

# STATE INTERNATIONAL RESPONSIBILITY

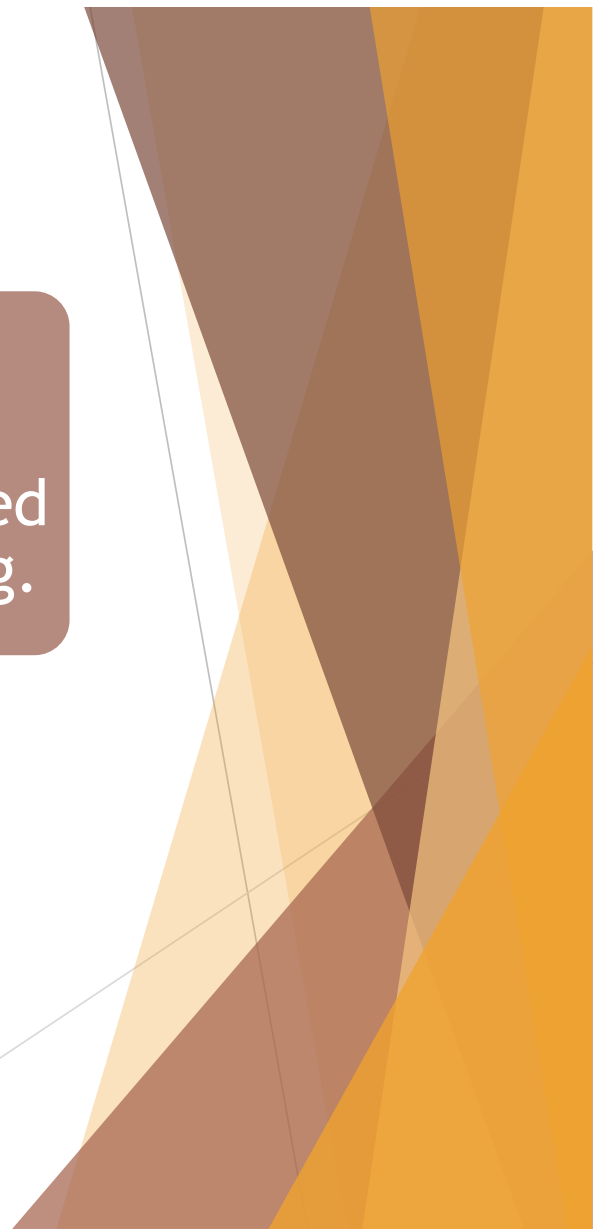
UNIT 16



Obligations of the wrongdoers.

Rights and powers of those affected by the wrong.

State responsibility:  
legal consequences of an international wrongful act of a State.



# Traditional Law

- ▶ Mostly customary rules evolving out of the practice of States and of cases brought before international arbitral tribunals.
- ▶ Art. 3 Fourth Hague Convention (1907) on the Laws and Customs of War on Land: “A belligerent party which **violates de provisions** of the said Regulation shall, if the case demands, be **liable to pay compensantion**. It shall be responsible for all acts committed by persons forming part of its armed forces.”
- ▶ **First attempt to codify customary law:** Responsibility for the treatment of aliens.
- ▶ Violation of international obligation = international responsibility.
  - ▶ Injured State entitled to Self-help
    - ▶ Forcible action
    - ▶ Non-forcible measures

# ILC, Draft Articles on Responsibility of States for International Wrongful Acts, 2001

## Primary rules:

- Customary or treaty rules laying down **substantive obligations** for States.

## Secondary rules (law of State responsibility):

- Conditions for the breach of a primary rule.
- Legal consequences of the breach.

