

# Responsabilidad Internacional

# Objetivos

- **elementos** que integran un **hecho ilícito**
- supuestos bajo los cuales un hecho ilícito es **atribuible** a un Estado
- circunstancias que **excluyen** la ilicitud
- **consecuencias** jurídicas de un hecho ilícito
- Contrastar la teoría tradicional sobre responsabilidad estatal entre estados y responsabilidad internacional debida a la comunidad internacional como un todo
- efectos jurídicos de violaciones a normas fundamentales

# hecho ilícito

Acción u omisión

1. Atribuible al Estado
2. Violación a una obligación internacional del Estado



# Responsabilidad

- Todo hecho ilícito **implica** **responsabilidad**
- Las consecuencias de un hecho ilegal (responsabilidad) no se limitan a reparaciones o sanciones, sino que dan nacimiento a un **conjunto** de nuevas relaciones legales.
- El vínculo legal violado es **independiente** de la responsabilidad
- El hecho ilícito solamente tiene dos elementos, no requiere intencionalidad (wrongful act)
- Responsabilidad no se circunscribe al caso Estado vs Estado

# Responsabilidad

- Hay que distinguir entre normas **primarias** (obligación originaria) y **secundarias** de la responsabilidad (consecuencias de incumplir las primarias)
- La responsabilidad no busca penalizar ni criminalizar (no existen daños punitivos)
- Artículos adoptados por la *International Law Commission*, 9 agosto 2001
- La responsabilidad es derecho internacional consuetudinario

# Violación a una obligación internacional del Estado

- **No conformidad** entre la conducta requerida por la obligación internacional y la conducta efectivamente desplegada
- Puede ser cualquier tipo de obligación: de conducta, de resultado, consuetudinaria, establecida por una corte, en un tratado
- Aplica la regla de la **intertemporalidad** (Palmas Case 1928 PCIJ). La violación se comete cuando existe la obligación. No hay aplicación retroactiva
- La responsabilidad no muere aunque la obligación violada ya no exista



