"Of Hacking and Human Rights:
Designing the International Law of State Responsibility"

Leslie Johns
Associate Professor of Political Science and Law
UCLA
ljohns@polisci.ucla.edu

Francesca Parente
Ph.D. Candidate in Political Science
UCLA
fparente@ucla.edu

20 March 2019

Abstract

The *lex generalis* on state responsibility contains multiple disconnects between legal breaches and punishments. General rules on attribution limit the responsibility of states for individuals; numerous circumstances preclude the wrongfulness of breaches; and the consequences of breaches are at best restorative, not punitive. But many specialized areas of law depart from this approach. What explains this variation? We argue that to understand the existing and potential design of the law of state responsibility, we must understand why states are tempted to break international law. In this paper, we describe three competing political theories of why states break international law (enforcement, managerial, and flexibility). We then elucidate the implications of each of these theories for how states design rules of state responsibility. We argue that the general rules on state responsibility accommodate managerial and flexibility concerns, but neglect the competing objective of enforcement. We then argue that when states prioritize enforcement, they should design specialized rules. We demonstrate the plausibility of our approach by examining case-law from the Inter-American Court of Human Rights, which differs from the general rules that are used by other institutions and areas of law.

1 Introduction

In spring 2007, a sixty-year old statue started a virtual "war." At the end of World War II, Soviet soldiers expelled German Nazi forces from Tallinn, Estonia, a small city on the coast of the Baltic Sea. In celebration of this event, the Soviet Army created a war memorial called the "Monument to the Liberators of Tallinn" with a Bronze Soldier statue standing watch over the unclaimed bodies of Soviet soldiers. After the fall of the Soviet Union in 1989, Estonia gained its independence and gradually realigned itself with Western Europe. Consequently, the Estonian government decided in 2007 to relocate the Bronze Soldier statue and the unclaimed bodies of Russian soldiers from their prominent position in the center of Tallinn to a military cemetery on the edge of the city. This move generated widespread criticism by Estonia's ethnic Russian community. In addition to large conventional protests, "hacktivists"—political activists who use computer networks for subversive purposes—launched massive cyberattacks on the websites of Estonian government agencies, news organizations, and private businesses.

During and after the attacks, the Estonian government and numerous intelligence and technology experts blamed Russia for inciting and supporting the attacks. Merit Kopli, the editor of a major Estonian newspaper that was targeted in the attack, declared: "The cyber-attacks are from Russia. There is no question. It's political."[1] Anonymous NATO officials told Western news sources that the attacks were probably not the work of isolated individuals. They believed that the depth and sophistication of the operations indicated that Russian security services were involved.[2] NATO legal experts also concluded that if such attacks were committed by a state, they would constitute an illegal intervention.[3] But was Russia legally responsible for the attacks? The NATO experts found it was not because "there is no definitive evidence that the hacktivists … operated pursuant to instructions from any State, nor did any State endorse and adopt the conduct."[4] The cyber-attacks were thus the work of individuals rather than of states.

Two years later, the Inter-American Court of Human Rights was confronted with a similar challenge: it needed to determine whether a human rights violation by an individual could be attributed to a state. The case involved the murder of Blanca Jeannette Kawas Fernández, a prominent environmental activist in Honduras. The petitioners claimed that Honduras had violated the American Convention on Human Rights because the state had failed to properly investigate Kawas Fernández's death, allowing her murderers to escape with impunity. Honduras claimed that it was not responsible for the murder because Kawas Fernández had been killed by private individuals, unaffiliated with the state, rather than state officials. The Inter-American Court of Human Rights agreed with the petitioners, finding that Honduras' failure to investigate the murder

[1] Quoted in Ian Traynor, "Russia accused of unleashing cyberwar to disable Estonia" *The Guardian* (UK), 16 May 2007. Available at: https://www.theguardian.com/world/2007/may/17/topstories3.russia.
[2] *Ibid.*
[3] Michael N. Schmitt (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. Cambridge: Cambridge University Press.
[4] Michael N. Schmitt (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. Cambridge: Cambridge University Press. p. 382.

entailed "in some way, assist[ance] by public authorities, which would entail international responsibility for the State."[5]

Why did the NATO legal experts and Inter-American Court of Human Rights come to such different conclusions? Why were the actions of human rights violators attributable to a state, while the actions of hackers were not? One will note, of course, that different rules applied in each case. NATO legal experts based their opinion on the general rules on state responsibility, which have stricter requirements for attributing acts of individuals to the state; the Inter-American Court, on the other hand, could use its own jurisprudence under the American Convention on Human Rights, where the standard for attribution is lower. Each set of legal experts followed their own rules. But why were the rules designed differently in the first place?

We argue that to understand the design of international rules on state responsibility, we must understand why states sometimes break international law. We describe three competing political theories: the enforcement, managerial, and flexibility perspectives. Each of these theories comes with different assumptions and implications about the design of international law. By its design, the *lex generalis* of state responsibility accommodates the managerial and flexibility perspectives on state behavior, but neglects the issue of enforcement.

When will states design a different set of rules? We argue that when states strongly support a legal regime, they can and should re-prioritize enforcement by developing specialized rules on state responsibility. By crafting *lex specialis* on attribution, wrongfulness, and consequences, states can better promote their common objectives. To demonstrate the feasibility of this option, we discuss state responsibility rules in the Inter-American Court of Human Rights. This institution has departed dramatically from the *lex generalis* by adopting progressively more muscular standards to hold states accountable for past breaches and prevent future breaches. In our conclusion, we return to the issues raised in the 2007 cyberattacks on Estonia and *Kawas Fernández v. Honduras.* We argue that the *lex specialis* of human rights is unlikely to become the law of hacking because the international community lacks the consensus needed to bolster the enforcement of cybersecurity law.

2 Why Do States Break International Law?

International law scholars usually analyze the content of legal rules, rather than the reasons why states break these rules. But to have an effective system of international law—one in which law induces states to behave differently than they would in the absence of law—we must have some conceptual understanding of what motivates states to either comply with or break international law. Broadly speaking, three major competing perspectives explain why states sometimes break international law: the enforcement, managerial, and flexibility perspectives. These perspectives make different assumptions about how states behave, which yield different arguments about how international law should be designed to promote cooperation.

2.1 Enforcement Perspective

[5] Inter-American Court of Human Rights, *Kawas Fernández v. Honduras,* Judgment of 3 April 2009, para. 78.

Scholars who adopt a enforcement perspective usually assume that states are rational actors. This assumption requires that leaders have preferences over the outcomes that can result from their choices; and that leaders act instrumentally to try to achieve their preferences, given their beliefs about how other states will act. Political leaders are not saints; while they may feel a moral desire to follow international law, they behave in a way that best protects the interests of their state (as they understand these interests), regardless of what international law requires. As Jack Goldsmith and Eric Posner argue: "States do not act in accordance with a rule that they feel obliged to follow; they act because it is in their interest to do so."[6] Any policy decision is therefore based on a careful calculation of the costs and benefits of possible alternatives, and even if "citizens and leaders have a preference for international law compliance, preferences for this good must be compared to preferences for other goods."[7]

The enforcement perspective assumes that breaking international law can often give leaders a short-term benefit. For example, a leader that is facing a strong domestic political opposition may benefit politically from violating human rights treaties and suppressing his political opponents. If a leader is fighting a civil or interstate war, he may be tempted to adopt prohibited military tactics, like using chemical weapons, to gain a military advantage. Similarly, a leader with a weak economy may be able to temporarily improve economic conditions by breaking trade law and unilaterally raising trade barriers that limit foreign competition. If international law requires states to do things that they would not otherwise do in the absence of the law, then breaking international law can provide states with tangible benefits.

