Asian Agricultural Products Ltd (AAPL) v Sri Lanka (1990) 4 ICSID Rep 246

Yeager v Iran (1984) 17 Iran-US CTR 92

Mavrommatis Palestine Concessions case (Jurisdiction) (Greece v United Kingdom) PCIJ Rep (1924) Ser A No 2

Roberts Claim (United States v Mexico) (1926) 4 RIAA 77

Janes Claim (United States v Mexico) (1926) 4 RIAA 82

Noyes Claim (United States v Panama) (1933) 6 RIAA 308

Starrett Housing Corp v Iran (1984) 4 Iran-US CTR 122

Nottebohm case (Liechtenstein v Guatemala) ICJ Rep (1955) 4

Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) ICJ Rep (1970) 3

M/V 'Saiga' (No 2) case (Saint Vincent and the Grenadines v Guinea) (1999) 3 ITLOS Rep, No 2

Key treaties and instruments

Draft Articles on State Responsibility (2001): Art 1, Art 2, Art 3, Art 4, Art 5, Art 6, Art 7, Art 8, Art 9, Art 10, Art 11, Art 16, Art 20, Art 21, Art 22, Art 23, Art 24, Art 25, Art 31, Art 35, Art 36, Art 37, Art 44, Art 49, Art 50, Art 51

Resolution on Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803 (XVII) (1962): Art 4

Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930): Art 1, Art 4

Draft Articles on Diplomatic Protection (2006): Art 4, Art 7, Art 9, Art 15

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965): Art 27

Responsibility generally

5.1 States are the principal subjects of international law.[1] They are the entities which carry the most extensive form of legal personality. Indeed, only States are capable of exercising all the rights and bearing all the obligations available in international law (except for human rights and individual responsibility under international criminal law).

1 See 1.1-1.5 and 4.1-4.3.

Although States have conferred a limited measure of legal personality on international organisations[2] and individuals,[3] it is States which, in practice, still bear primary responsibility for breaches of the rules prescribed by international law. Even where international law imposes liability directly on an individual (for example, for breaches of international criminal law and acts of piracy *jure gentium*), if the individual's unlawful conduct can be attributed to a State then that State will also bear international responsibility for the conduct.

5.2 Every legal system contains a class of primary rules which specify prohibited and permitted types of conduct (for example, rules relating to physical violence, protection from defamation, marriage, or breach of contractual promise). These might be called the primary rules of responsibility. Depending on the domestic legal system in question, these rules might be found in constitutions, legislation, decrees, customs or legally binding judicial precedents.

The international legal system also contains primary rules of responsibility. These primary rules may be found in treaties, customs and general principles which commit States to certain standards of behaviour (for example, diplomatic immunity, non-intervention in each other's internal affairs, respecting the innocent passage of foreign vessels through territorial waters, and so on). Indeed, primary rules of responsibility are the principal subject matter of the remaining chapters of this book.

5.3 Unless a legal system is very primitive, there will also be complementary rules which specify particular legal consequences for any such breaches (for example, damages for violation of certain contractual and tortious obligations). These might be classified as secondary rules of responsibility. Further, where the entity apparently committing the breach is not a natural person (viz, an incorporated association or other legal person), there will also need to be secondary rules of responsibility which render the acts of individuals attributable to that entity before legal responsibility can be attached to it. In domestic legal systems, this is often dealt with as a matter of the law of agency or of special rules concerning authority and delegation in corporations law and administrative law.

The secondary rules of obligation in domestic law find an equivalent in the international legal order. International law, too, possesses rules concerning the consequences for breaching the system's primary rules of obligation.[4] Moreover, States are legal persons which are incapable of acting except through the conduct of natural persons associated with

2 See 4.57-4.61.
3 See 4.62-4.70.
4 See 5.49-5.62.

them, such as politicians, judges, police or military officers. Accordingly, international law has rules which determine the circumstances in which the conduct of such persons may be attributed to the States which they serve for the purpose of establishing the State's legal responsibility.[5]

Definition of State responsibility

5.4 Max Huber (1874–1960), in his capacity as arbitrator in the *Spanish Zone of Morocco Claims*, expressed the idea of State responsibility in the following terms:[6]

> Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation is not met, responsibility entails the duty to make reparations.

It is the secondary rules of responsibility in the international legal system which constitute the separate and relatively autonomous law of State responsibility. This law does not determine the content of primary legal obligations — that task is a matter of treaty interpretation, and of construing applicable customary rules and general legal principles.

