damage, caused by that act, if and to the extent necessary to provide full reparation.

2 Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured state, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3 The right of the injured state to obtain satisfaction does not justify demands which would impair the dignity of the state which has committed the internationally wrongful act.

Article 46 Assurances and guarantees of non-repetition

The injured state is entitled, where appropriate, to obtain from the state which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III – COUNTERMEASURES

Article 47 Countermeasures by an injured state

1 For the purposes of the present articles, the taking of countermeasures means that an injured state does not comply with one or more of its obligations towards a state which has committed an internationally wrongful act in order to induce it to comply with its obligations under Articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured state that it do so.

2 The taking of countermeasures is subject to the conditions and restrictions set out in Articles 48 to 50.

3 Where a countermeasure against a state which has committed an internationally wrongful act involves a breach of an obligation towards a third state, such a breach cannot be justified under this chapter as against the third state.

Article 48 Conditions relating to resort to countermeasures

1 Prior to taking countermeasures, an injured state shall fulfil its obligation to negotiate provided for in Article 54. This obligation is without prejudice to the taking by that state of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter.

2 An injured state taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured state and the state which has committed the internationally wrongful act.

3 Provided that the internationally wrongful act has ceased, the injured state shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in para 2 is being implemented in good faith by the state which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

4 The obligation to suspend countermeasures ends in case of failure by the state which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.

Article 49 Proportionality

Countermeasures taken by an injured state shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured state.

Article 50 Prohibited countermeasures

An injured state shall not resort by way of countermeasures to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the state which has committed the internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

CHAPTER IV – INTERNATIONAL CRIMES

Article 51 Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Articles 52 and 53.

Article 52 Specific consequences

Where an internationally wrongful act of a state is an international crime:

(a) an injured state's entitlement to obtain restitution in kind is not subject to the limitations set out in sub-paras (c) and (d) of Article 43;

(b) an injured state's entitlement to obtain satisfaction is not subject to the restriction in para 3 of Article 45.

Article 53 Obligations for all states

An international crime committed by a state entails an obligation for every other state:

(a) not to recognize as lawful the situation created by the crime;

(b) not to render aid or assistance to the state which has committed the crime in maintaining the situation so created;

(c) to co-operate with other states in carrying out the obligations under sub-paras (a) and (b); and

(d) to co-operate with other states in the application of measures designed to eliminate the consequences of the crime.

Part Three – Settlement of disputes

Article 54 Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more states parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 Good offices and mediation

Any state party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 Task of the Conciliation Commission

1 The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2 To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3 The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its later recommendations.

4 The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5 If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 Arbitration

1 Failing a reference of the dispute to the Conciliation Commission provided for in Article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2 In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the state against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Article 59 Terms of reference of the arbitral tribunal

1 The arbitral tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its

decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2 The tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 60 Validity of an arbitral award

1 If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2 Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Annex I The Conciliation Commission

1 A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary General of the United Nations. To this end, every state which is a member of the United Nations or a party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under para 2.

2 A party may submit a dispute to conciliation under Article 56 by a request to the Secretary General who shall establish a Conciliation Commission to be constituted as follows:

(a) The state or states constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that state or of one of those states, who may or may not be chosen from the list referred to in para 1; and

(ii) one conciliator not of the nationality of that state or of any of those states, who shall be chosen from the list.

(b) The state or states constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3 The failure of a party or parties to participate in the conciliation procedure

shall not constitute a bar to the proceedings.

4 A disagreement as to whether a Commission acting under this annex has competence shall be decided by the Commission.

5 The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6 In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply para 2 in so far as possible.

Annex II The arbitral tribunal

1 The arbitral tribunal referred to in Articles 58 and 60, para 2 shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the chairman shall be chosen by common agreement from among the nationals of third states.

2 If the appointment of the members of the tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3 Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4 Following the establishment of the tribunal, the parties shall draw up an agreement specifying the subject matter of the dispute, unless they have done so before.

5 Failing the conclusion of an agreement within a period of three months from the date on which the tribunal was constituted, the subject matter of the dispute shall be determined by the tribunal on the basis of the application submitted to it.

6 The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7 Unless the parties otherwise agree, the tribunal shall determine its own procedure. Decisions of the tribunal shall be made by a majority vote of the five members.