Political leaders must balance this temptation to break international law against the expected cost of doing so. Although the international system lacks a centralized body to enforce international law by punishing states that break it, many decentralized forms of punishment may exist. We use the term punishment to describe any response to a legal violation by states (either individually or collectively) that raises the cost of breaking international law. Possible punishments include both legal and political outcomes. If a state has accepted jurisdiction of an international judicial body, a legal breach may lead to formal dispute settlement at a venue like the International Court of Justice, the International Centre for the Settlement of Investment Disputes, or the World Trade Organization. Alternatively, governments may face domestic accountability from nationals who favor compliance with an international rule. In the realm of international politics, a state that breaks international law may face reciprocity, retaliation, or damage to its reputation.[8]

The expected cost of punishment depends on both the magnitude of the punishment and the likelihood that the violation will be punished. Punishments vary greatly in terms of magnitude; for example, economic sanctions and military invasion are much costlier than only negative publicity. Thus, raising the magnitude of punishment will raise the cost of non-compliance. However, high-magnitude punishments are not always likely: military intervention is a costly punishment, but if the probability is close to zero, a leader may still believe non-compliance is the optimal choice. The likelihood of punishment can be affected by many different factors, including likelihood of detection and the cost of punishing the violator state. All else equal, more powerful states can usually better

[6] Jack L. Goldsmith and Eric A. Posner (2005) *The Limits of International Law*. Oxford University Press. p. 39.
[7] *Id.* at p. 9.
[8] Andrew T. Guzman (2008) *How International Law Works: A Rational Choice Theory*. Oxford University Press.

withstand the effects of a punishment than less powerful states because they can handle punishments of higher magnitude and face a lower chance of being punished in the first place.

The enforcement perspective suggests that if states wish to bolster the effectiveness of international law, they should write rules and design institutions that increase the likelihood and magnitude of punishment for legal violations. Scholars who adhere to the enforcement perspective would probably point to the Estonian cyberattacks case as evidence of international law's weakness: despite a widespread belief that Russia was responsible, Russia faced no tangible punishment for its violations. Moreover, Estonia had few options for holding Russia responsible for the attack. It could not establish the jurisdiction of an international court to hear its case, and it could not appeal to the UN Security Council where Russia holds veto power. Instead, Estonia was reliant on NATO—an institution of power politics—to exert pressure on Russia. Additionally, the international community's failure to punish Russia for the 2007 cyberattacks appears to have encouraged Russia to commit further attacks.[9] Overall, the enforcement perspective suggests that enforcement is a key component of ensuring that international law works, and that rules regarding enforcement should be designed accordingly. As illustrated by the Estonian cyberattacks, disconnects between legal breaches and punishments in cyberattacks may encourage more noncompliance with international law.

2.2 Managerial Perspective

Scholars who adhere to the managerial perspective believe that the international system is fundamentally characterized by order.[10] As Louis Henkin wrote in 1979:

> Violations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*.[11]

The managerial perspective thus begins with the observation that states usually comply with international law.

Given the managerial assumption that states are predisposed to compliance, why do states ever break their legal commitments? The managerial perspective puts forward three main arguments about why states sometimes break international law. First, states may have principled disagreements about what the law requires because of ambiguity in legal rules. For example, in the *North Sea* dispute, Denmark and the Netherlands believed that Germany was legally required to use the equidistance method during negotiations over maritime delimitations in the North Sea. In

---

[9] These include cyber operations during the conflict with Georgia in 2008; the conflict with Ukraine in 2014; and possible interventions in elections in the US and other Western democracies. See Michael N. Schmitt (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations.* Cambridge: Cambridge University Press. p. 376.

[10] The most comprehensive articulation of the managerialist paradigm comes from Abram and Antonia Handler Chayes. This discussion is based on Abram Chayes and Antonia Handler Chayes (1993) "On Compliance" *International Organization* 47: 175—205; and Abram Chayes and Antonia Handler Chayes (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press.

[11] Louis Henkin (1979) *How Nations Behave: Law and Foreign Policy*. Columbia University Press. p. 47. Emphasis in original.

contrast, Germany believed that it was not required to use the equidistance method, in part because it believed this rule was fundamentally unfair given Germany's curving coastline. A managerial scholar would hold up such a case as an example of principled disagreement about the meaning of law. Neither side opportunistically broke a clear, well-defined rule. Rather, the two sides disagreed about what rules should apply to the dispute, and each side made a principled legal argument. Managerial scholars might also argue that states faced significant ambiguity about the details of the cyberattack and the legal obligations involved, such that Russia should not be responsible. International law does not have any treaties that specifically address cyberattacks; rather, NATO had to convene a team of legal experts to clarify what legal obligations were involved in cyberattacks. If law experts themselves were uncertain in 2007 about what international law required, how could we expect Russia to know any better?

Second, states may sometimes break international law because they lack the capacity to fully comply with their legal obligations. Capacity is likely to be a bigger issue for states that are not economically developed or have weak government institutions. For example, Indian Prime Minister Narenda Modi said in 2017 it would be a "morally criminal act" for states to ignore the growing threat of climate change.[12] However, the government of a developing state like India may find it extremely costly, both economically and politically, to comply with an environmental agreement that halts or even slows industrialization and economic growth. Similarly, if a government lacks effective bureaucracies and local governments, it may not be able to force businesses and consumers to adopt pollution-reducing technologies. In sum, a genuine desire by the government to comply may not be enough to ensure actual compliance, particularly when international law requires private actors to change their behavior. Managerial scholars might also point to capacity constraints as a reason not to hold Russia responsible for the cyberattacks: Russia may not have the capacity to control the acts of the "hacktivists" – private individuals – so the cyberattack should not be attributed to it.