## **Trail Smelter arbitration US vs Canada, 1941**

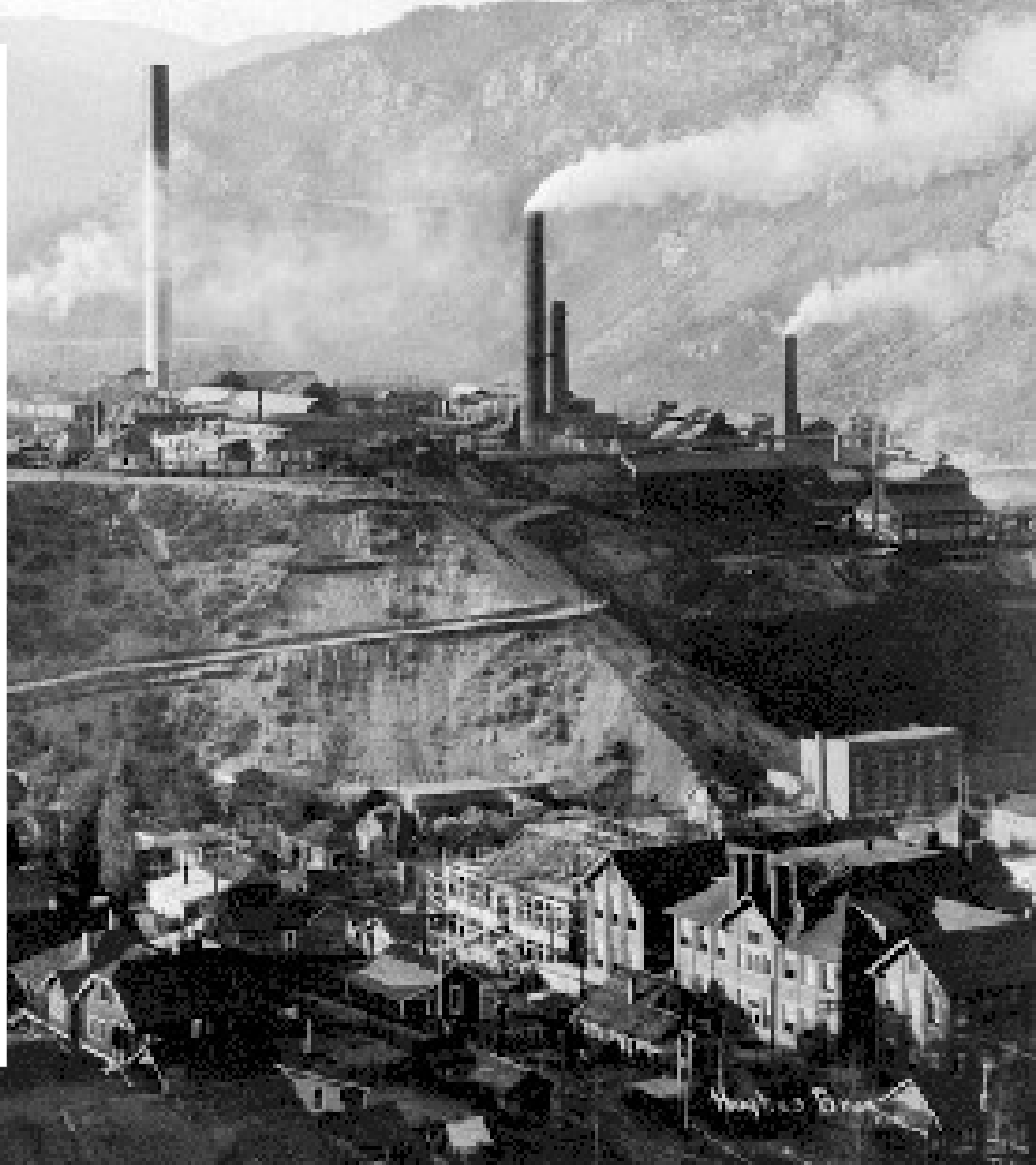
---

- Contaminación transfronteriza
- Principio de daño en derecho ambiental:

Todas las personas pueden tomar lo necesario de la naturaleza evitando daños mayores

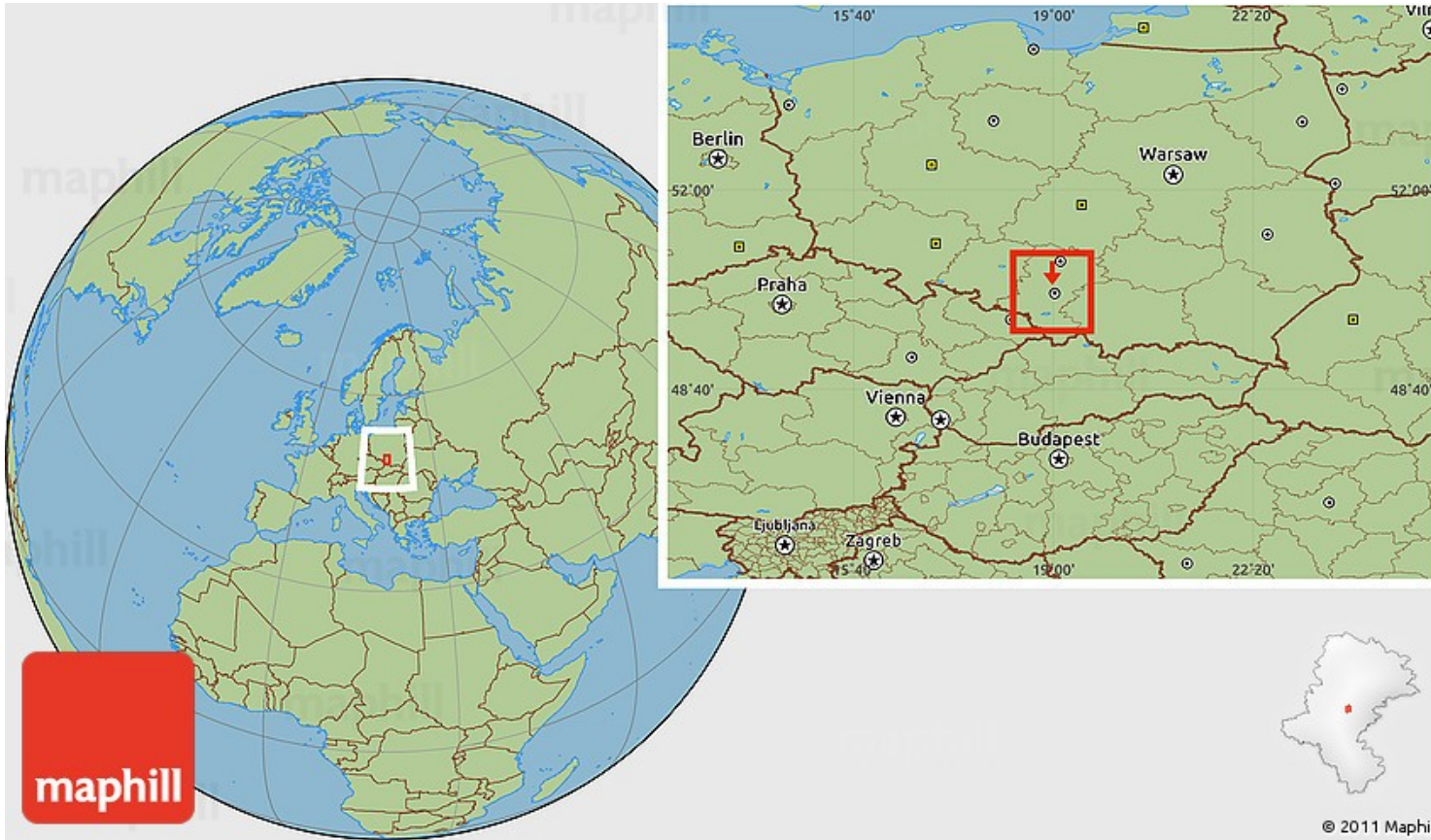
# Trail Smelter Arbitration, US vs Canada, 1941