More precision

## Categories:

- Ordinary
- Aggravated responsibility

### Requirement to endeavour to settle disputes by peaceful means.

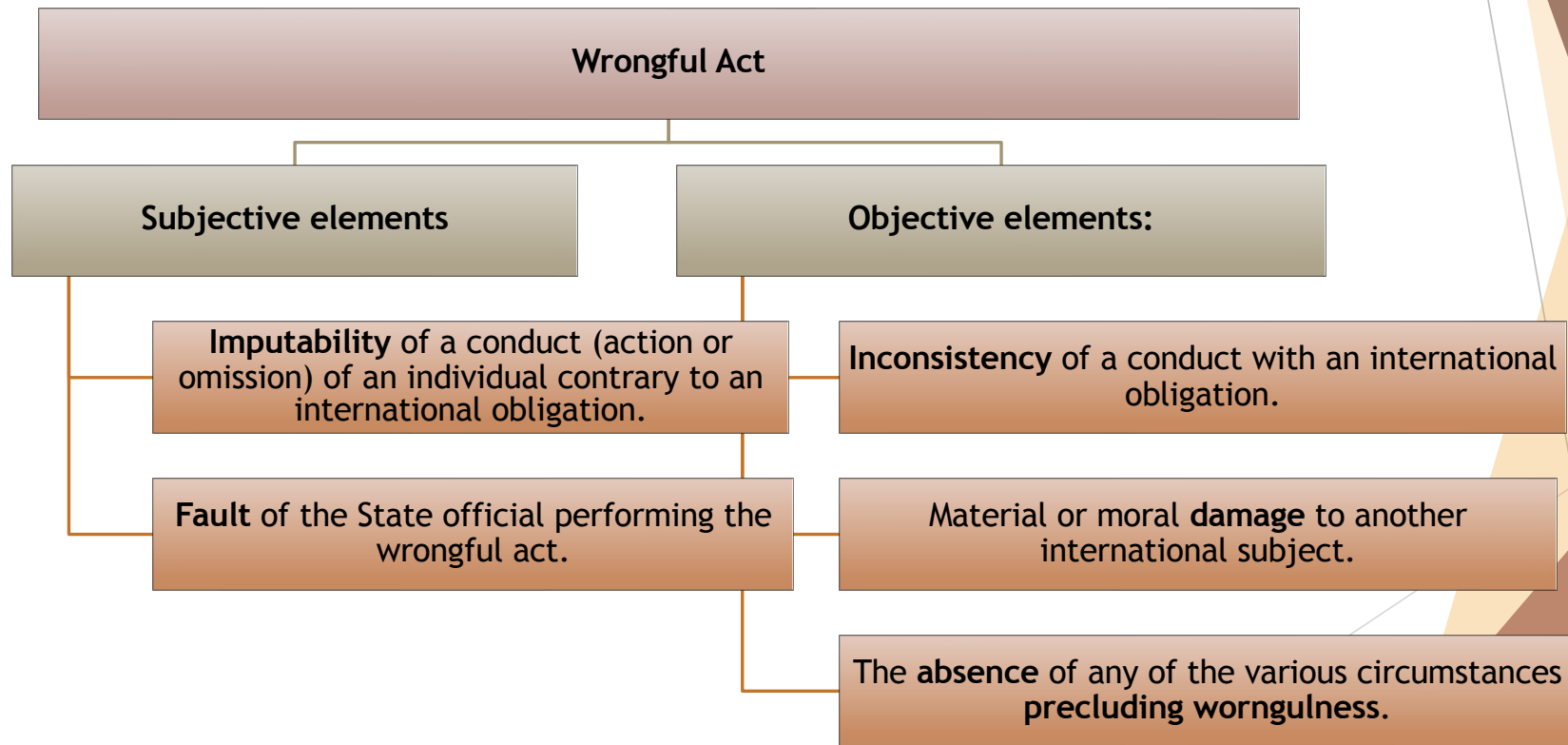
- Negotiations, conciliation, arbitration or other means.
- Failing the above - possibility to take **peaceful countermeasures**.
  - Exception - art. 51 UN Charter (self-defence).

### Individual criminal liability

- State officials (regardless of their position) or private persons are accountable for serious breaches of international law (genocide, war crimes, crimes against humanity, terrorism...)
- In time of peace and war.