Rather, the law of State responsibility is concerned with determining: (i) whether an act or omission which is inconsistent with a primary legal obligation can be attributed to a State so as to engage that State's responsibility for the violation; and (ii) the legal consequences for a State in respect of any act or omission which has been successfully attributed to it.

5.5 There are two further aspects of the law of State responsibility which do not find a ready analogy in domestic law.

First, States are not only subjects of international law, they are also possessed of domestic legal orders. Indeed, according to theorists such as Hans Kelsen (1881–1973), States are nothing but legal orders.[7] The law of State responsibility must, therefore, provide for the possibility that an act prohibited by international law is permitted or required by a State's domestic legal order. Conversely, an act required by international law may be forbidden by a State's domestic legal order. As will be seen,[8] the law of State responsibility gives supremacy to the obligation under international law. Consequently, the fact that an obligation under international law is

5 See 5.16-5.48.
6 *Spanish Zone of Morocco Claims (United Kingdom v Spain)* (1925) 2 RIAA 615, 641.
7 Hans Kelsen, *Pure Theory of Law (Reine Rechtslehre)*, 2nd ed (1960), University of California Press, Berkeley, 1967, 285-90.
8 See 5.14-5.15.

inconsistent with domestic law is not, as far as international law is concerned, a defence to an alleged breach of an international legal obligation.

5.6 Second, the law of State responsibility was for a long time almost inseparable from the primary rules of obligation governing standards of treatment owed by States to nationals of other States. Indeed, many of the rules of State responsibility have their origin in disputes involving the treatment by States of aliens within their jurisdiction. The law of State responsibility evolved in such a way as to require a bond of nationality between the mistreated alien and the State which took diplomatic action in respect of that mistreatment. The importance of the primary rules regarding mistreatment of aliens has been somewhat diminished by the emergence of international human rights law. The requirements of international human rights law do not, with a few exceptions such as certain political rights and rights of migration, depend on the nationality of the affected individuals.

Nevertheless, when a State mistreats an alien, whether under the classical rules relating to treatment of aliens or under international human rights law, it remains necessary to establish a link of nationality between the alien and the State making any claim on his or her behalf,[9] unless the mistreatment involves breach of an obligation *erga omnes*.[10]

It is still traditional to consider the rules on nationality of claims and the primary rules of responsibility regarding treatment of aliens in the course of studying the law of State responsibility.

5.7 It should also be noted at the outset that the law of State responsibility is customary and residual. That is to say, it applies only if the State breaching the obligation and the State to which the obligation is owed have not made legally binding alternative arrangements.[11] It is always open to the States concerned, by treaty or local custom,[12] to modify the operation of the law of State responsibility in their relations *inter se*. States might, for instance, agree that a breach of a particular treaty obligation should engage a consequence different from that which would apply under the law of State responsibility. In such a case, the agreed alternative arrangement would prevail over the general customary rules of State responsibility.

9 See 5.99-5.116.
10 Draft Articles on State Responsibility, Art 48(1)(b). See 2.106-2.110.
11 Draft Articles on State Responsibility, Art 55.
12 As to local custom, see 1.147-1.151.

Draft Articles on State Responsibility and Draft Articles on Diplomatic Protection

5.8 The law of State responsibility is found in customary international law and the general principles of law. There is, as yet, no multilateral treaty regulating or codifying the general rules and principles of State responsibility.

Until relatively recent times, establishing the requirements of State responsibility in any particular case usually involved an extensive consideration of numerous arbitral determinations and instances of State practice. Furthermore, there was frequently much disagreement about some fairly fundamental matters, such as whether the liability of States for breaching primary rules of responsibility depended on some fault or culpability on the part of that State (for example, wilful breach or negligence), or whether liability could be established strictly (that is, merely by demonstrating the fact of the breach).

5.9 Recognising the importance of this branch of international law, the International Law Commission (ILC)[13] approached its codification as an early priority. The ILC's work in studying the law of State responsibility commenced in 1949, and generated numerous reports on various aspects of State responsibility. Early hopes that the ILC's work would result in a multilateral convention proved misplaced. Disagreement about the substantive content of the relevant rules and principles remained difficult to resolve. It was not until 1980 that the ILC was able to adopt provisionally a reasonably comprehensive set of 35 Draft Articles dealing with the 'origins' of State responsibility. The ILC revised and expanded the provisional Draft Articles in 1996.