- Una minera de Canadá procesaba Zinc y graffito contaminando por humo el bosque y los cultivos del estado de Washington
- A State owes at all time a duty to protect other States against injurious **acts by individuals** from within its jurisdiction.... But the real difficult often arises rather when it comes to determine what ... is deemed



an injurious act.





## Chorzow Factory Case, Germany v. Poland, PCIJ, reparation, 1927

- Mediante un tratado de 1922, Alemania cede el control del Este de Silesia a Polonia, bajo la **condición de no expropiar** propiedad de alemanes
- La fábrica de nitrógeno *Oberschlesische Stickstoffwerke* fue expropiada por Polonia en violación al tratado (es decir, incautada)

# Chorzow Factory Case, Germany v. Poland, PCIJ, reparation, 1927

- (21) It is a principle of international law that the **breach** of an engagement involves an obligation to make **reparation** in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.
- (31) if expropriation in consideration of an indemnity is prohibited by ... [1922 Geneva Convention between Germany and Poland concerning Upper Silesia] ... *a fortiori* is a seizure (incautación), without compensation to the interested Parties, prohibited

# Barcelona Traction, Light and Power Case, Belgium v. Spain, ICJ, 1970

- (33) .... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

# Case concerning the Vienna Convention on Consular Relations, Germany v USA, Merits, LaGrand Case, 2001, ICJ

- The Court concludes that article 36, paragraph 1, [Vienna Convention on Consular Relations] **creates individual rights ...** these rights were violated in the present case... individual rights for the detained person in addition to the **rights accorded to the sending State...**
- parties to a case **must abstain** from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or

# Corfu Channel Case, UK v Albania, Merits, ICJ, 1949

- By reason of this exclusive control to the other state, the victim of a breach of international law; is often unable to furnish direct proof to facts given rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.
- The court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of mine lying in her territorial waters, the court draws the conclusion that the laying could not have been accomplished without the knowledge of the Albanian government [culpability]

# Atribuible

- La regla general es que la conducta de los órganos de gobierno o quienes actúan bajo sus órdenes (agentes) es atribuible al Estado
- La atribución no califica si la conducta es lícita o ilícita
- El derecho nacional es la primer guía para determinar quién es órgano del Estado (judicial, legislativo, ejecutivo u otro)
- Sin embargo, el derecho internacional exige que se ejerzan autoridad gubernamental o tenga capacidad oficial (cárceles privadas)
- En principio la conducta de privados no es atribuible al Estado

# Atribuible, órganos de gobierno

- Neer Claim 1926
- Roberts Claim 1926
- James Claim 1926
- Quintanilla Claim 1926
- Mallen Case 1926
- Rainbow Warrior Case 1987

# Neer Claim, US v Mexico, 1926, AT

- Paul Neer fue asesinado en Durango. La noche del homicidio las autoridades revisaron el lugar y el cuerpo. Al día siguiente el juez liberó a los sospechosos por falta de evidencia.
- Property of governmental acts should be put to the test of **international standards** and (second) that the **treatment of an alien** in order to constitute an international delinquency should amount to outrage, bad faith, wilful neglect of duty or insufficiency of governmental actions so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency whether the insufficiency proceeds from deficient execution of an intelligent law, or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.
- Mexican authorities have shown NO such lack of diligence.