### Accountability for lawful actions.

# Ordinary State Responsibility



# SUBJECTIVE ELEMENTS

The background features a dark brown central area with the text 'SUBJECTIVE ELEMENTS' in orange. To the right, there is a complex geometric pattern of overlapping triangles in various shades of brown and orange, creating a layered, abstract effect.

# Imputability

Whether the conduct of an individual may be attributed to a State.

Whether the individual who materially committed the breach has the status of State official.

- Act in his **official capacity**.
  - ICJ, *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*: “according to a well-established rule of international law the conduct of any organ of a State must be regarded as an act of that State.”
- Even if the State official performed the act outside (or contrary to) his instructions or even outside his remit. (Art. 7 DASR)
- ***De facto* State organs (art. 8 DASR)**.
  - Under instruction from a State.
  - Under the overall control of a State.
  - In fact behave as State official.
- **Individuals not acting as *de facto* State officials** - Only if the State did not act with due diligence (preventive measures, bring perpetrators to justice, compensation).
- If the State acknowledges and adopts the conduct in question as its own (Art. 11 DASR).



# Fault

- ▶ Psychological attitude of the wrongdoer consisting of either “intention” or “recklessness”.
- ▶ **Intention:** the intent to bring about the event resulting from the conduct.
- ▶ **Recklessness:** awareness of the risk of the prohibited consequences occurring.
- ▶ **International courts** only consider the question of fault if the State objects that it did not act willingly (e.g *force majeure*). They **do not assess whether State officials acted intentionally.**
- ▶ Art. 39 DASR: Takes fault into account for establishing the amount of **compensation.**
- ▶ Cases where fault is taken into account (in the form of knowledge) to establish responsibility:
  - ▶ Art. 17 DASR: Responsibility of the State that directs and controls another State in the commission of an international wrongful act.
  - ▶ Art. 18 DASR: Responsibility of the State that coerces another State to commit the wrongful act.

# OBJECTIVE ELEMENTS

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# Inconsistency of State conduct with an international obligation

- ▶ It must be a conduct contrary to an obligation from an applicable rules or principle of international law.
- ▶ Rule in force at the time it was breached (*tempus commissi delicti*).
- ▶ Action or feilure to take a prescribed action.

# The Question of Damage

Material damage: any prejudice to the economic or patrimonial interests of a State or its nationals.

Moral damage: breach of a State's honour or dignity (burning of flag, violating the airspace of a foreign country, ...).

Required in the case of "ordinary responsibility" but not indispensable in the case of "aggravated responsibility".

## Circumstances precluding wrongfulness

Consent of the  
State injured.

Self-defence.

Countermeasures  
in respect of an  
international  
wrong.

Force majeure.

Distress.

State of  
necessity.

# Consent

Consent to carry out activities that would otherwise be prohibited by international law.

E.g: foreign military aircraft crossing the airspace.

It must be valid.

Consent to activities contrary to *just cogens* is not valid.

# Self-defence

Lawful reaction to an “armed attack” (massive armed aggression against the territorial integrity and political independence of a State that imperils its life or government.

It has to be of such magnitude that it cannot be repelled otherwise.

It must be limited to reject the armed attack.

ICJ, Nicaragua (*merits*): self-defence only warrants measures which are proportional to the armed attack and necessary to respond to it.

# Countermeasures

- ▶ States must first **call** upon the responsible State to **discontinue** the wrongful action, or make **reparation**.
- ▶ If the cessation of the wrong is not obtained or no reparation is made, the injured State must endeavour to **settle the dispute** through negotiations.
- ▶ **Countermeasures** may not derogate the obligation to refrain from acts of reprisal involving the use of force (art. 50.1a) DASR).
- ▶ Countermeasures may not disregard **international rules for the protection of human rights** or, more generally, the dignity and welfare of human beings (art. 50.1.b) DASR).
- ▶ Countermeasures may not disregard **obligations imposed by norms *jus cogens*** (art. 50.1.d) DASR).
- ▶ They may only **target a State allegedly responsible** for an international wrongful act.
- ▶ They must be **proportionate**.