Third, states may not comply fully with their international commitments because they have not had enough time to change their behavior. For example, the modern World Trade Organization (WTO) is based on international rules that were initially crafted in the late 1940s by a handful of relatively rich states. As more states joined the trade regime over time, its members became more diverse, creating challenges for trade cooperation. When China joined the WTO in 2001, it had to negotiate a special agreement under which it promised to progressively adopt economic reforms so that its economy would more closely resemble a market economy. Many of China's conflicts with capitalist states stem from frustration over the pace of Chinese economic reforms; for example, the EU and US often argue that China does not provide enough protection to intellectual property rights, thereby harming foreign businesses. Yet intellectual property rights have expanded dramatically since 2001, and are likely to continue growing stronger, particularly as Chinese companies develop new technology.[13] Some scholars defend China by arguing that it is moving in

[12] See Ben Westcott, "Reluctant Signatory India Takes Moral High-ground on Paris Climate Deal" CNN, 2 June 2017. Available at: https://www.cnn.com/2017/06/02/asia/india-paris-agreement-trump/index.html.
[13] See Natalie P. Stoianoff (2012) "The Influence of the WTO over China's Intellectual Property Regime" *Sydney Law Review* 34: 65—89.

the right direction, and simply has not had sufficient time to dramatically reform its domestic economic and legal system.[14]

Scholars who see the world through the managerial perspective often argue that international law and institutions should be used to manage compliance by persuading states to comply, rather than punishing them for breaking international law. While international courts can help to reduce ambiguity about the meaning of international law, adversarial lawsuits and strict rules about state responsibility cannot help states to solve the other challenges of compliance. Harold Hongju Koh argues that "nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply."[15] The managerialist perspective therefore suggests that the international system should help states to build capacity and internalize international norms, rather than punishing them for breaking international law.

2.3 Flexibility Perspective

The final theoretical approach – the flexibility perspective – was originally developed by political scientists to understand the design and operation of international trade law.[16] Like the enforcement perspective, the flexibility perspective emphasizes the importance of punishment in inducing states to comply with international law. Yet just as the managerial perspective believes that states often have legitimate reasons for breaking international law, so too does the flexibility perspective emphasize that states should sometimes be allowed to break their commitments in response to extreme economic or political pressure. International law must therefore be designed in a way that can survive periodic breaches without complete collapse.

The flexibility perspective begins with the assumption that economic and political pressure on governments to break international law can change unexpectedly over time.[17] Most of the time, states will find it beneficial to comply with their legal commitments. Yet sometimes unexpected events can tempt states to break international law. For example, after the 2015 terrorist attacks in Paris, France declared a state of emergency and temporarily limited human rights by reducing judicial oversight of police activities. The flexibility perspective assumes that sometimes unexpected events—like economic recessions or terrorist attacks—will make compliance with international law extremely costly for states.

The flexibility perspective also assumes that states can select into and out of their legal commitments over time. As emphasized by the managerial perspective, states would not select into legal commitments to cooperate if they did not believe that these commitments would be followed most of the time. Yet states often exit from international treaties when they can no longer afford to

---

[14] See Xuan-Thao Nguyen (2011) "The China We Hardly Know: Revealing the New China's Intellectual Property Regime" *Saint Louis University Law Journal* 55: 773—810.
[15] See Harold Hongju Koh (1997) "Why Do Nations Obey International Law?" *The Yale Law Journal* 106: 2599—2659. p. 2601.
[16] See B. Peter Rosendorff and Helen V. Milner (2001) "The Optimal Design of International Trade Institutions: Uncertainty and Escape" *International Organization* 55: 829—857; and B. Peter Rosendorff (2005) "Stability and Rigidity: Politics and the Design of the WTO's Dispute Resolution Procedure" *American Political Science Review* 99: 389–400.
[17] Leslie Johns and B. Peter Rosendorff (2009) "Dispute Settlement, Compliance and Domestic Politics" In *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment*. James C. Hartigan, ed. Emerald Group Publishing, pp. 139–163.

comply with their legal commitments.[18] Similarly, many states have chosen to renounce the jurisdiction of international courts when they disagree with important court rulings or are unable to comply with them. An optimal legal system is therefore one in which: states join cooperative agreements; states comply with their legal commitments; and states do not exit their agreements during severe economic or political times.

The flexibility perspective argues that laws should be designed to allow states to sometimes break their commitments without facing severe punishment. Stronger punishments make it costlier in expectation for states to join an agreement. States know that they may sometimes face tough times, like economic emergencies or terrorist attacks. If every legal breach triggers an extreme punishment, states may simply refuse to join cooperative agreements in the first place. Alternatively, they may join the agreement, but then exit the moment that compliance becomes costly. Strong punishment can thus make treaty unstable over time.

The flexibility perspective argues that international law should include escape clauses, which allow states to sometimes temporarily break their legal commitments without facing severe punishments when facing unexpected and severe economic and political pressure. While Estonia's decision to move the Bronze Soldier and Soviet graves did not legally excuse or justify a cyberattack, it does explain why individuals of Russian ethnicity wanted to lash out at the Estonian government. From Russia's perspective, Estonia's actions were a provocation that triggered political pressure on the Russian government to respond. Similarly, investment law also sometimes allows states to violate these property rights in response to unexpected events, like economic emergencies, and many human rights agreements allow states to suspend some civil liberties during temporary crises, like terrorist attacks.[19] Escape clauses come with three primary benefits to international cooperation. First, escape clauses make states more likely to join cooperative agreements in the first place.[20] Second, escape clauses allow states to make deeper commitments to cooperation, such as pledging to remove more trade barriers or protect more human rights.[21] Third, agreements with escape clauses survive longer.[22] All of these benefits result from allowing states to sometimes break international law without suffering legal responsibility and consequences.

3 Understanding General Rules of State Responsibility

The international law of state responsibility developed over time in response to international disputes about the treatment of individuals and businesses in foreign states, particularly in the nineteenth and early twentieth centuries.[23] Over time, the International Law

[18] Laurence R. Helfer (2005) "Exiting Treaties" *Virginia Law Review* 91: 1579—1648.
[19] Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss (2011) "Emergency and Escape: Explaining Derogations from Human Rights Treaties." *International Organization* 65: 673–707.
[20] Jeffrey Kucik and Eric Reinhardt (2008) "Does Flexibility Promote Cooperation? An Application to the Global Trade Regime" *International Organization* 62: 477–505.
[21] Leslie Johns (2014) "Depth versus Rigidity in the Design of International Trade Agreements" *Journal of Theoretical Politics* 26: 468—495.
[22] B. Peter Rosendorff (2005) "Stability and Rigidity: Politics and the Design of the WTO's Dispute Resolution Procedure" *American Political Science Review* 99: 389–400.
[23] For example, see Alan Nissel (2013) "The Duality of State Responsibility" *Columbia Human Rights Law Review* 44: 793—858.

Commission (ILC) attempted to codify these rules, and ultimately crafted a general framework that delineated state responsibility across all areas of international law. These rules are laid out in the ILC's Articles on State Responsibility, which were completed in 2001. The UN General Assembly passed a resolution in 2001 to show its support for the ILC Articles, but the Articles were never transformed into a treaty. While they lack the status of treaty-law, they have been broadly supported by judges, scholars, and states as reflecting customary international law. We therefore use the ILC Articles as the basis of our discussion on general rules, noting debates over these rules where appropriate.

3.1 Attribution

Attribution rules determine when a particular behavior is considered an act of a state. They operate by asking who specifically has committed a certain act, and whether the state had the capacity to control the actor. By emphasizing capacity, they usually reflect the managerial perspective on compliance. Only sometimes—when states are held responsible for non-state actors under their overall control—do they reflect the enforcement perspective.