# Roberts Claim , US v Mexico, 1926, AT

- Henry Roberts fue detenido en México por tiempo prolongado y bajo condiciones inhumanas. Se reclamaba tratamiento cruel e inhumano
- The test is, broadly speaking, whether aliens are treated in accordance with **ordinary standards of civilisation**. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhuman imprisonment

# Janes Claim, US vs Mexico, AT, 1926

- Carbajal dio muerte a su ex patron, Janes, el superintendente de la mina El Tigre, en Sonora.
- En la comunidad todo mundo se enteró y supo donde estaba Carbajal, muchas personas fueron testigos del asesinato. La policía fue informada 5 minutos después de los hechos.
- 8 años pasaron desde la muerte y la autoridad Mexicana no había tomado los pasos apropiados para aprehender y castigar a Carbajal

# Quintanilla Claim, 1926, Mexico vs US, AT

- Alejo Quintanilla lazó a una niña de 14 años en Texas. Ella informó a su padre quien a su vez avisó al Sheriff, quien fue a su casa y lo detuvo. Quintanilla nunca arribó a la prisión, fue encontrado muerto al lado de la carretera. El Sheriff y su ayudantes fueron liberados bajo fianza y el Gran Jurado no los acusó
- If the government is obligated to state what happened to the man in its custody, its officials are bound to inform their government. It might be that the custodians themselves perish in a calamity together with the men in their custody, and therefore cannot furnish any information. But if they are alive, and are silent, the government has to bear the consequences. The commission holds that under international law the respondent government is liable for the damages in this act of a state official and resulting in injustice.

# Mallen Case, Mexico vs US, AT, 1927

- Franco, quien era ayudante de alguacil en Texas traía un rencor personal en contra del Cónsul mexicano de apellido Mallén.
- Al toparse con Mallén un día en el paso, Franco lo abofetea y le tira "después de haber dicho algunas palabras en español"
- Dos meses más tarde, estando en la calle Franco se acercó a Mallén, le golpeó salvajemente en la cabeza, lo amenazó con una pistola después de haber caído al suelo, y mientras su rostro estaba manchado de sangre, lo llevó a la cárcel bajo el cargo infundado de portar pistola sin permiso.

# Mallen Case, Mexico vs US, AT, 1927

- The evidence of the first assault... clearly indicates a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official... direct responsibility of the United States for this first assault has not been alleged
- The question has been raised whether **consuls** are entitled to a 'special protection' for their persons...The government of the consul's residence should exercise greater vigilance in respect to their security and safety...The recognised public character of the foreigner and the circumstances in which he is present in its territory, entail upon the state a corresponding duty of special vigilance on his behalf
- It is essential to note that both governments consider Franco's acts as the acts of an official on duty

# Rainbow Warrior Case, New Zealand v France, AT, 1987

En 1985, un barco de Greenpeace explotó en Nueva Zelanda con dos bombas que pusieron dos agentes del servicio secreto francés. Un holandés (nacido en Portugal) murió



# Rainbow Warrior Case, New Zealand v France, AT, 1987

---

- Francia niega su participación en actos terroristas
- Mediante un entendimiento con Nueva Zelanda, se resolvió el incidente y Francia se comprometió a retener a los dos agentes en la Isla de Hao 3 años
- En el arbitraje se reclama incumplimiento de Francia a ese compromiso. Se alega fuerza mayor, peligro extremo:

Marfat tenía un problema abdominal, y Dominique tenía 6 semanas de embarazo. Su padre estaba muriendo de cáncer



# Rainbow Warrior Case, New Zealand v France, AT, 1987

‘the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness ... and the appropriate remedies for breach, are subjects that belong to the **customary law** of State responsibility... any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and, consequently, to the duty of reparation’



Forest  
counterculture  
source of life

Hut Tax  
War  
of 1898

Bai Bureh was a Sierra Leonean ruler and military strategist who led the Temne and Loko uprising against British rule in 1898 in Northern Sierra Leone.

## Atribuible privados sin instrucciones

---

- Home Missionary Society Claim, US vs UK, AT, 1920

En 1898 UK impuso el Hut Tax (choza) en Sierra Leona; en las revueltas los misioneros fueron atacados y algunos muertos

It is a well-established principle of international law that no government can be held responsible of the acts of **rebellious bodies** of men committed in violation of its authority, where **it is itself guilty of no breach of good faith.**

# Atribuible privados: bajo instrucciones y sin instrucciones

- Caire Claim, France vs. Mexico, AT, 1929

Dos soldados al mando del General Tomas Urbina, trataron de extorsionar a Caire quien al no darles dinero fue llevado a las barracas donde le dieron muerte por bala

Acts committed by the officials and agents of a state entail the international responsibility of that state, even if the perpetrator did not have specific authorisation... But in order to be able to admit this so called 'objective responsibility' of the state for acts committed by its officials, they must have act at least to all appearances as competent officials or organs, or they must have used powers or methods appropriated to their official capacity



- Atribuible  
privados: bajo  
instrucciones y sin  
instrucciones
- Union Bridge Company Claim
- US vs UK, AT, 1924
- En 1898 hubo una Guerra entre el Estado Libre de Orange y UK.
  - La afectada, una compañía de EEUU, se quejaba que el encargado de la bodega en Puerto Elizabeth, por instrucciones británicas había dirigido su mercancía a Cape Government Railways y no a la construcción del camino que era su destino original