The ILC finally adopted a set of Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) at its 53rd session in 2001.[14]

5.10 Where State responsibility is incurred in the form of State A unlawfully mistreating a national of State B, then State B's response may take the form of diplomatically protecting its injured national. This right of diplomatic protection involves State B taking diplomatic action and/or pursuing a claim against State A for reparation in respect of the injury. The claim can take any form that is lawful under international law, and typically manifests itself in the modes of peaceful dispute settlement sanctioned by Art 33(1) of the UN Charter — 'negotiation, enquiry,

13 See 1.54.
14 *Yearbook of the International Law Commission*, 2001, Vol II, Pt II.

mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[15]

Before State B may invoke a right of diplomatic protection, it must show that the individual was its national from the moment of the injury until the time the claim is made.[16] State B's claim will, furthermore, be defeated if State A can demonstrate that the injured individual has not exhausted all potentially effective legal remedies available under State A's domestic law.[17] The requirement of nationality and the defence of non-exhaustion of local remedies have been made the subject of a study by the International Law Commission, resulting in a set of Draft Articles on Diplomatic Protection (DADP) which were adopted at the ILC's 58th session in 2006.[18]

5.11 It is conceivable that the Draft Articles and the DADP might yet form the foundation of a multilateral convention on State responsibility and diplomatic protection. However, it is more likely that they will eventually be adopted as part of General Assembly resolutions on the law of State responsibility and diplomatic protection.

In the meantime, most of the Draft Articles, the DADP and their accompanying ILC Commentaries serve as a highly convenient and valuable statement of the applicable customary rules and general legal principles. They are the product of long and detailed study by many of the world's most eminent publicists of international law. It is to be anticipated that, as with many other landmark reports and studies of the ILC, even those provisions of the Draft Articles and the DADP which are strictly only *lex ferenda* will be so influential as to cause customary international law to coalesce in conformity with them. It is therefore difficult to overstate the importance of the Draft Articles and the DADP in understanding the contemporary law of State responsibility and diplomatic protection.

15 See chapter 8.
16 See 5.99-5.116.
17 See 5.117-5.125.
18 *Yearbook of the International Law Commission*, 2006, Vol II, Pt II.

A v Australia [1997] UNHRC 7
Gridin v Russia [2000] UNHRC 12
Baumgarten v Germany [2003] UNHRC 44
Toonen v Australia [1994] UNHRC 8
Mukong v Cameroon [1994] UNHRC 41
Winata v Australia [2001] UNHRC 24

Key treaties and instruments

Universal Declaration on Human Rights (UDHR), General Assembly Resolution 217A (III) (1948)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1966): Art 1, Art 5, Art 6

International Covenant on Civil and Political Rights (ICCPR) (1966): Art 2, Art 4, Art 6, Art 8, Art 9, Art 10, Art 11, Art 12, Art 13, Art 14, Art 15, Art 16, Art 17, Art 18, Art 19, Art 20, Art 21, Art 22, Art 23, Art 24, Art 25, Art 27

Optional Protocol to the International Covenant on Civil and Political Rights (1966) Human Rights Committee, General Comment No 11 (1983)

Human Rights Committee, General Comment No 15 (1986)

Human Rights Committee, General Comment No 17 (1989)

Human Rights Committee, General Comment No 18 (1989)

Human Rights Committee, General Comment No 19 (1990)

Human Rights Committee, General Comment No 20 (1992)

Human Rights Committee, General Comment No 21 (1992)

Human Rights Committee, General Comment No 22 (1993)

Human Rights Committee, General Comment No 23 (1994)

Human Rights Committee, General Comment No 25 (1996)

Human Rights Committee, General Comment No 27 (1999)

Human Rights Committee, General Comment No 28 (2000)

Human Rights Committee, General Comment No 29 (2001)

Human Rights Committee, General Comment No 31 (2004)

Human Rights Committee, General Comment No 32 (2007)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984): Art 1(1)

Slavery Convention (1926): Art 1

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

Convention on the Elimination of All Forms of Discrimination against Women (CEDW) (1979)

Convention on the Rights of the Child (CRC) (1989)

11.1 International human rights are the branch of international law which regulates the obligations of States to the protection and promotion of certain rights possessed by individuals and groups, as recognised in customary international law, treaty law, and the general principles of law. In structural terms, the rights are possessed by the individuals or groups themselves, and the corresponding duties are owed to them by States. This structure sets international human rights apart from almost all other branches of international law (with the principal exception of international criminal law), which are concerned almost exclusively with the rights and duties of States and public international organisations *inter se*.