# Force majeure

The occurrence of an **irresistible force** or of an unforeseen event, beyond the control of the State making it materially impossible in the circumstance to perform the obligation. (Art. 23(1) DASR)

It does not apply (Art. 23(2) DASR)

If the situation is due either alone or in combination with other factors, to the conduct of the State invoking it.

If the State assumed the risk of that situation occurring.

*Rainvow warrior case*: *force majeure* relates to an irresistible force or an unforeseen event against which the State has no remedy and which makes it “materially impossible” for the State to act in conformity with its obligation.

“*absolute and material impossibility*”.

# Distress

- ▶ The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has **no other reasonable way**, in a situation of **distress**, of **saving the author's life or the lives of other persons entrusted to the author's care**.
- ▶ It does not apply if:
  - (a) the situation of distress is **due**, either alone or in combination with other factors, **to the conduct of the State invoking it**; or
  - (b) the act in question is **likely to create a comparable or greater peril**.
- ▶ Acts of individuals attributable to the State in a situation of peril, either personally or in relation to persons under his or her care. Situation where human life is at stake.
- ▶ E.g.- Aircrafts or ships entering State territory under stress of weather or following mechanical or navigational failure; cases of violation of maritime boundaries.

- ▶ <https://www.expatica.com/es/general/gibraltar-accuses-spain-of-gross-sovereignty-breach-over-customs-incident-241178/>

## Gibraltar accuses Spain of ‘gross sovereignty breach’ over customs incident

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Written by Hazel WARD

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**Gibraltar on Friday accused Spain of a “gross violation of British sovereignty” after an incident on one of its beaches involving Spanish customs agents who were attacked by smugglers, during which shots were fired.**

‘The evidence surrounding this incident discloses a gross violation of British sovereignty and, potentially, the most serious and dangerous incident for many years,’ said Gibraltar’s Chief Minister Fabian Picardo in a statement.

# Necessity (Art. 25 DASR)

## Conditions:

- (a) is the only way for the State to safeguard an essential interest against a **grave and imminent peril**; and
- (b) **does not seriously impair an essential interest of the State** or States towards which the obligation exists, or of the international community as a whole.

It may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) the international obligation in question **excludes the possibility of invoking necessity**; or
- (b) the **State has contributed** to the situation of necessity.

ICJ, Gabčíkovo-Nagymaros Project (Hungary/Slovakia):

- “the state of necessity is a ground recognized by customary international law” par. 50.
- It “can only be accepted on an exceptional basis.” par. 50.