# Atribuible privados: bajo instrucciones y sin instrucciones

Union Bridge Company Claim, US vs UK, AT, 1924

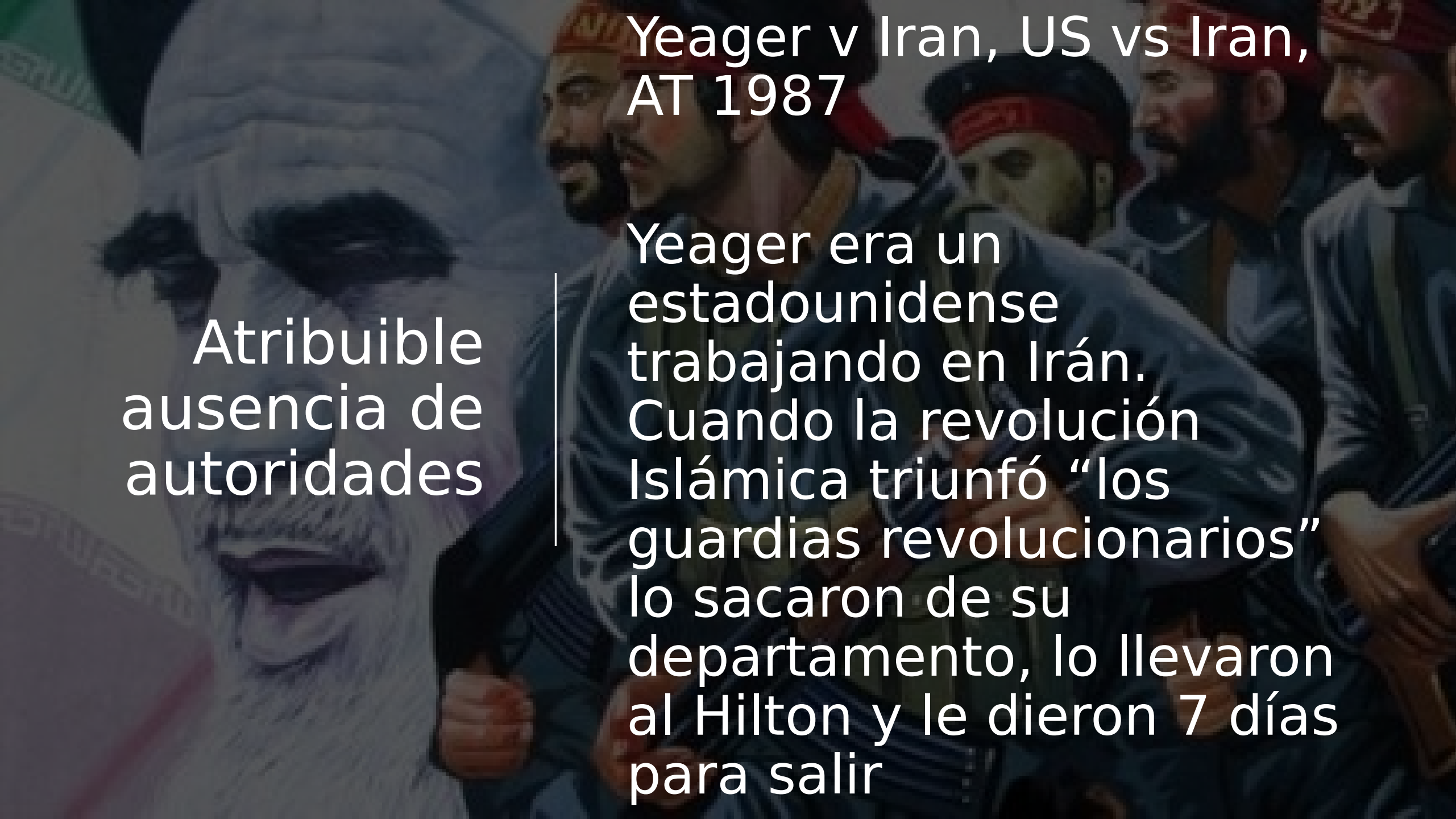
- Mr Harrison purported to act upon instructions given to him, 'to forward all bridge material intended for the Orange Free State railways to the Imperial military railways. He made two mistakes: 1) the material was neutral property, 2) it was intended for a road, not a railway bridge
- That liability is not affected by the fact that he did so under a mistake as to the character and ownership of the material, or to the fact that there was no intention on the part of the British authorities to appropriate the material in question

# Atribuible ausencia de autoridades

Zafiro Claim 1925

El Zafiro era un barco mercante con tripulación china que bajo el comando de un oficial de EEUU, surtía de provisiones al ejército de dicho país. Atracado en Filipinas, la tripulación china robo la casa de los afectados

The nature of the crew, the absence of a regime of civil or a military control ashore and the situation of the neutral property were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they were ashore in a body.