Under international law, a state is responsible for the acts of all of its government bodies.[24] International law does not distinguish between acts of a national government and acts of regional or local governments. A state is responsible for the acts of all of its various units, meaning that states with federal systems of government, like Mexico and the US, often face special challenges when complying with international law. Even if the national government lacks the authority to order a regional or local government to behave in a particular way, the state as a whole is still responsible for the acts of its regional and local governments. Similarly, even if the executive branch lacks authority to compel the legislature or courts to behave in a certain way, the state as a whole is still responsible for the actions of all of its branches of government.

While it is relatively straightforward to determine attribution for the acts of government bodies, it can be more problematic to assess the acts of individuals who have received authority from the state, like government officials. This is because government officials are sometimes agents of the state, and other times private individuals, acting independently of their employer. International law attempts to deal with these dual lives through attribution rules based on the authority and capacity of employees. Broadly speaking, authority usually refers to the types of actions that an individual is legally allowed to take. For example, most states give their police officers the authority to arrest and detain individuals who are suspected of committing crimes. However, they usually do not give police officers the authority to torture criminal suspects. Such activities are referred to as *ultra vires* ("beyond the powers") acts: they lie outside of the authority given by the state to the individual official. In contrast, capacity usually refers to the way in which others might interpret the government official's actions, given the overall context or situation. From the ILC's perspective, it does not matter whether a government official is acting within his authority, provided that he is acting within his capacity as a government official. That is, even if a

[24] International Law Commission (2001) "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" ("ILC Commentary") *Official Records of the General Assembly.* Fifty-sixth session, Supplement No. 10 (A/56/10). Article 4, para. 1.

government official exceeds his legal authority (commits an *ultra vires* act), the state is still responsible for his conduct if he acts in his capacity as a government official.

The differing rules on government bodies and government employees reflect managerial concerns about compliance. Although attribution rules are relatively strict when it comes to government bodies, they are more relaxed when it comes to government officials because states are only responsible for government officials acting in accordance with either their authority or capacity. The law of state responsibility implicitly assumes that states can mostly control their employees, which is why they are still responsible for government officials' actions even when they are illegal. However, the law of state responsibility recognizes that states do not have absolute control over their employees. This ensures, for example, that the state is not responsible for illegal acts committed by police officers in their private lives.

States can also be responsible for breaches of international law committed by non-state actors. Article 8 of the ILC Articles says that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

In practice, there is often disagreement about how to interpret and implement this standard. International courts have articulated two competing approaches: an effective control standard and an overall control standard, with the former having greater acceptance in existing jurisprudence.

The ICJ laid out the effective control standard in the *Nicaragua* case (1986), in which it was asked to rule upon the legality of US military involvement in Nicaragua in the 1980s. Over a prolonged period of time, the US government provided support to various rebel groups that were challenging Nicaragua's Sandinista government, which the US perceived as a Communist threat to Nicaragua's neighbors. In its ruling, the ICJ distinguished between three types of actors involved in the conflict: US government personnel, who primarily worked for the US military and the Central Intelligence Agency; "Unilaterally Controlled Latino Assets" (UCLAs), who were "persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel";[25] and Nicaraguan rebel forces, known collectively as the *contras*.

The ICJ argued that the US was responsible for the acts of the UCLAs because of heavy US involvement in planning and supporting UCLA acts.[26] However, the ICJ found that the US had a more limited role in supporting the *contras,* which Nicaragua accused of numerous crimes. The US provided funding, intelligence, supplies, and training for the *contras*. But the Court was not convinced based on the available evidence that the operations of the *contras* "reflected strategy and tactics wholly devised by the United States."[27] According to the ICJ, the US could only be held responsible for the acts of the *contras* if it had "effective control" over them.[28] Namely, Nicaragua

[25] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, para. 75.
[26] *Id.*, para. 86.
[27] *Id*., para. 106.
[28] *Id.*, para. 115.

could not prove that the US specifically directed the *contras* to commit the alleged crimes, so the US was not held responsible for the *contras*' actions.

The International Criminal Tribunal for Yugoslavia (ICTY) proposed an alternative standard in the *Tadić* case: the overall control standard. The ICTY Appeals Chamber began by arguing that international courts were not always bound to apply the same standard when determining state responsibility because "[t]he degree of control may … vary according to the factual circumstances of each case."[29] The ICTY Appeals Chamber then argued that just as states were responsible for *ultra vires* acts of their officials, so too are they responsible for the actions of military and paramilitary groups under their overall control, regardless of whether these groups are following the explicit directions or instructions of the state. It argued:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity … However, it is not necessary that … the State should also issue … instructions for the commission of specific acts contrary to international law.[30]

The overall control standard thus requires less than the effective control standard to establish that a state is responsible for the behavior of non-state actors. The ICTY in the *Tadić* case took a more aggressive approach in creating accountability for legal violations than the ICJ took in the *Nicaragua* case.

The ICJ revisited its *Nicaragua* ruling in 2007 when it heard a lawsuit involving the Srebrenica genocide during the Bosnian conflict. Rather than adopting the overall control standard from the *Tadić* case, the ICJ instead doubled-down on its earlier *Nicaragua* ruling, arguing that:

> the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct … the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.[31]

The effective control standard is a relatively weak attribution rule because it allows states to avoid responsibility for the acts of non-state actors. By emphasizing managerial concerns about the capacity of states to control non-state actors, the effective control standard diminishes the deterrent effect of any possible punishments for legal violations. In contrast, the overall control standard is a relatively strong attribution rule that privileges enforcement over managerial concerns. In the *Tadić* case, the ICTY argued that if a non-state actor "is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each

---

[29] International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Tadić*, Appeals Chamber Judgment of 15 July 1999, para. 117.
[30] *Id.*, para. 131.
[31] International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 26 February 2007. para. 406.

of them was specifically imposed, requested or directed by the State."[32] The ICJ's adherence to the effective control standard suggests that it views managerial concerns as more salient than enforcement.

Finally, even if a state has no control whatsoever over non-state actors, sometimes it can become responsible for their behavior if the state "acknowledges and adopts the conduct in question as its own."[33] As the International Law Commission noted, such a situation requires that a state offer more than "mere support or endorsement" of an act.[34] Such situations are relatively rare, but the ICJ held Iran responsible for legal violations in the *Iran Hostages* case after numerous Iranian officials expressed support for the 1979 attacks on US embassies and consulates in Iran.[35]

Thus, attribution rules in international law appear to mostly match the concerns of the managerial perspective: when states have less capacity to control the acts of government officials and non-state actors, they are less responsible for these acts. This ensures that states are not punished needlessly for outcomes that lie outside their control.[36] In the Estonian cyberattacks, Russia claimed that it was not responsible for the activities of "hacktivists" who attacked Estonian business and government websites. The Russian government successfully portrayed the attacks as acts of isolated individuals who were not operating under the instructions of the Russian government. The NATO legal experts found that there was not sufficient evidence that the attacks could be attributed to the Russian government under the effective control standard because "there is no definitive evidence that the hacktivists involved in the cyber operations against Estonia in 2007 operated pursuant to instructions from any State, nor did any State endorse and adopt the conduct."[37] Accordingly, they found that Russia could not be held responsible for the cyberattack.