## Compliance with preemptory norms (Art. 26 DASR)

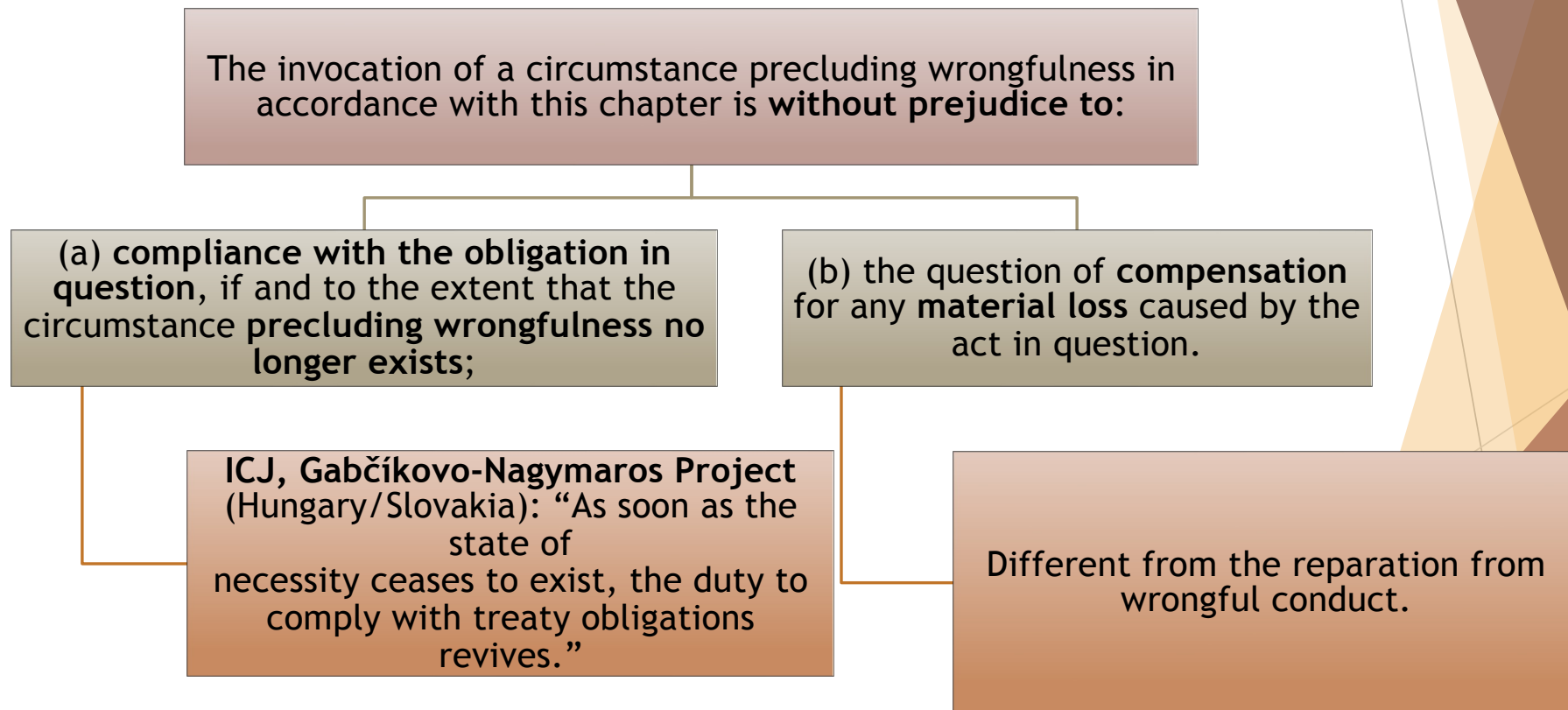
“Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a preemptory norm of general international law.”

E.g. - Genocide cannot justify a counter-genocide.

### Origin:

- Art. 53 VCLT: A treaty which conflicts with a preemptory norm of general international law is void.
- Art. 63 VCLT: An early treaty which conflicts with a new preemptory norm becomes void and terminates.

## Consequences of invoking a circumstance precluding wrongfulness (Art. 27 DASR)



# CONSEQUENCES OF THE WRONGFUL ACT (Arts. 28 ss DASR)

“injured State” (Art. 42 DASR): entitled to invoke responsibility.

The obligations are owed to:

- **State individually:**
  - breach of rules based on reciprocity (e.g bilateral treaties).
  - Multilateral treaties or customary law obligations owed to one particular State.
- **a group of States** including that State, or the **international community** as a whole.
  - Injuries arising from violations of collective obligations.

Breach of the obligation:

- (i) specially affects that State (e.g pollution of high seas -coastal States might be injured); or
- (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation (e.g disarmament treaty - each party’s performance is effectively conditioned upon and requires the performance of each of the others).

# Obligations of the responsible State

## Art. 30 DASR

- **Cease** the wrongdoing, if it is continuing.
- Offer appropriate **assurances and guarantees of non-repetition.**

Full reparation for the injury caused (Art. 31 DASR).

Peaceful settlement of dispute (Art. 2.3 UN Charter).



# Reparation

(Art. 31.1 DASR) Full reparation: re-establishment of the situation affected by the breach.

*Factory at Chorzów, PCIJ*, “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”



(Art. 31.2 DASR) “Injury”: Any damage caused by the wrongful act.

Includes any material and moral damage caused thereby.



Forms of reparation (singly or in combination):

Restitution.