Antecedents of international human rights

The natural law

11.2 The idea that all human beings possess rights by reason of their humanity, and that earthly sovereigns can neither confer nor revoke those rights, is deeply embedded in the Judeo-Christian religious and philosophical traditions and particularly the Christian tradition of the natural law *(jus naturale)*. That tradition has its roots in classical antiquity and reached its apogee during Europe's high middle ages, with the influential works of the scholastics such as St Thomas Aquinas (1225–1274). Indeed, the main concerns of Aquinas's landmark *Treatise on Law* (1266) are the nature and varieties of law, the relationship between the natural law and the positive law, and the obligations owed to all persons under the natural law simply by virtue of their humanity.

11.3 During the middle ages and prior to the advent of the modern State system in the late 16th and early 17th centuries, relations among European sovereigns were conceived and regulated mainly in terms of the *jus gentium*, which derived partly from the *jus naturale* and partly from the positive law of all civilised peoples. This was true also of relations between European sovereigns and the subjects of foreign sovereigns.[1]

11.4 The medieval conception of the *jus naturale*, sometimes referred to as the *philosophia perennis* (perennial philosophy), began to pass out

1 See 1.7 and 1.156-1.168.

of favour with the arrival of the intellectual movement known as the Enlightenment which accompanied the emergence of the modern State system. Enlightenment legal theorists of the 'naturalist' school broke with the *philosophia perennis*, which they scornfully rejected as an artefact of a backward age. They did not, however, entirely reject the idea of a natural law.

Indeed, a highly distorted and desiccated version of the *jus naturale* enjoyed considerable intellectual fashionability during the Enlightenment period.

11.5 Enlightenment naturalism in continental Europe was highly individualistic, voluntarist and rationalist, and rested on various conceptions of a state of nature and a social contract (the Enlightenment movements in England and Scotland were more empirical and sceptical, and less inclined to the flights of rationalist fancy which afflicted their continental counterpart). It tended strongly, but in varying degrees depending on the publicist, towards a rejection of custom and tradition as sources of authority or as restraints on personal and political action. Further, the naturalism of the continental Enlightenment cut itself off from the much older and richer tradition of the *philosophia perennis*. That tradition postulated man as an intrinsically social being, and not simply a creature who surrendered his cosmic solitude in some notional contract with his fellows. Rather, the *jus naturale* was ordained to the common good and was man's rational participation in an antecedent eternal law.

11.6 In its earlier stages, Enlightenment naturalism was definitely 'an affair of the ruling class, the nobility and the intellectuals of the age, clerics and men of science'.[2] It was, from the first, primarily political in orientation. It served reformist objectives by helping to replace the remnants of feudal society with more rational social arrangements corresponding to the orderly administrative requirements and modernising ambitions of centralised Enlightenment despotism.

As these political objectives were realised and consolidated, and as the logic of its individualist and contractarian foundations were remorselessly worked through, Enlightenment naturalism became an increasingly important component of a popular-revolutionary ideology, particularly in France. Under the influence of Jean-Jacques Rousseau (1712–1778) in particular, the politicisation of Enlightenment naturalism was completed, and by the late 18th century it had become principally an ideological weapon for social revolution and the overthrow of Enlightenment despots. Though it superficially resembled the *philosophia perennis*, Enlightenment

2 Heinrich Rommen, The Natural Law: *A Study in Legal and Social History and Philosophy*, trans Thomas R Hanley, Liberty Fund, Indianapolis, 1998, 69.

naturalism involved a dramatic decay in legal theorising. This decay was only partly offset, during Enlightenment naturalism's later radical phase, by the express recognition of natural rights.

11.7 The Enlightenment's recognition of natural rights was, however, substantially impaired by the distorting conceptual framework of the social contract. In its earlier reformist phase, under the influence of Thomas Hobbes (1588–1679) and the naturalist school, Enlightenment naturalism posited that man had decisively surrendered the rights he possessed in his state of nature when he entered into the social contract. In the later revolutionary phase, these radically individualist 'natural rights of man' were thought, on the contrary, to be preserved intact by the social contract.

There was also a distinct readiness, for narrowly political purposes, to reject established positive law by appeals to a highly abstract, disembodied and revolutionary conception of the natural rights of man.