3.2 Wrongfulness

Even if a legal breach is attributable to a state, sometimes the breach will not be considered wrongful and a state will not be responsible for the legal violation. The six specific factors that keep a legal violation from creating responsibility are referred to as circumstances precluding

---

[32] *Id.*, para. 122.
[33] ILC Commentary, Article 11.
[34] ILC Commentary, p. 53.
[35] See International Court of Justice, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, para. 71 and 74.
[36] . The one exception to this conclusion lies in those courts, like the ICTY, that support the overall control standard. When this standard is used, enforcement is more likely, because states are unable to evade responsibility by claiming the behavior was out of their control, or worse, outsource legal violations to non-state actors specifically to avoid attribution. Indeed, this possibility was recognized by the ICTY in the *Tadić* case when it explained the importance of the overall control standard: "the rationale…is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials" See International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Tadić*, Appeals Chamber Judgment of 15 July 1999, para. 117.
[37] Michael N. Schmitt (2017) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. Cambridge: Cambridge University Press. p. 382.

wrongfulness (CPWs). These circumstances are akin to excuses or justifications for legal violations.[38] Overall, these circumstances clearly reflect the flexibility perspective.

The first three CPWs all involve situations in which actions by the injured state prevent a breach from being wrongful. First, under the law of state responsibility, a legal breach is not considered wrongful if the injured state consents to the breach. Ideally, such consent should be given before a state breaks its obligations, but this is not explicitly required by the ILC Articles.[39] Second, the ILC Articles explicitly list self-defense as a circumstance that precludes wrongfulness of a legal breach.[40] This legal provision ensures that the law of state responsibility is consistent with contemporary international law on the use of force. However, some legal scholars have been critical of the inclusion of self-defense in the ILC Articles. For example, legal scholar Philip Allott argued that "Self-defense … is part of the law on the legitimate use of force, not a general feature of legal liability."[41] Third, legal breaches are not considered wrongful under international law if they are countermeasures, which are actions taken by a state that was previously injured by a wrongful act of another state.

These CPWs all essentially assume that a legal obligation no longer holds. This is because the injured state has either consented to a breach (and thus altered the legal obligation) or committed a prior violation of international law (thus enabling self-defense or countermeasures). As such, they release a state from its commitments, giving the state flexibility to temporarily adapt to the changing economic or political environment.

The final three CPWs all involve external forces that are outside of the control of the state that commits a breach. Usually, these forces are short-term events that temporarily disrupt normal cooperation between states, but then allow a return to cooperation once the external force has passed. The conventional justification for allowing breaches in such circumstances is that "such an event, not being within the *de facto* control of the state, should not be allowed to disrupt cooperation if its effects are only temporary."[42]

The fourth circumstance in which a breach is not considered wrongful is if the breach is cause by a *force majeure*, which the ILC defines as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."[43] In the past, states often invoked the concept of *force majeure* opportunistically to defend themselves when compliance was merely made more costly or difficult. However, the modern use of the term only includes circumstances in which compliance is not at all possible. Accordingly, claims of *force majeure* are usually not successful because the standard for invoking this CPW is so high.

---

[38] However, the ILC was careful to note that none of these six circumstances precluding wrongfulness apply to breaches of peremptory norms. If a state breaks a peremptory norm of international law—for example, by permitting slavery, committing genocide, etc.—its action will always be considered wrongful. Additionally, once a circumstance precluding wrongfulness has passed, a state is expected to return to compliance with its legal obligations. CPWs thus temporarily excuse or justify breaches of international law, but they do not invalidate or otherwise remove or cancel out a legal obligation.

[39] See ILC Commentary, Article 20.

[40] See ILC Commentary, Article 21.

[41] Philip Allott (1988) "State Responsibility and the Unmaking of International Law." *Harvard International Law Journal*. 29: 1–26. p. 22.

[42] Pierre-Hugues Verdier (2002) "International Relations, State Responsibility and the Problem of Custom." *Virginia Journal of International Law*. 42: 839—867. p. 858.

[43] ILC Commentary, Article 23.

Fifth, the law of state responsibility recognizes distress as a CPW. The ILC Articles define "distress" as a situation in which "the author of the act in question has no other reasonable way … of saving the author's life or the lives of other persons entrusted to the author's care."[44] This CPW derives from the customary law of the sea, under which ships could enter foreign ports when poor weather conditions threatened their safety.[45] Similarly, in modern times it is not considered a breach of international law if an airplane in distress needs to make an emergency landing on foreign territory, even though states have the legal right to restrict flights through their airspace under normal conditions.

The final CPW is necessity, which comes from the natural law concept of self-preservation. Throughout the development of international law, states often invoked the concept of necessity to try to excuse or justify breaches of international law.[46] Yet when drafting the ILC Articles, many states believed that the concept of necessity had been abused by states, who tried to excuse noncompliance when it was merely inconvenient, and not when it was truly necessary to the survival of the state. Philip Allott articulated the views of many when he wrote: "Among the clearest lessons of our collective experience is that the concept of state necessity is the most persistent and formidable enemy of a truly human society."[47] As a compromise, the ILC Articles allow states to invoke necessity subject to strict limits.[48]

The three CPWs involving external forces reflect both the managerial and flexibility perspectives. The doctrine of *force majeure* is clearly based on managerial concerns about capacity, as a state's breach is not considered wrongful if the state completely lacks the ability to comply. In contrast, distress and necessity allow states to temporarily violate their commitments when competing values (like the preservation of human life and the survival of the state) make the cost of compliance excessively high. While states may still have the capacity to comply, their violations are excused/justified if the cost of compliance is temporarily and unexpectedly too high. In other words, distress and necessity operate as escape clauses. All six of the CPWs fundamentally challenge the enforcement perspective by giving states wiggle-room to excuse or justify legal violations, thereby opening the door to abuse by states.[49] Note, however, that none of these CPWs would have applied in the case of the Estonian cyberattacks. Russia could not plausibly claim that Estonia had consented to the cyberattacks; similarly, the Estonian government's decision to move the Bronze Soldier and Soviet graves was not an act that could justify Russian self-defense or countermeasures; and no external forces could be invoked to excuse or justify the cyberattacks. Therefore, if Estonia had been able to attribute the 2007 cyberattack to the Russian government, then Russia would likely have been considered legally responsible for the attack.

---

[44] ILC Commentary, Article 24.
[45] For example, see Emer de Vattel (1758/2008) *The Law of Nations*. Thomas Nugent, trans. Liberty Fund. See Book II, Chapter IX, Section 123.
[46] See Krzysztof J. Pelc (2013) *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law.* Cambridge University Press. p. 63—75.
[47] Philip Allott (1988) "State Responsibility and the Unmaking of International Law." *Harvard International Law Journal*. 29: 1—26. p. 17.
[48] See ILC Commentary, Article 25. Even so, what circumstances count as necessity are still controversial. For example, see Robert D. Sloane (2012) "On the Use and Abuse of Necessity in the Law of State Responsibility" *American Journal of International Law* 106: 447—508.
[49] Philip Allott (1988) "State Responsibility and the Unmaking of International Law." *Harvard International Law Journal*. 29: 1—26. p. 17.

3.3 Consequences

Once attribution and wrongfulness have been established, the law of state responsibility turns to the consequences of the breach. Overall, we argue that these rules reflect the flexibility perspective on compliance, rather than the enforcement or managerial perspectives.