Compensation.

Satisfaction.

# Restitution (Art. 35 DASR)

“re-establish the situation which existed before the wrongful act was committed” - establishing the *status quo ante*.

## Conditions:

It is not materially impossible.

Does not involved a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Material restoration or return of territory, persons or property, or the reversal of some juridical act (e.g release of detained individual, restitution of ships or other types of property, amendment of legislation, etc.).

# Compensation (Art. 36 DASR)

If restitution is not possible.

The compensation shall cover any **financially assessable damage** including loss of profits insofar as it is established.

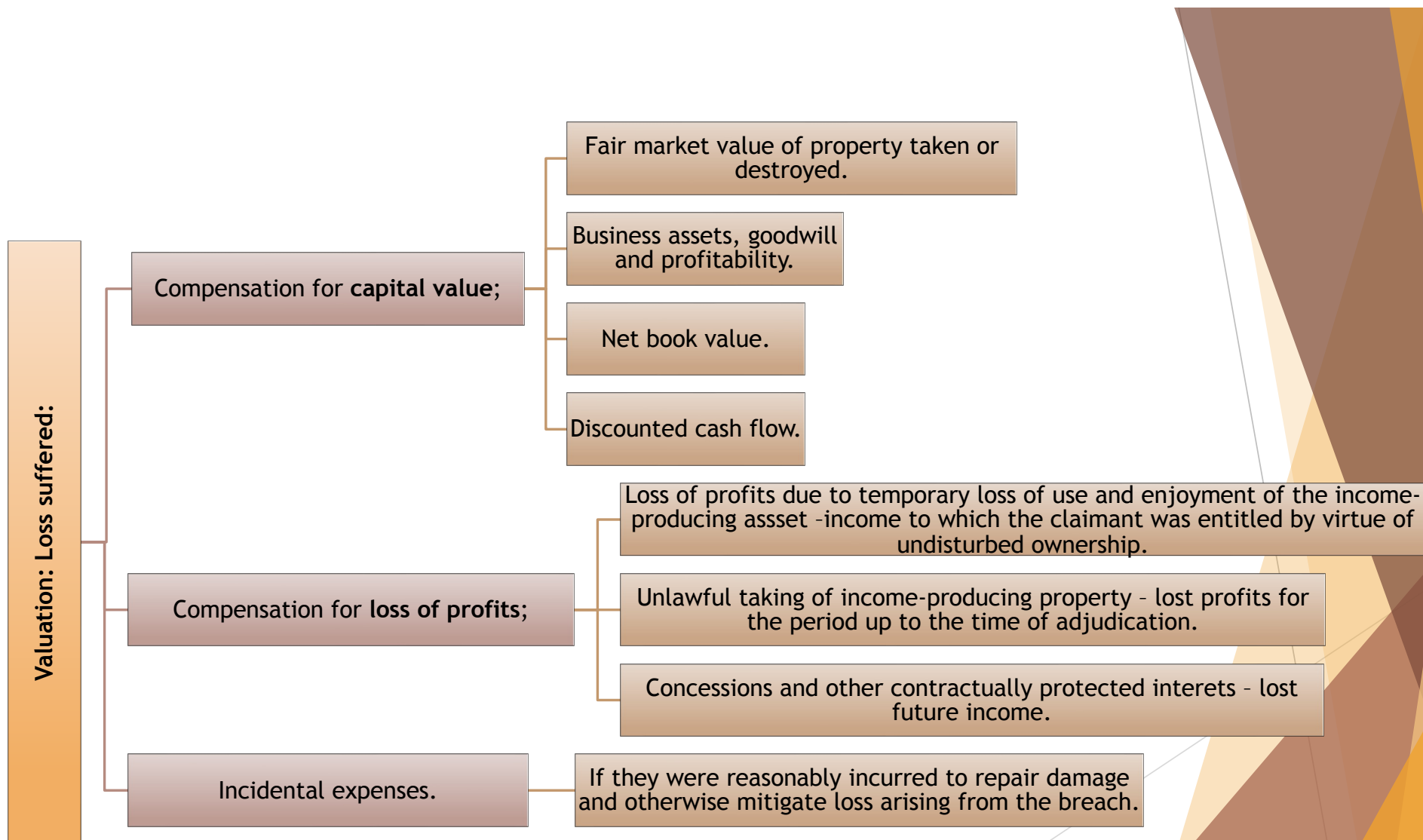
- Any damage capable of being evaluated in financial terms.
- Both damage suffered by the **State** and by its **nationals** (individuals or companies).

