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2.1 Preliminary View

Historically, the idea of a responsibility between states may be traced back to the vague origins of rights and duties, which have always been regarded as fundamental by mankind. Among these the conviction that reparation should be made for an injury committed and this idea of responsibility, whether between persons or states, is as old as morality itself\(^1\). The Old Testament Law was “an eye for an eye and a tooth for a tooth”, and it was applied between nations as well as between individuals\(^2\). The Greeks were accustomed to the use of reprisals; at first the state permitted its citizens to seize persons or property in return for injury done them; later, as its interest increased, the state itself assumed the function, and employed reprisals against other states not merely on account of attacks upon its citizens, but because of attacks upon itself\(^3\). In addition to reprisals, whose use has continued in one form or another down to the present day, the duty of making reparation for injurious acts was occasionally recognized in a treaty, or by arbitration.

In the medieval period the state was regarded as a collectivity, with each member thereof responsible for an injury done by any other member. The sense of responsibility remained, however, without adequate expression until the time of Grotius. When Grotius took up his pen in the Seventeenth Century, he had as little here as elsewhere to build upon. While the idea of obligation between states is implicit throughout his work as indeed it must be in any discussion of international law he makes no effort to treat the subject as a whole\(^4\).

2.2 Development of State Responsibility before and after World Wars I and II

It is tempting to describe the international law of state responsibility as developing between the poles of the two great Italian lawyers Dionisio Anzilotti and Robert Ago. Anzilotti’s *Teoria generale della responsabilita dello state nel diritto internazionale* of 1902 and his article *‘La Responsabilite Internationale des Etats* of 1906 are considered to be the leading expositions, some even say the scientific

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1 Clyde Eagleton, *The Responsibility of states in International Law*, (1929), p. 16
2 Ibid p. 17
4 Supra Note 1, p. 18
establishment, of this branch of international law before the First World War. Ago’s reports to the ILC since the 1960s have perhaps been the major theoretical impulse for the reconception of the International Law of State Responsibility after the Second World War. Conceptually, Anzilotti and Ago’s positions seem to be diametrically opposed: while Anzilotti does not grade violations of international law according to their gravity, Ago differentiates between (lesser) delicts and (more serious) Crimes. While Anzilotti only admits violations of obligations between two or more particular states as giving rise to responsibility under international law, Ago also postulates obligations towards the international community of states as a whole.

These conceptual differences appear to be grounded in diametrically opposed philosophical and historical perspectives. Anzilotti embodies the little-checked power politics of the period before the First World War and Ago represents the recognition after the Second World War that there is a real international community of states, which possesses some legal mechanisms to enforce the collective will. If viewed from this perspective, the development from Anzilotti to Ago appears to be a story of progress.

2.2.1 Classical International Law before Anzilotti

Classical international law does not begin with Anzilotti. His position that the sovereign equality of states excluded the invocation by one state of the responsibility of another state for violations of the rights of a third state has slowly emerged against the Grotian Natural Law tradition according to which ‘kings have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever’. Emer de Vattel, the last of the great natural law authors, marks a turning point. He argued in 1758 that to take reprisals against a nation for the benefit of third party nationals would mean playing the role of the judge between nations and these strangers and that no sovereign had the right to do so. In the course of the nineteenth century,

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6 European Journal of International Law, 2002, p.1
7 ILC Yearbook, (1976), Vol II, Part one, p. 39
8 Grotius, De jure Belli ac pacis, Book II, Chapter 20, p. 40
9 Supra Note 6, p. 2
Vattel’s bilateral conception was adopted by a majority of authors until it received its formal refinement in the writing of Anzilotti.

The bilateral conception, however, was never unchallenged. A few years before Vattel and Bynkershock had already expressed doubts as to whether the Dutch claim in the order of Malta case was justified. If reprisals are permitted on behalf of subjects, he argued in 1744, there seemed to be no reason why they should be denied for the benefit of foreigners, for in legal theory it makes no difference whether one is a Troian or a Tyrian’. This statement contains the germ of a non-bilateral conception of state responsibility. In the nineteenth century, such a conception was more fully developed by several influential writers. Heffter and, following him, Bluntschli each postulated a list of particularly serious violations of international law which would affect all nations and whose occurrence would give all nations the right to take measures to redress the wrong and even to punish the wrongdoer\textsuperscript{10}.

At the end of the Nineteenth Century, Hall restated Bluntschli’s position in abstract term: ‘when a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrongdoing for being accomplished, or to punish the wrongdoer\textsuperscript{11}. The justification Hall gives for this statement is neither an invocation of practice nor of higher law but a structural policy consideration: ‘International Law being unprovided with the support of an organized authority, the work of police must be done by such members of the community of nations as are able to perform it. It is, however, for them to choose whether they will perform it or not’\textsuperscript{12}.