First, states must cease any ongoing breaches: "The State responsible for the internationally wrongful act is under an obligation … [t]o cease that act, if it is continuing."[50] Even if a circumstance precluded the wrongfulness of a violation, the legal obligation remains in force and must be resumed once the circumstance passes.

Second, the law of state responsibility technically allows states to prevent future breaches. The ILC Articles say that responsible states may be required "[t]o offer appropriate assurances and guarantees of non-repetition, if circumstances so require."[51] The ILC clarified that "assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach."[52] Such assurances and guarantees "are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily."[53]

Yet it is relatively rare for states to seek assurances and guarantees of non-repetition in international disputes, and even more rare for courts to demand them. As Dinah Shelton explains: "Guarantees of non-repetition … are disfavored … because such assurances anticipate future breaches."[54] That is, an injured state that raises the issue of repetition risks offending a state that is responsible for previous breaches. Additionally, a court that orders such assurances and guarantees could be viewed as pre-judging a dispute that has not yet occurred.

Finally, a state that is responsible for breaking international law must repair the damage to states injured from its violations. As the Permanent Court of International Justice famously ruled in 1928, "it is a principle of international law … that any breach of an engagement involves an obligation to make reparation."[55] The standard forms of reparation under international law include: restitution, compensation, and satisfaction. All of these forms of reparation are based on a conception of remedial justice. That is, the international law of state responsibility focuses on repairing the damage caused by a legal violation, rather than deterring or punishing violations.

The most preferred form of reparation is restitution (*restitutio in integrum)*, which seeks to make the injured state "whole" by returning it to its *status quo ante*. The ILC Articles state that:

---

[50] ILC Commentary, Article 30.
[51] ILC Commentary, Article 30.
[52] ILC Commentary, p. 90.
[53] ILC Commentary, p. 89.
[54] Dinah Shelton (2002) "Righting Wrongs: Reparations in the Articles on State Responsibility" *American Journal of International Law*. 96: 833—856. p. 844.
[55] Permanent Court of International Justice, *Case Concerning the Factory at Chorzów*, Judgment No. 13 (Merits) of 13 September 1928, p. 29.

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (a) Is not materially impossible;
>
> (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[56]

Even in simpler disputes, where it is clear what restitution would entail, international politics may keep restitution from being a feasible solution. These cases may result in compensation as a form of reparation. Compensation is usually considered a second-best solution;[57] nevertheless, it is routine in many areas of international law, including investment law and disputes involving property damage.[58] In some situations, a responsible state may be ordered to pay additional financial damages like lost profits or interest. However, compensation may not be punitive: it cannot be larger than the harm suffered by the injured state.

Finally, many international disputes involve more symbolic issues than claims of expropriation or property damage. In such situations, states often ask for a verbal or written statement that acknowledges or apologizes for a legal violation, known as satisfaction. According to the ILC Articles:

> 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.[59]

Such satisfaction "may not take a form humiliating to the responsible State."[60] But an apology or admission of responsibility can often help to heal the moral damage that is caused by a violation of international law. However, while Estonia might have been entitled to satisfaction for the cyberattack, and a formal finding of Russian responsibility might have given the Estonian government and people some moral value, satisfaction provides little material value.

The nature of consequences for legal violations best reflects the flexibility perspective. If states are unable to comply, they may temporarily breach their obligations, but must cease their violations as soon as they have the capacity to comply, and have a continuing obligation to comply in the future. Responsible states might be asked to provide reparation to an injured state in the

---

[56] ILC Commentary, Article 35.

[57] This is because policy-makers want to avoid commodifying legal violations. The legitimacy of law is harmed if poor states are bound by legal obligations, while rich states can break the law and simply pay compensation. See Dinah Shelton (2002) "Righting Wrongs: Reparations in the Articles on State Responsibility" *American Journal of International Law*. 96: 833—856. p. 845.

[58] For example, UK warships routinely patrolled portions of the Mediterranean Sea after World War II. During one of these patrols in 1946, two UK ships struck mines in the Corfu Channel, which is located off the coast of Albania. Dozens of sailors were killed in the explosion and both ships suffered severe damage. Albania was held responsible for the explosions in a subsequent lawsuit heard by the International Court of Justice. The ICJ ordered Albania to pay compensation to the UK to cover the cost of repairing the ships.

[59] ILC Commentary, Article 37.

[60] ILC Commentary, Article 37, para. 3.

form of restitution, compensation, or satisfaction, but the rules on state responsibility do not allow punitive damages. Thus, states can often temporarily violate their legal obligations and then return to compliance via restitution (i.e. a return to the *status quo ante*).[61] In the Estonian cyberattack case, for example, the *status quo ante* would have been effectively restored as soon as the attack had passed. While Estonia might have been entitled to some compensation for the harm that it suffered during the attack, such as disruptions to commercial activities, it could not receive punitive damages. Additionally, states could choose to break their obligations in response to severe economic or political pressure and pay compensation to any injured parties as a form of reparation. A relatively powerful state like Russia could easily pay off a small state like Estonia for any economic harm suffered during the cyberattack. In the long-term, the flexibility perspective suggests that the ability to violate and pay compensation will make states more likely to join and remain in international agreements over time. However, if legal regimes were designed to prevent violations, the consequences for legal breaches should be increased.

4 Towards *Lex Specialis:* State Responsibility in the Inter-American Court of Human Rights

As we have thus far shown, the general rules on state responsibility create multiple disconnects between legal breaches and punishment, which privilege the concerns of the managerial and flexibility perspectives on compliance. However, international law might be designed differently if states wished to prioritize enforcement. For example, if a group of states have recently transitioned from autocracy to democracy, they might seek to design strong human rights protections that deter violations and prevent a backslide to autocracy.[62] What might these adjustments look like? In a regime designed around enforcement, one ought to expect stricter attribution rules; fewer circumstances precluding wrongfulness; and stronger consequences for breaches. The exact nature of these adjustments will vary by regime and what the members of that regime collectively decide to implement.

To illustrate the adjustments that could be made if states are less concerned about managerialism and flexibility, we consider the case of the Inter-American Court of Human Rights (IACHR), a regional human rights court in Latin America. Most members of this institution are relatively new democracies that joined the court upon transitioning from military dictatorship to democracy in the 1980s. The American Convention on Human Rights and jurisprudence of the IACHR have created stronger rules on state responsibility to prevent future human rights violations. These efforts are reflected in strict rules that attribute actions of private individuals to

[61] For example, if an international tribunal finds a state guilty of violating international trade law, the state is only required to return to compliance by changing its trade policy. It is not required to compensate a state for the harm that it suffered while the offending policy was in place or to pay any sort of punitive damages. Trade law scholars often refer to this aspect of international trade law as a "remedy gap" because states can break trade laws temporarily while they delay legal challenges, and then return to compliance after being found guilty. See Rachel Brewster (2011) "The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement" *George Washington Law Review* 80: 102—156.

