a superior or a subordinated position in the organization of the state\textsuperscript{71}. Such organs and agencies are as follows.

a. Executive and Administrative Organs;
b. Acts of Diplomatic Envoys;
c. Acts of Members of Armed Forces;
d. Acts of Judiciary;
e. Constituent units of Federal States.

\subsection*{a) Executive and Administrative Organs}

When an act causing injury to another state is committed by the Head of the Government of a state, or an official or other individual commanded or authorized by the Head of the Government, a state becomes responsible for their acts. Such acts are called ‘international delinquency’. Thus, international delinquency may be caused either by the higher authorities or by minor or subordinate officers and employees if they have been commanded or authorized by the former. However, the distinctions between higher and subordinate officials have no significance for the placing of responsibility on the state. Unreasonable acts of violence by police officer and failure to take the appropriate steps to punish the culprit will constitute state responsibility\textsuperscript{72}.

\subsection*{b) Acts of Diplomatic Envoys}

Although diplomatic envoys enjoy immunities in the state where they are sent and are excluded from the jurisdiction of the receiving state for their acts, a state become responsible for those injurious acts which are performed by them at the command or with the authorization of his home state. For such injurious acts, the diplomatic agents cannot personally be blamed\textsuperscript{73}. International law therefore makes the home state in a sense responsible for all acts of an envoy which are injurious to the state or his subjects on whose territory he resides\textsuperscript{74}.

\textsuperscript{71} Year Book of the International Law Commission, 1973, Vol 11, p.193
\textsuperscript{72} Supra Note 66, p.218
\textsuperscript{73} Supra Note 67, p.542
\textsuperscript{74} Ibid p.544
c) Acts of Members of Armed Forces

A State shall be responsible for all injurious acts of its armed forces if the act has been commanded or authorized by the state. Conversely, if the act is committed by the members of its armed forces in the exercise of their official functions without that state’s command or authorization, it is not regarded as to state act, and as such a state is not held responsible for such acts. But if the soldiers commit any mistaken act or show any reckless conduct, the state shall be held responsible even if they have not been authorized by the state.

d) Acts of Judiciary

It is a fundamental principle of the municipal law that judiciary remains independent. However, it is irrelevant from the international law point of view. If the courts give any such judgment, which is contrary to the international obligation of a state, responsibility of a state shall be involved.

For instance, a judgment denying to an ambassador the immunities ensured by customary international law, or a decision in which the judge exceeds the limits of the territorial jurisdiction recognized by international law, or the decision where a fugitive offender has been dealt with the contrary to a provision of an extradition treaty are the cases where a state is held to be responsible.

e) Constituent units of Federal States,

It is a generally accepted principle of international law that a federal state is responsible for the wrongful acts of its constituent units. A federal state cannot evade his responsibility by alleging that its constitutional powers of control over them are insufficient. A state cannot plead the principles of municipal law, including its Constitution, in answer to an international claim. ILC in its report of 1974 is clearly stated.

The principle that the state is responsible for acts and omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has been unequivocally recognized in territorial judicial decisions and the practice of state. A state is held responsible for the wrongful acts of the above organs and authorities. In certain cases it becomes difficult to find out which organ or agency has

75 Ibid p.545
76 Fifth Report of International Law Commission , pp. 3-4
committed wrongful act. State responsibility arises if the act has been done in its
territory even if it is not clear as to who has committed it.

In the *Corfu Channel Case*, Albania was held responsible for the
consequences of mine laying in its territorial waters by reasons of the knowledge by
the Albanian authorities of the presence of the mines. There was no finding as to the
agency, which did the mine laying, and it was possible that a third state was
involved.\(^77\) Similarly, a neutral state may be responsible for allowing armed
expeditions to be fitted out within its jurisdiction which carry out belligerent
operations against another state\(^78\).

1.5.2 **Indirect State Responsibility**

It is an obligation of a state to prevent its own subjects as well as foreign
subjects living within its territory from committing such acts, which may cause injury
to the other states. If any wrongful act is done by an individual or a group of
individuals a state to which they belong is held responsible for the acts. Such
responsibility is called ‘indirect’ responsibility because a state is responsible not for
the wrongful acts of its own organs but for the acts of its individuals. Oppenheim has
rightly stated that if a state has not exercised due diligence it can be made responsible
and held liable to pay damages.\(^79\)

Acts of individuals for which a state may be held responsible may be many.
For instance, the crime against foreign sovereigns or ambassadors, offences to the flag
of a foreign state, organization of armed bands in support of insurrection, injurious
propaganda directed against a foreign state or its head, damages to the person or
property of aliens. The responsibility of a state for the wrongful acts of individuals
may be as follows.

a) Mob violence.

b) Violence in insurrections and in civil wars.