10.3 Fault

There has been some debate as to whether the responsibility of states for unlawful acts or omissions requires an element of fault or whether liability is strict. The ILC Draft Articles provide no assistance in the matter and there are a number of conflicting authorities. Brownlie has argued that the nature of liability will depend on the precise nature of the particular obligation in issue

and suggests that the discussions of the ILC tend to support this view.

10.3.1 Objective or risk responsibility

The view that seems to attract majority support is that an objective test should be applied to the actions of states. Provided that the acts complained of can be attributed to the state then it will be liable if those acts constitute a breach of international law regardless of any question of fault or intention. There are certain defences available but the burden of establishing them will be placed upon the defence once the fact of the breach of an obligation is established. The most cited example of the objective test is to be found in the judgment of Verzijl in the *Caire Claim* (1929). Caire was a French national who was asked to obtain a large sum of money by a major in the Mexican army. He was unable to obtain the money and was subsequently arrested, tortured and killed by the major and a number of soldiers. France successfully pursued a claim against the Mexican government which was heard by the French-Mexican Claims Commission. The principal question for the Commission was whether Mexico could be responsible for the actions of individual military personnel who were acting without orders and against the wishes of their commanding officer and independently of the needs and aims of the revolution. Verzijl gave support to the objective responsibility of the state according to which a state is responsible for the acts of its officials and organs even in the absence of any fault of its own. He continued by finding a state to be responsible:

> ... for all the acts committed by its officials or organs which constitute offences from the point of view of the law of nations, whether the official or organ in question has acted within or exceeded the limits of his competence ... [provided that] they must have acted at least to all appearances as competent officials or organs, or they must have used powers of methods appropriate to their official capacity.[16]

Similarly in the *Jessie* case (1921) the British-American Claims Arbitral Tribunal held the United States responsible for the action of its revenue officers who had boarded and searched a British ship on the high seas. The officers had acted in good faith, mistakenly believing that they were empowered to carry out the search by virtue of municipal law and an agreement between the UK and the USA. The tribunal laid down the principle that:

> Any government is responsible to other governments for errors in judgement of its officials purporting to act within the scope of their duties and vested with powers to enforce their demands.[17]

10.3.2 Subjective responsibility

A number of writers, most notably Hersch Lauterpacht, have argued that the responsibility of states depended on some element of fault. Such fault is often expressed in terms of intention to harm (*dolus*) or negligence (*culpa*). A number of cases are commonly cited to support the subjective view. The *Home Missionary Society Claim* (1920) arose following a rebellion in the British protectorate of Sierra Leone. During the course of the rebellion property

16 (1929) RIAA 575.

17 (1921) RIAA 57.

belonging to the Home Missionary Society was destroyed or damaged and a number of missionaries were killed. The US brought a claim on behalf of the Missionary Society against the UK. The tribunal dismissed the claim and noted that:

> It is a well established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[18]

Those advocating the objective doctrine have argued that the *Home Missionary Society Claim* was concerned with a specific question of state responsibility for the acts of rebels (which is discussed at 9.3.3) and that the case cannot be used to establish a general rule.

Another case which has been cited in support of subjective responsibility is the *Corfu Channel (Merits)* case (1949).[19] The case arose following the sinking by a mine of a British warship in Albanian territorial waters. The UK brought a claim against Albania arguing firstly that Albania itself had laid the mines. However, it adduced little evidence on this point and its main argument was that the mines could not have been laid without the knowledge or connivance of the Albanian authorities. The ICJ found that the laying of mines could not have been achieved without the knowledge of the Albanian government. This being so, Albania's failure to warn British naval vessels of the risk of mines gave rise to international responsibility. In the course of its judgment the Court stated that:

> It cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

Lauterpacht subsequently remarked that 'the *Corfu Channel* case ... provided an instructive example of the affirmation of the principle that there is no liability without fault'.[20] However it is worth noting that the Soviet judge in the case understood the decision to be an application of the objective responsibility doctrine and dissented from it on that ground. He argued that responsibility could only arise on the basis of *culpa*, a more exacting test than mere fault since it requires a wilful and malicious act or a culpably negligent act, ie guilt rather than mere inadvertence or carelessness. Brownlie has stated that liability in the case arose out of the particular legal obligation of Albania identified by the Court 'not to allow *knowingly* its territory to be used for acts contrary to the rights of other states' (emphasis added).