[62] See, for example, Emilie M. Hafner-Burton, Edward D. Mansfield, and Jon C.W. Pevehouse (2015) "Human Rights Institutions, Sovereignty Costs and Democratization" *British Journal of Political Science* 45(1): 1-27; Andrew Moravcsik (2000) "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" *International Organization* 54(2): 217-252; and Simon Zschirnt and Mark Menaldo (2014) "International Insurance? Democratic Consolidation and Support for International Human Rights Regimes" *International Journal of Transitional Justice* 8(3): 452-475.

the state; a general unwillingness to accept states' excuses or justifications for legal breaches; and the lack of discretion given to states when ordering measures of non-repetition.

4.1 Attribution

As with the *lex generalis* on state responsibility, states in the Inter-American system are responsible for actions of all government bodies and government agents acting in their official authority or capacity. This includes officials acting *ultra vires* if they are acting in their official capacity, as established in the Court's first case, *Velásquez Rodríguez v. Honduras.* Most violations in IACHR cases are committed by government agents, including military and police officers.[63] Thus, states usually cannot avoid responsibility based on attribution.

For non-state actors, the IACHR has developed an expansive attribution rule that covers actions by private individuals, even if those individuals are not controlled by the state. This is a "complicity standard" in which states are accountable for providing "a knowing and causal contribution to the commission of a conduct by a non-state actor," which entails any form of aid or assistance.[64] As the IACHR wrote in *Mapiripán Massacre v. Colombia:*

> [I]nternational responsibility may also be generated by acts of private individuals not attributable in principle to the State. The States Party to the Convention have *erga omnes* obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons. The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these *erga omnes* obligations…[65]

Thus, as long as government officials assist in the violation, the state has incurred responsibility.

Such state assistance can come in the form of acts or omissions. For example, in *Mapiripán Massacre v. Colombia*, the Court found that the actions of paramilitary groups that committed the violations could be attributed to the state because "the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance, expressed through several actions ..., of the Armed Forces of the State."[66] The Court has also interpreted assistance more broadly to include omissions. While the American Convention does not explicitly include an obligation to investigate human rights violations, it does include a duty to "ensure the free and full

---

[63] See Francesca Parente (2019) "Past Regret, Future Fear: Compliance with International Law." UCLA Dissertation.
[64] Vladyslav Lanovoy (2017) "The Use of Force by Non-State Actors and the Limits of Attribution of Conduct" *European Journal of International Law* 28 (2): 563-585, pp. 585. We also note the limitations of the complicity standard, as noted by Ilias Plakokefalos (2017) "The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy" *European Journal of International Law* 28 (2): 587-593 and Lanovoy's defense of complicity in Vladyslav Lanovoy (2017) "The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Rejoinder to Ilias Plakokefalos" *European Journal of International Law* 28 (2): 595-599.
[65] Inter-American Court of Human Rights, *Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005, para. 111.
[66] *Mapiripán Massacre*, para. 120.

exercise" of rights under Article 1(1), which the state can violate by failing to investigate alleged criminal acts. In *Kawas Fernández v. Honduras*, the IACHR held that a murder could be attributed to the state, even if the murder was committed by private individuals, because Honduras failed to investigate the violation. The Court wrote:

> the obligation [to investigate] persists irrespective of the agent to whom the violation may be eventually attributed, even individuals, since if the events are not investigated in depth, they would be, in some way, assisted by public authorities, which would entail international responsibility for the State.[67]

Even though Honduran state agents did not commit the murder, Honduras was found responsible for violating Article 4 (right to life), "in connection with the obligation to respect and guarantee laid down in Article 1(1)."[68] Thus, if a state does not effectively investigate a human rights violation by a private actor, it is held responsible for the original legal violation.

The complicity standard deters human rights violations by giving states incentive to prevent and punish violations at the domestic level. By this standard, states are responsible for violations of the American Convention even when their agents do not commit the actions, and even if there is no active relationship between government agents and the perpetrators. States cannot evade responsibility by "outsourcing" violations to non-state actors because even these actions can be attributed to the state.

4.2 Wrongfulness

In the *lex generalis* on state responsibility, several circumstances can preclude the wrongfulness of a legal breach. These include actions of the injured state--which can give rise to consent, self-defense, or countermeasures--and external forces--that can generate *force majeure*, distress, or necessity. Compared to the general rules, the American Convention allows for far fewer exceptions.

First, the American Convention does not allow the actions of the injured party to affect wrongfulness. This speaks to the universality of rights guaranteed – there is nothing an individual can do that would allow the state to breach its obligation to respect those individuals' rights, as laid out in the treaty. The IACHR has, on occasion, considered the possibility of the violation occurring in self-defense, but in the few cases where this has been mentioned, the Court has not accepted this as a justification. For example, in *Miguel Castro-Castro Prison v. Peru*, the Court held:

> In this case the deliberate way in which the police officials acted in order to deprive the inmates of their life is notorious. Due to the situation of these inmates, there was no possible justification for the use of weapons against them, nor was there any need of self defense, or an imminent danger of death or serious injuries against the police officers.[69]

---

[67] Inter-American Court of Human Rights, *Kawas Fernández v. Honduras,* Judgment of 3 April 2009, para. 78.
[68] Id., para. 227.
[69] Inter-American Court of Human Rights, *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006, para. 186, pg. 45.

The Court's reasoning allows for the possibility that police officers could have acted in self-defense, which would have perhaps excused the breach committed against the prisoners. However, to date, acting in self-defense has yet to preclude the wrongfulness of a violation in the IACHR.

Second, the American Convention only allows external forces to preclude wrongfulness under extremely limited circumstances. Article 27(1) lists some circumstances in which the state may temporarily suspend obligations:

> In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation…[70]

However, to deter states from derogating when merely convenient, the Convention and IACHR have restricted the scope and definition of these circumstances. Article 27(2) stipulates that certain rights are nonderogable:

> [Article 27(1)] does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.[71]

Additionally, the IACHR clarified in Advisory Opinion 8/87 that an emergency can only be invoked if preservation of democracy is at stake. This limitation is intended to avoid the "abuses [that] may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27," which, the Court notes, has "been the experience of our hemisphere."[72] While the Court's interpretation of Article 27 does allow for the possibility of CPWs, the restricted scope of what constitutes an emergency and limitations on what rights can be suspended are clearly meant to deter states from breaking international law. Honduras did not raise any of these possible CPWs in its defense in the *Kawas Fernández* case, and even if it had, none of these circumstances would have applied.

4.3 Consequences

The enforcement perspective suggests that stronger punishments promote compliance. Although the IACHR does not allow for punitive damages, the consequences for violating the

---

[70] American Convention on Human Rights ("Pact of San José"), adopted 22 November 1969, Article 27(1).
[71] American Convention on Human Rights, Article 27(2). The IACHR determined in Advisory Opinions 8/87 and 9/87 that "judicial guarantees essential for the protection of such rights" are found in Articles 7(6) (Habeas Corpus), 8 (Fair Trial) and 25 (Judicial Protection).
[72] Inter-American Court of Human Rights, Advisory Opinion 8/87, para. 20.

American Convention are much stronger than the consequences in the *lex generalis* on state responsibility.