A background image showing a group of men, likely Iranian revolutionaries, wearing blue shirts and red headbands. They are looking towards the left. The image is dark and serves as a backdrop for the text.

## Yeager v Iran, US vs Iran, AT 1987

Atribuible  
ausencia de  
autoridades

Yeager era un  
estadounidense  
trabajando en Irán.  
Cuando la revolución  
Islámica triunfó “los  
guardias revolucionarios”  
lo sacaron de su  
departamento, lo llevaron  
al Hilton y le dieron 7 días  
para salir

# Atribuible ausencia de autoridades

Yeager v Iran, US vs Iran, AT 1987

Many of Ayatollah Khomeini's supporters were organised in '**Komitehs**'. It is reported that they made arrest, confiscated property and took people to prison. The Komitehs obtained a firm position within the state structure and were eventually conferred a permanent place in the state budget. Komitehs were acting in fact on behalf of the new government or at least exercised elements of governmental authority in the absence of official authorities.

## Atribuible, Estado que ayuda: US Diplomatic and Consular Staff in Teheran Case 1980

133. There, the International Court of Justice rightly found that the Iranian students (who did not comprise an organised armed group) who had stormed the United States embassy and taken hostage 52 United States nationals, **had not initially acted on behalf of Iran**, for the Iranian authorities had not specifically instructed them to perform those acts. Nevertheless, Iran was held internationally responsible for failing to prevent the attack on the United States' diplomatic premises and subsequently to put an end to that attack. **Later on, the Iranian authorities formally approved and endorsed the occupation** of the Embassy and the detention of the United States nationals by the militants and even went so far as to order the students not to put an end to that occupation. At this stage, according to the Court, **the militants became *de facto* agents of the Iranian State** and their acts became internationally attributable to that State.

Tadic Case, July 1999, Appeals Chamber, ICTFY



# Atribuible: Estado que ayuda Nicaragua, Merits 1986

La Corte distinguió tres tipos de grupos:

1. Aquellos con estatus de oficial, miembros de las fuerzas armadas o funcionarios del gobierno de EEUU, en cuyo caso sus actos son atribuibles a EEUU
2. Individuos que no siendo nacionales de EEUU (UCLA's: Unilaterally Controlled Latino Assets), eran pagados y recibían instrucciones directas de personal militar o de inteligencia de EEUU para llevar a cabo tareas específicas como colocar minas en aguas de Nicaragua o colocar bombas en sus pozos petroleros
3. Los Contras

# Atribuible: Estado que ayuda Nicaragua, Merits 1986

109. What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States government was so much one of *dependence on the one side and control on the other* that it would be right to equate the *contras*, for legal purposes, with an organ of the United States government, or as **acting on behalf of that Government**

# Nicaragua, Merits 1986

- (115) The US participation even if preponderant or decisive, in the financing, organising, training, supplying and equipping of the contras, the selection of military or paramilitary targets and the planning of the whole of its operations, is still insufficient in itself , for the purpose of attributing to the US the acts committed by the contras. For this conduct to give rise to legal responsibility of the US, it would in principle have to be proved that that state had **effective control** of the military or paramilitary operations in the course of which the alleged violations were committed

# ICTFY

The Security Council

... 2.

Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of **international humanitarian law** committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council...

SC/RES/827 (1993), Capítulo VII, UN

# ICTFY Statute

## Article 2

### Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed **grave breaches of the Geneva Conventions of 12 August 1949**, namely the following acts against persons or property **protected** under the provisions of the relevant Geneva Convention:

(a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

Los Convenios de Ginebra solo aplican a **conflictos internacionales** y a ofensas cometidas contra personas o propiedad “**protegidas**” (por ejemplo civiles in manos de una parte de la que no son sus nacionales)

**IV Convenio de Ginebra 1949, artículos 2, 3**

# Dusko Tadic



- Nació en Kozarac, municipalidad de Prijedor en Bosnia (musulmana) (Tadic era serbiobosnio)
- Fue un soldado del ejercito Bosnio, actuando en Bosnia. El ejército luchaba contra los independentistas y a favor de la gran Serbia
- El ejército de Bosnia era controlado por Serbia
- IV Convenio de Ginebra artículo 4

Dusko Tadic fue exonerado de diversos cargos por la Cámara de Juicio en sentencia del 7 de mayo de 1997, bajo el argumento de que no se había demostrado que las víctimas fueran “personas protegidas” de acuerdo al IV Convenio de Ginebra relativa a la protección de civiles en tiempos de guerra



Tadic Case, sentence, jul 1999,  
Appeals Chamber, ICTFY  
The Requirements for the Applicability of  
Article 2 of the Statute

80.... (i) *The nature of the conflict.* ... the international nature of the conflict is a prerequisite for the applicability of Article 2.