It is submitted that much of the confusion arising from questions of the nature of responsibility arise from the tendency to equate objective responsibility with the municipal law doctrine of strict liability and to regard strict liability as an absolute liability from which no exculpation is possible. It

18 (1920) RIAA 42.

19 [1949] *ICJ Rep* at p 4.

20 Oppenheim, *International Law*, 8th edn, London: Longman.

has already been indicated that objective responsibility does admit the possibility of defences. Discussion about the nature of responsibility highlights the dangers of discussing the topic in isolation from the substantive 'first level' rules of international law. It is for this reason that writers such as Philip Allott have criticised the whole concept of a separate category of 'state responsibility'. In an article written in 1988 he wrote:

> In the terms of legal analysis, wrongdoing gives rise to a liability in the offender owed to others who have rights which may be enforced by legal processes. Liability is not a consequence of some intervening concept of responsibility. It is a direct consequence flowing from the nature of the wrong ... and the nature of the actual wrongful act in the given case.[21]

In individual cases what is important is the particular obligation which has been breached. As Brownlie has stated:

> It must always be borne in mind that the rules relating to state responsibility are to be applied in conjunction with other, more particular rules of international law, which prescribe duties in various precise forms. Indeed, the basic concept of responsibility is a necessary but not a sufficient condition for breaches of particular legal duties ... The relevance of fault, the relative 'strictness' of the obligation, will be determined by the content of each rule ... it would be pointless to embark on an examination of a question, framed in global terms, whether state responsibility is founded upon fault (ie *culpa* or *dolus*) or strict liability: the question is unreal.[22]

10.4 Imputability

As has already been stated, international law is concerned with the responsibility of international persons and in the main that will mean states. Because, ultimately, a state can act only through individuals, and individuals may act for reasons of their own distinct from the intentions of their state, it becomes necessary to know which actions of which persons may be attributed, or imputed, to the state. A state will only be liable for acts which can be attributed or imputed to it, it is not liable for all the private actions of its nationals.

10.4.1 Organs of the state

Article 5 of Part I of the ILC Draft Articles provides that:

> ... conduct of any state organ having that status under the internal law of that state shall be considered as an act of the state concerned under international law, provided that organ was acting in that capacity in the case in question.

and Article 6 states that:

> The conduct of an organ of the state shall be considered as an act of that state under international law, whether that organ belongs to the constituent, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in

21 (1988) 29 *Harvard International Law Journal* 1.

22 *The System of the Law of Nations: State Responsibility*, Part I, 1983, Oxford: Clarendon Press at p 40.

the organisation of the state.

This reflects the customary law position that a state is liable for the actions of its agents and servants whatever their particular status. Thus, when, in July 1985, French secret agents sank the Greenpeace ship Rainbow Warrior, France became internationally liable and the tribunal was not concerned with the issue of whether this act of state terrorism was ordered at a high or low level within the French government (*Rainbow Warrior Arbitration* (1987)).[23]

Article 7 extends responsibility to quasi-governmental organisations, ie those organs which, although not part of the formal structure of government, exercise elements of governmental authority, when they act in a governmental capacity. The Commentary to the Draft Articles gives as an example the case of a railway company to which certain police powers have been granted.

Where one state or an international organisation has made available its representatives to another state, as, for example, where it sends members of its medical agencies to assist in an epidemic or natural disaster, responsibility for their actions lies with the receiving state. This is often provided for in the agreement under which such assistance is given and it is also reflected in Article 9 of the Draft Articles. The Commentary to Article 9 gives the specific example of the UK Privy Council acting as the highest court of appeals for New Zealand.

10.4.2 Individuals

Article 8 of the Draft Articles provides that:

> The conduct of a person or a group of persons shall also be considered as an act of the state under international law if:
>
> (a) it is established that such person or group of persons was in fact acting on behalf of that state; or
>
> (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of official authorities and in circumstances which justified the exercise of those elements of authority.

In the *US Diplomatic and Consular Staff in Tehran* case (1980),[24] the ICJ considered the status of the students who initially took possession of the US Embassy in Tehran:

> No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognised 'agents' or organs of the Iranian state. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that state on that basis ... Their conduct might be considered as itself directly imputable to the Iranian state only if it were established that, in fact, on the occasion in question the militants acted on behalf of the state, having been charged by some competent organ of the Iranian state to carry out a specific operation.