Usually a monetary payment.

**Function:** to address the actual losses incurred as a result of the international wrongful act. It is not concerned to punish the responsible State.

ICJ, ITLS, human rights courts, ICSID tribunals, etc..

**Pollution damage:** Expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in value of polluted property (Trail Smelter case).



# Satisfaction (Art. 37 DASR)

Non-material damage, moral damage.

It may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

It shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

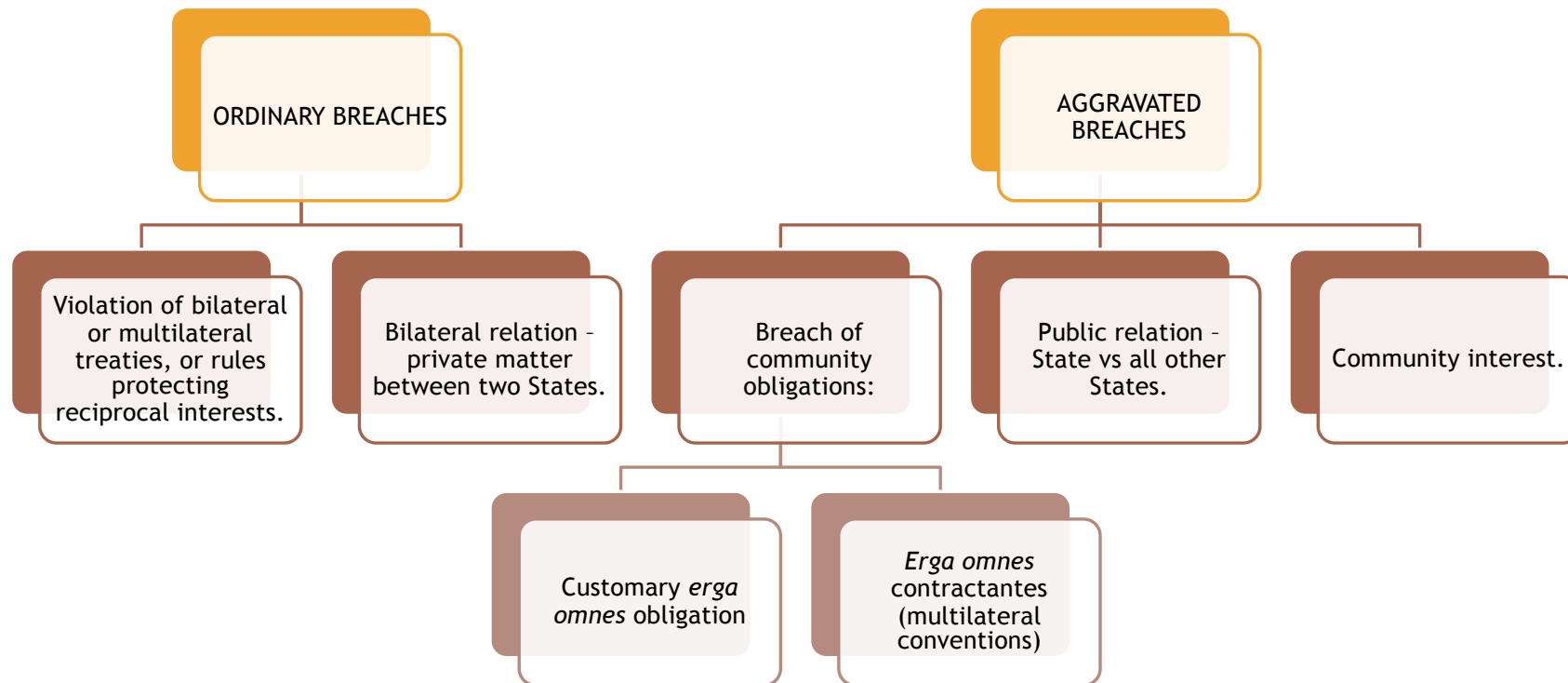
Other forms: punishment of the individuals who caused the wrong, assurances by the responsible State that it will not repeat the wrong.

