Video Transcript

State Responsibility – Gleider Hernández

Welcome to my mini-lecture on Chapter 10 of my book *International Law*, where we go through the rules of what is called ‘state responsibility’. Now, state responsibility is perhaps one of the most important regimes. It's analogous, broadly speaking, to the concept of tort or delict in domestic law where we assign responsibility for a breach then we decide what the consequences are of that breach of the legal system. So in international law we look, effectively, at the attribution of wrongful conduct, or the breach of international law to a state. And these rules have been extended, to a degree, through proposals of what’s called the International Law Commission, also to the responsibility of international organisations.

At their heart, the rules on responsibility, whether of states or of international organisations, concern questions of imputability, and the ability of international law to ensure its rules are respected and that a breach can be remedied, or somehow restored, or attenuated. Now, international law being a decentralised legal order without a centralised enforcement mechanism means that enforcement remains a challenge, both conceptually and practically speaking. Nevertheless, there is a broad principle at stake here, and it's a principle that concerns legality as a whole, and that is the principle that the violation of a rule by an actor should entail the responsibility of that actor to make reparation for the breach.

So, there are various general principles of state responsibility that affect the system as a whole. These were codified by the International Law Commission in an important document called the Articles on State Responsibility, through which the ILC sought to systematise centuries of existing practice between states. Now, these articles have not been codified into a treaty; states have not seen it fit to take them and to ratify a written document and to turn it into that kind of language as with the Vienna Convention on the Law of Treaties that we saw in Chapter 7. However, because the International Law Commission focused primarily on existing practices of states and sought to identify rules that were already based in customary international law, the articles are regarded widely as being authoritative. And in some cases when the ILC was not trying to codify, but in fact engaging in an exercise of progressive development, over time, states have endorsed those solutions and they've been recognised by international courts

themselves as having been crystallized into custom. A really notable example being the recognition that Article 48 of the Articles on State Responsibility was recognised as custom in 2012 by the International Court of Justice in a case between Belgium and Senegal called The Obligation to Prosecute or Extradite.

I'll go through very briefly because this is a very rich and dense subject matter. I'll go briefly through the various elements that we go through in this chapter that are important. The first one is: what constitutes a breach of an international obligation by a state? In that, we examine notions of fault, of injury, or of damage, all of which in international law don't necessarily constitute the breach. Usually the breach doesn't require fault, it requires proof of no damage and it doesn't require proof of injury necessarily. It depends on the obligation, but it's not part of the general rule that you have to prove those elements, unlike in domestic legal orders.

You can also have different categories of unlawful acts. The articles on state responsibility recognise general breaches, or standard breaches, but they also recognise a category of aggravated breaches of state responsibility. These usually tie up with peremptory norms of *jus cogens*, in which a state has breached a serious norm of international law and it would have done so manifestly and systematically. We go through that in more detail in the chapter itself.

A major component of the law on state responsibility concerns the rules through which conduct is attributed to the state. After all, there cannot be a responsibility of a state if the state isn't found to have committed the action, if the action is been committed by a private actor. So, sophisticated rules have developed over time through which the actions of certain actors can be attributed to the state. So obviously, the easy ones are the organs of a state, with the officials of a stat, but what about private actors that are discharging elements of governmental authority? What about an organ or a legal official that is acting outside its official capacity, or even abusing its powers? All of these more interstitial questions are very much at the forefront of the development of rules of attribution and the purpose of this legal regime is to identify which actions can be imputed to the state, which actions hold the state to be liable, and which actions are too far removed from the state and ought not to be able to attract the responsibility of a state as a whole. So we look at organs of the state, we look at other entities, et cetera.

And finally, we look at a number of defenses that a state can invoke in order to excuse itself. These are called ‘circumstances precluding wrongfulness’. And amongst them, one finds implications of principles of necessity, the principle of

self-defense, the principle of what is called in French *force majeure*, and is referred to that in English as well. But basically, the element of a fundamental fact that was something that a state couldn't get around, that was irresistible, as it were, that excuses the state's responsibility because it could not have done otherwise.

And finally, a category that forms the subject of a separate section in Chapter 13, a later chapter in this book, and that is the law on countermeasures, which are acts that would normally be unlawful, but are excused by a breach by the other states, that the acting state taking countermeasures is seeking to remedy. So we see how different areas of international law interplay with one another, and how relevant that is for the practice of international law today.

The final part of this chapter concerns what are called the ‘rules on remedies’. So, whether a state must repair the injury that has been done, whether it must pay compensation, or whether other forms of reparation such as a declaratory judgment, or satisfaction, would be sufficient.

Thank you.