11.8 The apotheosis of the continental Enlightenment was the French Revolution of 1789, and the ensuing continent-wide series of wars, social upheavals and insurrections which lasted until Napoleon's final defeat at Waterloo 26 years later.

Among the most enduring and influential legal artefacts of this period was the Declaration of the Rights of Man and of the Citizen, the revolutionary charter approved by the French National Assembly in 1789. The American Declaration of Independence of 1776 and the Bill of Rights of 1791 (being the first 10 amendments to the United States Constitution) were also significant manifestations of Enlightenment naturalism. The American examples were, however, more precisely drafted, less given to generalised abstractions, more deferential to established liberties and the requirements of prudence, and significantly tempered by a British empiricism and suspicion of abstract theorising. In this they are in the tradition of earlier English charters of fundamental freedoms, most notably the Magna Carta (1215) and the Bill of Rights (1689). The American Revolution was political, while the French Revolution was political, social and cultural. Notwithstanding important differences between them, the French and American documents express common commitments to certain basic rights of the human person. The French declaration, for instance, says that '[m]en are born and remain free and equal in rights'[3] and that the 'natural and imprescriptible rights of man' are 'liberty, property, security, and resistance to oppression'.[4] The opening words of the American declaration are: 'We hold these truths to be self-evident, that all men are created equal, that they

3 Article 1.
4 Article 2.

are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

Both the French declaration and the American Bill of Rights make provision for freedom of religion, freedom of expression, property rights, and rights of the accused in criminal cases.

The French declaration engages in additional generalised abstractions, such as '[t]he principle of all sovereignty resides essentially in the nation',[5] while the American Bill of Rights enumerates further specific guarantees not included in the French document, such as freedom from unreasonable search and seizure.[6] The French and American documents established a burgeoning tradition of liberal constitutionalism which endured and spread throughout the world in the 19th and 20th centuries, and which was to be highly influential on the 20th century's evolving regime of international human rights.

Positive law antecedents

11.9 As the modern State system consolidated and the first great period of globalisation arrived in the 19th century, international law began a steady expansion of its material scope.[7]

The principle of sovereignty, which underpins the State system of international law and relations, generally prohibits any external interference in the way a State treats persons within its territory.[8] Nevertheless, the 19th century witnessed resort to humanitarian intervention[9] by States in the territories of other States with regard to the protection of the lives and safety of persecuted minorities, the suppression of the slave trade on the high seas by Britain's Royal Navy[10] following condemnation of the slave trade by the Congress of Vienna,[11] the continuing emergence and consolidation of a customary law of diplomatic protection of aliens,[12] the conclusion of several important conventions regulating the law of armed conflict,[13] and the treatment of Christian minorities inside the Ottoman Empire. The Versailles Peace Conference at the conclusion of the First World War established an international legal regime for the protection of minority rights after the extensive redrawing of international boundaries

5 Article 3.
6 Fourth Amendment.
7 See 1.13.
8 See 7.1-7.4.
9 See 9.68-9.77.
10 See 12.96.
11 See 1.11 and 10.4.
12 See 5.76-5.125.
13 See 1.12.

left substantial pockets of ethnic, religious and linguistic peoples located in States in which they were a minority. These various currents also contributed to the shaping of the 20th century's system of international human rights.

United Nations human rights system

11.10 The principal issues facing international society at the end of the Second World War were the preservation of international peace and the protection of human rights. These priorities were dictated by the experience of the war itself. The Axis powers' global acts of predatory aggression against other States' territorial sovereignty and political independence triggered a world war costing more than 50 million lives and violations of the standards of human decency on a hitherto unimagined scale.

11.11 These preoccupations found reflection in the Charter of the United Nations, the international organisation established in 1945 to replace the defunct League of Nations. The UN system for preserving international peace and security is discussed in detail elsewhere.[14] The UN Charter lists among its basic purposes and principles 'promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion'.[15] The system of human rights protection established by, or under the auspices of, the United Nations provides the international legal framework for the protection of human rights.

The principal rights, and the institutional mechanisms for their protection, are discussed below. Particular attention is paid to developments occurring in the 20 years following the Second World War, during which time the main foundations of international human rights were laid. This important period witnessed the conclusion of conventions against genocide and racial discrimination, and the emergence of a fundamental right to self-determination of peoples. It also embraced the 'International Bill of Rights', consisting of the Universal Declaration of Human Rights (UDHR) and two landmark conventions on civil, political, economic, social and cultural rights.

14 See 9.7-9.62.
15 UN Charter, Art 1(3).