(ii) *The status of the victim.* Grave breaches must be perpetrated against persons or property defined as “protected” by any of the four Geneva Conventions of 1949.



# Tadic Case, sentence, jul 1999, Appeals Chamber, ICTFY

104, What is at issue.... the conditions on which under international law an individual may be held to act as a **de facto organ of a State**. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the **international responsibility of that State**; and (ii) where the court must instead determine whether individuals are acting as de facto State officials, thereby **rendering the conflict international** and thus setting the necessary precondition for the "grave breaches" regime to apply. In both cases, what is at issue is ... establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status

# Tadic Case, July 1999, Appeals Chamber, ICTFY

- 120. One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up *an organised and hierarchically structured group*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has **a structure**, a **chain of command** and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the **overall control** of the State.

# Tadic Case, July 1999, Appeals Chamber, ICTFY

- 145. ... In the case at issue, given that the Bosnian Serb armed forces constituted a “military organization”, the control of the FRY authorities over these armed forces required by international law for considering the **armed conflict to be international** was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions.

# Tadic Case, July 1999, Appeals Chamber, ICTFY

167. ... the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in **Article 4 of Geneva Convention IV** are met: the victims were “protected persons” as they found themselves in the hands of armed forces of a State of which they were not nationals.

# Circunstancias que excluyen la ilicitud

1. Consentimiento
2. Legítima defensa (self defence)
3. Contramedidas
4. Fuerza mayor (force majeure)
5. Peligro extremo (distress)
6. Estado de necesidad (necessity)

# Circunstancias que excluyen la ilicitud

- Estas circunstancias no eliminan la obligación incumplida (son un escudo no una espada)
- Tan pronto como las condiciones cambian hay que cumplir con la obligación
- Las normas perentorias (ius cogens) prevalecen sobre otras obligaciones
- Las circunstancias que excluyen la ilicitud no aplican sobre obligaciones de ius cogens. Un genocidio no justifica un contra – genocidio

# Circunstancias que excluyen la ilicitud

- Consentimiento, libremente dado y claramente expresado

Savakar Case, France vs UK, PCA, 1911

- Legítima defensa (self defence)

176. self-defence would warrant only measures which are **proportional** to the armed attack and **necessary** to respond to it, a rule well established in customary international law. Nicaragua Case, 1986

# Circunstancias que excluyen la ilicitud

- Contramedidas

83. In order to be justifiable, a countermeasure must meet certain conditions: In the first place it must be taken in **response to a [1] previous wrongful act** of another State and must be [2] **directed against that State**....

84. the injured State [3] must have **called upon** the State committing the wrongful act **to discontinue** its wrongful conduct or to **make reparation** for it.

The Court considers that Czechoslovakia ... failed to respect the [4] **proportionality** which is required by international law (al adoptar la llamada solución provisional)

87. ... other condition for the lawfulness of a countermeasure, ... its purpose must be [4] **to induce** the wrongdoing State **to comply** with its obligations [cessation & reparation] under international law and that the measure must therefore be [5] **reversible**.

**Case concerning the Gabčíkovo Nagymaros Project, Hungary/Slovakia, ICJ, 1997**



# Circunstancias que excluyen la ilicitud

- Fuerza mayor (force majeure)
  1. Fuerza irresistible o un evento no previsto
  2. Más allá del control
  3. Torna materialmente imposible cumplir la obligación

‘NZ is right in asserting that **force majeure** is not relevant to the case because the test of its applicability is of **absolute** and **material impossibility**, circumstances rendering performance more difficult or burdensome does not constitute force majeure.

Rainbow Warrior, New Zealand vs France, AT, 1987

# Circunstancias que excluyen la ilicitud

- Peligro extremo (distress)

(The tribunal upheld the reasoning in case of Mafart)  
existence of very exceptional **circumstances of extreme urgency** involving medical consideration and **recognition of the other party; re-establishment** of the original situation of compliance as soon as the reasons of emergency had disappeared; good-faith effort to try to obtain the **consent**

Rainbow Warrior, New Zealand vs France, AT, 1987

# “Caroline Affair”

- Rebellion in Canada
- U.S. sends supplies across the water near Niagara Falls to Canada aboard a boat named “Caroline”
- British Sneak over and burn the Caroline, then send it over the falls.
- General Winfield Scott is sent to calm any American unrest