**a) Mob violence**

A state is responsible for the damage caused by a group of individuals or by
mob. Responsibility of a state for the mob violence may arise in two ways.
Firstly, a state shall be responsible if foreign public or private property is damaged by

\(^77\) Supra Note 68, p.447  
\(^78\) Ibid p.449  
\(^79\) Supra Note 67, p.549
the mob violence due to substantial neglect to take reasonable precautionary or preventive action. In other words, responsibility of a state arises where a state has not taken due diligence to prevent the mob-violence. The principle implies that it is a duty of a state to foresee the danger of violence and it should have made special efforts to prevent it.

Secondly, state is also responsible where mob violence takes place due to indifferent attitude of its organs, i.e., if the wrongful act is done with the connivance of its organs. In order to establish the responsibility, it has to prove that the violence occurred due to the connivance of the state.\(^{80}\)

b) Violence in insurrections and in civil wars.

A state remains responsible for the injuries caused to an alien in the consequence of civil strife. The above principle is based on the presumption that it is a duty of a state to prevent violent acts of the revolutionary on its own territory by taking due diligence. Thus, the responsibility of a state for acts of insurgents and rioters is the same as for acts of other private individuals. However, if the loss or damage is caused in the course of an action taken for the suppression of rebellion and restoration of order, the state is not responsible by an application of analogy of the principle that there is no responsibility for injuries inflicted by acts of war. Responsibility of a state ceases in such cases also because it amounts to unjustifiable inequality between nationals and foreigners.

1.6 Consequences of State Responsibility

When a state causes injury to another state it has to discharge the responsibility incumbent upon it for breach of an international obligation. The juridical consequence of the breach of any international obligation is the creation of a duty to make reparation\(^{81}\). The language of the PCIJ in the *Chorzow Factory Case* represents the classic articulation of the content of this duty.

The essential principle contained in the actual notion of an illegal act a principle which seems to be established by international practice and in particular by the decision of arbitral tribunals is that reparation must, as far as possible, wipeout all

\(^{80}\) Supra Note 66, pp. 221-222
the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed\(^82\).

Three categories of reparation exist: restitution, compensation, and satisfaction. Although inconsistent terminology in the literature has blurred the boundaries of these categories\(^83\), it is possible to define the core nature of each. Restitution, in the broad sense of restitution in integrum, represents the obligation to eliminate the effects of the breach to restore the situation to its pre-breach state. Restitution in kind, the return of persons or property wrongfully taken, constitutes a specific subset of the general restitution obligation\(^84\). In certain cases, of course, restitution in kind may be inapplicable or impossible given the nature of the breach and its consequences. Restitution in kind “should be discarded when there is absolute impossibility of envisaging specific performance, or when an irreversible situation has been created\(^85\). Payment of compensation may be required when it is needed as a supplement to restitution, when restitution in kind is impossible, or when it is prohibited by a compromise\(^86\).

Chorzow Factory Case summarizes the principles of compensation: Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law\(^87\). Few guidelines help to quantify loss when the breach consists, for example, of a violation of territory or, perhaps, a failure to punish, when no economic loss has occurred\(^88\).

Satisfaction, the third form of reparation, is often associated with such non-material injuries\(^89\). Satisfaction is not used only in moral or political injury cases\(^90\).

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82 Chorzow Factory Case (Merits) (Germ V Pol), 1928, PCIJ (Sec A) No 17, p. 47. See B.Cheng, General Principles of Law Applied by International Courts and Tribunals, (1953), p. 233
83 Supra Note 68, pp. 457-58
84 Mann, The Consequences of an International Wrong in International and National Law, (1977), p. 2
86 G.Schwarzenberger, International Law, (3rd Ed. 1957), p. 660
87 Chorzow Factory Case (Merits) (Germ V Pol), 1928, PCIJ (Ser A) No.17, p. 47, for discussion of the issue of damages in charzow factory, see M whiteman, Damages in International Law, (1937), p. 1529
88 M.Whiteman, Damages in International Law, (1937), p. 42
The forms of satisfaction may include formal apology or declaration of responsibility, guarantees against repetition, punishment of individual actors, and other measures fashioned appropriately to the facts. And, as Brownlie logically suggests, pecuniary awards predominantly designed to express apology are properly viewed as cases of satisfaction rather than compensation in the strict sense.

Another obvious obligation relating to responsibility rarely receives specific mention in the literature: the duty to stop the conduct constituting a breach of obligation. As Riphagen, writing as a special rapporteur to the ILC, submits, “It does not seem relevant whether one considers this duty as a consequence of the continuing ‘validity’ or ‘force’ of the primary obligation or as a duty which arises as a consequence of the breach.” Nor, if defined as a consequential obligation, does it matter whether the duty is viewed as subsumed in the notion of restitution in integrum or as an independent remedy. Without question, a state in a position of responsibility must cease its violative conduct. The selection of the appropriate form of reparation in a particular case, of course, depends on the facts, i.e., the specific nature of the breach and its consequences.