# Rights, powers and obligations of injured State: countermeasures (Art. 52 DASR)

- ▶ Countermeasures may be taken after **the failure of the parties concerned to negotiate with a view to settling the matter.**
- ▶ **1. Notice of claim (Art. 43):**
  - ▶ The injured State may specify in particular:
    - ▶ (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
    - ▶ (b) what form reparation should take.
- ▶ **2. Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.**
- ▶ The injured State may take such urgent countermeasures as are necessary to preserve its rights.
- ▶ Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
  - ▶ (a) the internationally wrongful act has **ceased**; and
  - ▶ (b) the **dispute is pending before a court or tribunal** which has the authority to make decisions binding on the parties.
- ▶ The above does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

# Aggravated State Responsibility









## ▶ Overview

- ▶ There are some universal values of concern for the international community.
  - ▶ Peace (prohibition of aggression).
  - ▶ Human Rights (genocide, slavery, racial discrimination, CAH, torture).
  - ▶ Self-determination of peoples.
- ▶ A serious breach of those values affects any member of the community **regardless of whether that breach damages interests or concerns of a member.**
- ▶ Any member of the community is authorised to take steps to demand cessation of the serious breach.
- ▶ Collective enforcement
  - ▶ Coercive measures not involving the use of force.
  - ▶ Measures involving use of force.
- ▶ Human rights: **special bodies and institutions** monitoring the compliance with human rights treaties (CAT, ECtHR, ACtHR, UNHRC...).
- ▶ International criminal law: **cooperation and judicial assistance by States.**

## Chapter III (part two) DASR: “Serious breaches of obligations under peremptory norms of general international law”

### Article 40. Application of this chapter

“1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a **peremptory norm** of general international law.  
2. A breach of such an obligation is serious if it involves a **gross or systematic failure** by the responsible State to fulfil the obligation.”

### Peremptory norm: Art. 53 VCLT:

“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.”

## Consequences of a serious breach (Art. 41 DASR)

States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

# Invocation of responsibility by a State other than an injured State (Art. 48 DASR)

## Conditions:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.

- Any State entitled to invoke responsibility may claim from the responsible State:
- (a) **cessation** of the internationally wrongful act, and assurances and guarantees of **non-repetition** in accordance with article 30; and
  - (b) performance of the obligation of **reparation** in the interest of the injured State or of the beneficiaries of the obligation breached.

Right to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breach (Art. 54 DASR).



▶ Liability for lawful acts

▶ **Art. 110 (3) UNCLOS: Boarding of a foreign ship.**

“If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”

▶ **Article II, III Convention on International Liability for Damage Caused by Space Objects, 1972.**

▶ **International environmental law: Pollution and other externalities that transcend the borders of a single State.**

▶ *Trail Smelter case*: Canada was producing air pollution which affected the US. The Arbitral Tribunal considered that Canada was responsible for under international law for damage, regardless of the legality of the activities itself.

▶ No State has the right to use or permit the use of its territory in such a manner to cause **injury by fumes in or in to the territory of another or the properties or persons herein**, when the case is of **serious consequence** and the injury is established by **clear and convincing evidence**.



# ILC

Decision of the Commission to subdivide the topic "International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law" into two parts:

- Prevention of transboundary damage from hazardous activities and
- International liability in case of loss from transboundary harm arising out of hazardous activities.

1997

2006

Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities.

- Principle 4(1): compensation for victims of transboundary damage.



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