## Results:

- British-American Relations become very tense.
- Cements Canada's relationship to the U.S.
- Affirms U.S.'s backing of an independent Canada

# Circunstancias que excluyen la ilicitud

- Estado de necesidad

“it will be for Her Majesty government to show a **necessity** of ... [self preservation], **instant** [actual and not merely apprehended], **overwhelming** [the very existence of State is in peril], leaving **no choice** of means [all legitimate means of self preservation have been exhausted], and **no moment for deliberation**. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment of authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive [reasonableness in its exercise], since the act must be limited by necessity and kept clearly within it... A necessity the government of the US cannot believe to have existed”

Caroline Incident, 1837

# Contenido de la responsabilidad

**A. Cesar** el hecho ilícito (wrongful act). Protege al estado perjudicado y a la comunidad internacional al preservar “the rule of law”

**B. Reparación integral** por el perjuicio causado  
Además

- I. Continuidad del deber** de cumplir la obligación: Un hecho ilícito en principio no destruye la obligación incumplida
- II.** Aparte de la cesación se exigen garantías de **no repetición**

# Reparación

(21) It is a principle of international law that the breach of an engagement involves an obligation to make **reparation** in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.

Chorzow Factory Case, Germany v. Poland, July 26, 1927,  
Jurisdiction (Reparation), PCIJ

# Reparación

(47) The essential principle contained in the actual notion of an illegal act ... is that reparation must, so far as possible, 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. **Restitution in kind**, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear

Chorzow Factory Case, Germany v. Poland, July 26, 1928,  
Merits, PCIJ

# Reparación

- Restitución en especie
- Sino se puede compensación
- La reparación se relaciona con el perjuicio causado (injury)
- Perjuicio causado: incluye daños (material y moral)
- Se requiere un vínculo causal entre el hecho ilícito (wrongful act) y el perjuicio (injury)
- Existe el deber del estado perjudicado de tratar de mitigar el perjuicio



# Formas de reparación

## **1) Restitución:**

Status quo, situación que hubiera existido, no se da si es materialmente imposible (casi siempre es imposible), se basa en equidad y razonabilidad

## **2) Compensación** por daños

Es compensatoria no punitiva (ejemplar), los intereses deben incluirse

3) Satisfacción: remedio cuando hay perjuicios no valorables en dinero (daño no material), no debe ser humillante

# violaciones graves al *Ius Cogens*

- Norma dispositiva: derecho que nace de la voluntad de las partes
- Norma imperativa: derecho que no depende de la voluntad
- *Cogens*: del latín *cogo, coactum*, (forzar)
- Perentoria: apremiante, concluyente, definitivo, urgente (RAE)
- Violaciones graves (*serious*): falta sistemática, intensidad, magnitud de la violación
- Son debidas a la comunidad internacional como un todo
- Todos los estados tienen un interés legal en su protección (por su importancia)
- Su violación no genera castigo ejemplar para el Estado

# violaciones graves al ius cogens

## Consecuencias legales

- I. Deber de los Estados de **cooperar** para poner fin al hecho ilícito
- II. Deber de **abstención** que incluye:
  1. No reconocer
  2. No brindar asistencia

# violaciones graves al ius cogens

- International status of South-West Africa 1950 ICJ
- South West Africa Cases 1962, 1966 ICJ
- Barcelona Traction Case ICJ 1970
- East Timor Case ICJ 1995
- Case concerning armed activities on the territory of the Congo, New application, 2002, Congo v. Rwanda, 10, July, 2002, Provisional measures, Order

# Implementación de la responsabilidad

- Estado perjudicado: aquel cuyo derecho ha sido afectado por el hecho ilícito
  1. Puede invocar la responsabilidad
    - i. Cesación
    - ii. reparación
  2. Puede tomar contramedidas  
(puede ser afectado 1 o más Estados)  
(Puede ser responsable 1 o más Estados)
- Otros Estados con interés legal en invocar la responsabilidad (at 48)

Cesación, garantías de no repetición, exigir reparación

Obligaciones de interés colectivo o aquellas debidas a la comunidad internacional como un todo

# Contramedidas

Represalia (*retortion*): conducta no amigable inconsistente con el derecho internacional

Características de las contramedidas:

1. En otras condiciones serían contrarias al derecho
2. Se deben dirigir contra el Estado responsable del hecho ilícito
3. Buscan inducir el cumplimiento de las obligaciones (carácter instrumental no punitivo)
4. Excepcionales
5. Temporales
6. Proporcionales

# Contramedidas

- Cysne Case 1928
- Naulilaa Case 1928
- Air Services Agreement Case 1978
- Gabcikovo Nagymaros project 1997 ICJ