When a state loses a case at the IACHR, the Court issues a judgment with a highly-detailed list of specific orders that with which a state must comply. The Court then monitors and reports on the compliance of every order for every judgment. On average, the IACHR issues seven orders per case.[73] These orders routinely include compensation (for both pecuniary and non-pecuniary damages), rehabilitation (e.g., ongoing medical care for human rights victims), non-repetition (e.g., reform legislation) and satisfaction (e.g., public apologies). A few aspects of these orders appear unique to the Inter-American system.

First, states are often ordered to provide remedies that benefit individuals who were not parties to the case. For example, one of the remedies in the *Serrano Cruz Sisters* case was to create a DNA database that would aid in reunification of children who were disappeared during the civil war with their families. As scholars recognized, "[i]n this way, other families who have been searching for their lost children may benefit from the reparations order, even though they were not parties to the cases."[74] Thus, the Court goes out of its way to ensure that additional victims of widespread abuses receive remedies, even if they themselves have not filed a case. Individual court cases also often prompt states to create national reparations programs that benefit all victims, not just those who are able to pursue litigation.[75] When compared to investment arbitration, for example, in which only actual complainants can receive compensation, the IACHR dramatically increases the price of legal breaches, upping the expected cost of violations.

Second, the Court actively seeks to prevent future violations. The IACHR orders specific measures "[a]s a general deterrent to future human rights abuses, and to educate authorities as to how to effectively deal with violations."[76] These orders often include: the establishment of training programs in human rights for military, police, or other state officials; the implementation of legislation that nullifies or overturns an existing practice that violates the American Convention (like amnesty laws); and the establishment of police registries to prevent the disappearance of prisoners. All of these orders give states concrete and tangible ways to prevent repetition of legal violations.

In the *Kawas Fernández* case, Honduras was ordered to undertake nine remedies. Three were measures of compensation (reimbursement of court costs; and pecuniary and damages to Kawas Fernández' next of kin) and another three were measures of satisfaction (publish the judgment, publicly accept responsibility for the violation, and erect a monument in memory of Kawas Fernández, along with signs in a national park). Honduras was also ordered to provide ongoing care to the victim's next of kin (a measure of rehabilitation) and to undertake two measures to guarantee non-repetition. The first was to conclude the criminal proceedings against the alleged murderers, and the second was to "conduct…a national awareness-raising campaign on the importance of the work of environmentalists in Honduras and their contribution to the defense

[73] Francesca Parente (2019) "Past Regret, Future Fear: Compliance with International Law," UCLA Dissertation.
[74] Jo M. Pasqualucci (2013) *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed. Cambridge University Press, p. 211.
[75] Thomas Antkowiak (2008) "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" *Columbia Journal of Transnational Law* 46(2): 351-419. p. 402.
[76] Pasqualucci, p. 212.

of human rights."[77] In this way, the IACHR sought to prevent future violations by deterring would-be murderers through punishment and by reminding them of the important work done by the would-be victims. Overall, the Inter-American system shows how legal regimes can create stronger punishments to deter legal violations.

5 Conclusion

We began by examining the 2007 cyberattacks against Estonia, and the case of *Kawas Fernández v. Honduras* at the Inter-American Court of Human Rights. Both examples involved legal violations that were committed by individuals. However, Honduras was found responsible for legal violations under the *lex specialis* of human rights at the Inter-American Court, while Russia was not found responsible under the *lex generalis* of hacking.

The development and jurisprudence of the Inter-American Court of Human Rights illustrates how states can develop rules that place less emphasis on managerial and flexibility concerns when they have a common goal that is served by enforcement. The IACHR's jurisprudence prevents states from outsourcing violations to non-state actors because even these actions can be attributed to the state if, for example, the state fails to investigate them. Moreover, the IACHR has fewer allowable circumstances precluding wrongfulness, which prevents states from excusing or justifying legal breaches, and specific remedies that increase the cost of legal violations. States in the Inter-American system were able to cooperate and establish strict rules because they were committed to preventing future human rights violations. Could such logic extend to the realm of hacking? In other words, might states develop a *lex specialis* for cyberattacks that prioritizes enforcement?[78]

If states wanted to prevent future cyberattacks, they would need to start by developing a stronger attribution rule. The general rules might incentivize states to outsource legal violations to individual hacktivists, over whom they do not have effective control. For example, Scott J. Shackelford and Richard B. Andres argued that:

> Given the secretive nature of cyber conflict, States may incite civilian groups within their own borders to commit cyber attacks and then hide behind a (however sheer) veil of plausible deniability, thus escaping accountability.[79]

To prevent this evasion of responsibility, a *lex specialis* for cyberattacks would need to recognize the potential role of states in facilitating cyberattacks. The Inter-American Court was able to establish the complicity standard because it held states accountable for omissions, like the failure to investigate crimes. If a *lex specialis* for cyberattacks could establish stricter means of holding states

[77] Inter-American Court of Human Rights, *Kawas Fernández v. Honduras,* Judgment of 3 April 2009, para. 214.
[78] For other suggested proposals on how to design a law around "cybertorts", see Rebecca Crootof (2018) "International Cybertorts: Expanding State Accountability in Cyberspace" *Cornell Law Review* 103: 565-644.
[79] Scott J. Shackelford and Richard B. Andres (2011) "State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem" *Georgetown Journal of International Law* 42: 971—1015. p. 975.

accountable – for example, by incurring responsibility for failure to prevent cyberattacks – states might be more inclined to crack down on the hackers.

On the other hand, states might not want to prevent all cyberattacks. States might want to keep weak rules on cybersecurity and state responsibility because they do not want to be part of a system that fully enforces a prohibition on cyberattacks. While NATO members do not want Russia to attack Estonia, they also want to preserve their own flexibility to commit attacks against their adversaries. For example, the US has publicly been highly critical of countries like China, North Korea, and Russia for allegedly conducting cyberattacks within the US to access business and military secrets. Yet the US is also widely believed to have conducted the first ever cyberattack, which occurred in 1982 when a Soviet pipeline in Siberia exploded based on malicious computer code that the CIA had planted in Canadian software.[80] Similarly, a computer glitch revealed to the world in 2010 the existence of Stuxnet, a sophisticated computer program that could "worm" into computer operating systems and disrupt industrial control systems. Years of investigative reporting led to revelations that Stuxnet was a joint creation of Israel and the US, which had been using the program since 2006 to hinder Iran's nuclear centrifuges.[81]

As such, temptations to commit cyberattacks may simply be too large for effective cooperation on this issue. Any apparent opposition to cyberattacks is therefore likely to be mere rhetoric, at best, and hypocrisy, at worst: states want to retain the ability to use cyberweapons, even if they would rather not have the weapons used on themselves. In the case of cybersecurity, the general law on state responsibility will apply unless and until the international community decides that preventing all attacks is more important than preserving its own ability to launch them.

[80] See "Cyberwar: War in the Fifth Domain." The Economist, 3 July 2010. Available at: https://www.economist.com/briefing/2010/07/01/war-in-the-fifth-domain.

[81] See David E. Sanger. "Obama Order Sped Up Wave of Cyberattacks Against Iran." New York Times, 1 June 2012. Available at: https://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html.