However, the Court went on to find that the status of the students changed

23 (1987) 26 ILM 1346.

24 [1980] *ICJ Rep* at p 3.

during the occupation of the Embassy. On 17 November 1979, the Ayatollah Khomeini issued a decree which declared that the premises of the Embassy and the hostages would remain as they were until the US handed over the Shah for trial.

The ICJ commented:

> The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian state, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that state. The militants, authors of the invasions and jailers of the hostages, had now become agents of the Iranian state for whose acts the state itself was internationally responsible.

In *Yeager v Iran* (1987)[25] the Iran-US Claims Tribunal had to consider the status of 'revolutionary guards' who had detained Mr Yeager for a number of days. Iran argued that the conduct of the 'guards' was not attributable to it. The tribunal stated:

> ... attributability of acts to the state is not limited to acts of organs formally recognised under internal law. Otherwise a state could avoid responsibility under international law merely by invoking its internal law. It is generally accepted under international law that a state is also responsible for acts of persons, if it established that those persons were in fact acting on behalf of the state. An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of official authorities and in circumstances which justified the exercise of those elements of authority.

On the facts, the Tribunal found that the actions of the 'guards' were attributable to the Iranian state.

The rule enunciated in Article 8 will generally apply to activities taking place within the territory of the responsible state. Where the actions complained of take place outside the territory of the responsible state, it appears that a slightly stricter test will be applied. This can be seen in the decision of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua (Merits)* case (1986).[26] One aspect of the case was whether the activities of the contras who, Nicaragua argued, were recruited, organised, financed and commanded by the US government, could be attributed to the US. The contras were acting outside US territory and the Court took the view that:

> 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 operation, is still insufficient of itself ... for the purpose of attributing to the US the acts committed by the contras ... For this conduct to give rise to the legal responsibility of the US, it would have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

In general, a state will not be liable for the acts of private individuals which

25 (1987) 17 Iran-US Claims Tribunal Reports 92.

26 [1986] *ICJ Rep* at p 14.

cannot be attributed to it and this is confirmed in Article 11 of the Draft Articles. However, responsibility may still arise if it is shown that there existed a duty to exercise due diligence and that diligence was not exercised. It was seen in Chapter 7 that states are under a duty to protect the premises of diplomatic missions within their territory. Therefore a failure to provide adequate protection will give rise to responsibility should a diplomatic mission be attacked by a group of private individuals. It was for this reason that the Irish government admitted responsibility for the sacking by private individuals of the British Embassy in Dublin in 1972.

10.4.3 Ultra Vires *acts*

The mere fact that a state organ or official acts outside municipal law or express authority does not automatically mean that a state will not be responsible for their actions. Article 10 of Part I of the Draft Articles provides that:

> The conduct of an organ of a state, of a territorial government entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the state under international law even if, in the particular case, the organ exceeded its competence according to international law or contravened instructions concerning its activity.

An act may be attributed to a state even where it is beyond the legal capacity of the official involved, providing, as Verzijl noted in the *Caire Claim*,[27] that the officials 'have acted at least to all appearances as competent officials or organs or ... have used powers or methods appropriate to their official capacity'. In the words of the Commentary to the ILC Draft Articles, 'the state cannot take refuge behind the notion that, according to the provisions of its legal system, those actions or omissions ought not to have occurred or ought to have taken a different form'.

In the *Union Bridge Company Claim* (1924)[28] a British government official wrongly appropriated neutral property during the Boer War. The arbitration tribunal held Britain liable and commented:

> That liability is not affected either by the fact that [the official appropriated the property] under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question.

The *Youman's Claim* (1926)[29] arose from a situation in which Mexican troops, who were sent to protect US nationals besieged by rioters, joined in the attack in which the US nationals were killed. The Mexican authorities argued that since the soldiers had acted in complete disregard of their instructions Mexico could not be responsible for the deaths. The tribunal recognised that a state might not be responsible for the malicious acts of officials acting in a personal capacity but held that a state would almost invariably be responsible for wrongful acts committed by soldiers under the command of an officer. The soldiers in this

27 (1929) RIAA 575.

28 (1924) RIAA 138.

29 (1926) RIAA 110.