1.7 Scope of the Study

After this brief historical account of the circumstances under which the ILC decided to create a separate and distinct area, and the juridical, sociological and philosophical background necessitating the establishment of such a regime, the present discussion is taking within its encompass the said area as the scope of this thesis obvious, the work of the ILC comes within the critical analysis of the study. The scope of this research is therefore, focused on contemporary issues in regard to individuals problems of aliens, refugees, human rights, war crimes, terrorism, hijacking, environmental pollution, internally displaced persons, indigenous problems and also state responsibility before international judicial institutions.

The research work will not go in detail regarding above stated problems but it is focusing on certain minute problems involved in these areas. The scope is restricted...
to critical approaches in regard to state responsibility. The focus of this marathon study has discussed the ILC initiations and issues involved in the present context.

1.8 Problems Stated

- The constitution of a separate regime of responsibility is subject to a lot of circumspection, criticisms and skepticism.
- It requires examination how far it is acceptable to the community of nations to entail a non-prohibited activity to ensue “responsibility”. Again, to what extent the unorthodox view of holding ‘co-operation’ as the basis of obligation is workable in international community. Further, how the consequences of harm, like prevention and reparation, can be suitably accommodated in the regime.
- In the present context the Draft Articles provisionally adopted by the ILC do not provide clear guidance, for example Art 23.
- States are not given importance to the concept of state responsibility due to the evolution of individual and collective state responsibility.
- There is no proper international mechanism for the enforcement or implementation of state responsibility. Also unresolved difficulties on state responsibility are remained in the present scenario.
- The law of state responsibility is still in early phase and may possibly be advanced to the stage where states and individuals are fixed also with responsibility for breaches of international law which are international crimes as distinct from normal responsibility for breaches giving rise ordinarily to an obligation only to make reparation or pay compensation.
- The law of state responsibility has been unfastened from the set of substantive rules or the treatment of foreigners, with which it had been previously bound up.

1.9 Hypothesis

- State responsibility is now generally acknowledged that a distinction can be made between ‘primary rules’ of international law, that is those customary or treaty rules laying down substantive obligations for states (on state immunities, treatment of foreigners, diplomatic and consular immunities, respect for the territorial sovereignty of other states etc..) and ‘secondary
rules’, that is rules establishing (i) conditions on which a breach of a primary rule may be held to have occurred and (ii) the legal consequences of this breach. The latter body of international rules encompasses a separate and relatively autonomous body of international law, the law of state responsibility.

- Current rules on state responsibility have clarified and given precision to a number of previous controversial rules: for instance, the question of whether fault is necessary, the nature of the damage required for a state to be considered ‘injured’ by the wrongful act of another state, the circumstances precluding wrongfulness, etc.

- Now individual criminal liability, as opposed to state responsibility, has enormously expanded. Individuals, be they state officials or private persons, are now accountable for serious breaches of international law (war crimes, crimes against humanity, genocide, terrorism) both in time of peace (Except of course for war crimes) and in time of war. In addition not only simple soldiers and junior officers, as in the past, but also military leaders as well as senior politicians, members of cabinet, industrialists, etc may be held accountable for any international crime. National and international prosecution and punishment of these crimes ensure that the international rules of human rights law and international humanitarian law are respected and enforced.

- Current needs have resulted in the possibility for states to be held accountable for lawful actions.

### 1.10 Research Questions

The research work identifies certain pertinent questions in connection with the state responsibility.

1. How often states are held responsible under international law? If that is the case what steps shall be taken to protect the interest of the community as a whole?

2. Whether the articles of the ILC are more effective to focus on state responsibility? Are these articles helpful to focus on responsibility of state?

3. What are the allied doctrines and concepts of state responsibility? How these doctrines and concepts are living laws of community as a whole?
4. How often states are held responsible regarding terrorist activities, boundary disputes, fisheries zones problems, environmental problems, refugees, war crimes, aliens, human rights, internally displaced persons, indigenous problems and hijacking?

5. When an official acting outside of their authority can breach treaties which will lead to the state being found responsible?

6. Whether fault is required for the state to be held responsible or if liability is objective?

7. Under what circumstance state may be held responsible in the sphere of international law?

8. Whether responsibility of the state for unlawful acts or omissions is strict or whether is it necessary to show some faults or intentions on the part of the officials concerned.

9. The official’s question, however, is where exactly the state has broken international law. Can a state act through individuals, whether officials of the state, like military or police force or unofficial auxiliary force of the state?

1.11 Objectives of the Study

1. The main objective of the research work is to find out some of the problems involved in the state responsibility.

2. It gives more information, analysis and practical approaches of state responsibility.

3. There is an anticipating need to give more importance to the state responsibility so that all states would be benefited.

4. The process of the research work focuses on certain minute contemporary and preemptory norms of world community.

5. The entire purpose of this study is to examine, from all relevant points of view, the feasibility of founding a juridical basis for the establishment of a regime of ‘responsibility’ in respect of those activities, which are not prohibited by international law and whose consequences are transnational.

1.12 Research Significance

The study of state responsibility in the present context has a great significance and relevance in the scientifically and technologically advanced juncture. Where the
acts and omissions committed in one state might have an untoward effect on another state. The conduct of the state, while so acting or omitting to act may have been permitted by international law, but the consequences may be dangerous to the other state. Therefore, the consequences of such act or conduct are regulated by international law it will have pernicious or destructive effect on international relations between states.

From the above perspectives it is worthfull to study this subject for great concern. The study is focusing on the doctrines and principles, which are helpful to academicians, policy makers, ambassadors, statesmen, lawyers, or judicial officers and persons those who are involved in the field of international law. Especially, in the recent decades there has been much hot debate going on in the international agenda with reference to the state responsibility. Hence it is relevant from the legal standpoint. The philosophical analysis of this work will reflect in near future.

1.13 Methodology

The doctrinal method has been employed to do research work. For the purpose of analyzing case laws, doctrines, concepts and such other work, this process can be done meticulously and effectively. International conventions, international tribunals, resolutions and recommendations of international organizations are really helpful to focus on primary research work. Apart from these, principles and concepts peremptory norms of general international law and customary laws are also treated as primary as well as secondary sources of research work. Books, journals, reviews are formed as secondary sources of research work. With a view to understand the present scenario of state responsibility, of course, the Internet sources are referred as primary and secondary sources of research work. In this research work analytical, descriptive, critical evaluations and reasoning have been adopted.

1.14 Structure of the thesis

The present work is structured in seven chapters,

The First Chapter has dealt with some general remarks on state responsibility, kinds of state responsibility and finally consequences of state responsibility. It focuses on background, problems, significance, meaning and scope of state responsibility, objectives and methodology of research work. Primary and secondary research methods have been referred. The problem stated and hypothesis which have been
already raised in the tentative synopsis are answered in the thesis. In this Chapter some keen observations have been identified and these observations are discussed in the rest of the chapters meticulously and keenly.

The Second Chapter has critically evaluated the developments of state responsibility before and after I and II World Wars and also it has pointed out criticisms regarding the traditional law of the state responsibility invoking state responsibility in the 21st century. Finally, it has explained current and future regulations regarding state responsibility. The more analysis of descriptive and comparative methods is used to overview of the metamorphoses development of international law. In a similar view, some trend analysis has been made available to discuss what the law was and what the law ought to be followed.

The Third Chapter has explained on state responsibility and its foundations through doctrines and theories under international law, and some of general principles. It is worth to identify practical application of these theories, concepts and precepts that have been considered. Peremptory norms of general international have been critically evaluated accordingly. Fault and imputability and doctrine like Calvo Clause, claims and exhaustion of local remedies rule and principles of general international law are examined. Principle of co-operation, mutual co-existence, reciprocity, rehabilitation, repatriation, and permanent sovereignty over natural resources, non-intervention and non-use of force have examined on bases of research techniques. Finally, peremptory norms of international law like *jus Cogens, pact sunt servanda, en masse* and peaceful use of natural resource are discussed.

The Fourth Chapter is focusing on the contemporary issues under international law regarding state responsibility in the present context and how far the state is responsible to solve these issues in the present context is discussed. There are many problems of international law that are being considered as international discourse. There has been much hot discussion has been going on individual responsibility rather than state responsibility. In the present context how far a state is responsible for alien, refugees, internally displaced persons, indigenous people, war crimes, human rights, terrorism, environmental pollution and hijacking.

The Fifth Chapter has explained the state responsibility before international judicial institutions like ICJ, The International Criminal Tribunals for former Yugoslavia and Rwanda, International Criminal Court and Human Rights Courts.
The Sixth Chapter evaluates the role of ILC regarding Draft Articles on State Responsibility. This Chapter analyzes the brief history of ILC’s basic premises, the ILC Articles on State Responsibility, self-help and solidarity, significant features, responsibility toward completion of a second reading and finally focused on Revised Draft Articles on State Responsibility.

Final Chapter has dealt with concluding remarks, findings of the research and suggestions.