It is against the background of such statements by some of the most influential writers of the Nineteenth Century that the dominant contrary opinion must be seen. Most writers of that century contented themselves with saying that states must redress the injury caused by their violation of a right of another state. Since there is no criminal responsibility of states, say these writers, responsibility can be invoked only by the state whose specific rights have been infringed\textsuperscript{13}. The Sovereignty of states took precedence over international law and that this sovereignty would exclude any form of legal responsibility against the will of the state.

\begin{footnotes}
\item[10] Ibid p. 3
\item[12] Ibid p. 58
\end{footnotes}
2.2.2 Anzilotti’s Theory and its Significance

It was in this situation that Anzilotti developed his general theory of state responsibility. His theory mainly consists of a reduction and an abstraction. For our purposes, the most important reduction consists in the exclusion of sanctions and of mere interests from the field of state responsibility. According to Anzilotti, the violation of a rule of international law gives rise to a claim of reparation as the primary content of state responsibility, which is sharply distinguished from right to take reprisals or from permissible grounds of intervention\(^\text{14}\). In addition, only the violation by a state of a true subjective right of another state can give rise to state responsibility and not the mere violation of general or more specific interests. And, finally, only acts by states can give rise to responsibility under international law, not acts by individuals\(^\text{15}\).

This conceptual framework has several important implications:

1. Anzilotti introduced clear conceptual distinctions, which had analogies in various domestic legal systems. He thereby enhanced the status of international law, in the eyes of his contemporaries as a true (positive) law. In particular, he liberated the law of state responsibility from the question of enforcement.

2. Anzilotti connected the law of state responsibility plausibly with what was generally seen as the ultimate source of international obligation, the sovereignty of the state. If states are only bound to what they have (explicitly or implicitly) consented to, it seems logical that they should only respond in so far as they have accorded specific rights to other states.

3. By insisting on a strict concept of subjective right as against mere interests, Anzilotti disconnected seemingly insoluble general political issues and controversies from the realms of hard law.

4. Excluding the human person from the international law of state responsibility also served Anzilotti to depoliticize this branch of the law and to reduce it to a set of clearly distinguishable bilateral legal relationship.

Anzilotti’s reconception of the law of state responsibility should not be interpreted negatively. It is not the product of a man who was blinded by sovereignty

\(^{14}\text{D. Anzilotti, Cours de droit international, Vol. 1, p. 13}\)
\(^{15}\text{Ibid p.14}\)
and who had completely lost sight of international community interests and gradations of injury. Ago himself draws attention to the fact that Anzilotti accepted the individual or collective imposition of international community interests by way of intervention. In addition, Anzilotti’s exposition of the law of state responsibility is full of references to the ‘international community’ and to the legitimately rising demands of the individual person. And it should finally not be forgotten that Anzilotti work at a time when the use of force between states was not yet prohibited and in which community interests could lawfully be pursued by powerful states without having to invoke a specific right.

Perhaps internationally, Anzilotti’s conceptual reduction of the law of state responsibility has contributed to its factual limitation to the issue of injuries to aliens. It is Anzilotti’s enduring achievement to have provided a theoretical framework for the law of state responsibility, which reconciled the contemporaneous emphasis on sovereignty and the need to establish a clear system for this area of the law.

2.2.3 Developments between the First and Second World Wars

The First World War rocked the newly found self-confidence of international law, not least in the area of state responsibility. In 1916; Elihi Root, speaking the president of the American Society of International Law, remarked while referring, inter alia, to the violation of Belgian neutrality by Germany: ‘up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it’. And he demanded: ‘International Law violated with impunity must soon cease to exist and every state has a direct interest in preventing those violations which if permitted to continue would destroy the law’. He also demanded that ‘there must be a change in theory, and violation of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation’.

16 Supra Note 7, p. 42
17 Supra Note 14, p. 16
18 Ibid p. 17
19 E.Borchard, The Diplomatic Protection of Citizens – Abroad, (1916), p. 177
Historical Overview of State Responsibility

It is perhaps unsurprising that it was a German author who defended Anzilotti’s approach. In his monograph of 1920, Karl Strupp conceded that it was theoretically possible to conceive the violation of any treaty as a violation of the basic norm of *pacta sunt servanda*, which in turn would imply ‘a violation of all members of the community of states’\(^{21}\). He even estimated that such a conception of international law could be desirable ‘from the point of view of world justice, international solidarity and international morals’.

During the First World War, he reminded his readers, domestic and international pressure to make the United States or Switzerland protest or intervene against Germany’s violations of the laws of war and neutrality had not been successful. Therefore, Strupp reasoned, positive international law still provided only the immediately injured state with a right to invoke the responsibility of the injuring state.

Strupp’s reluctance to reconceive the general law of state responsibility was shared by almost all other authors who wrote in the decade after the First World War\(^ {22}\). The reason for this was not, however, that the notions of ‘crime of state’ or ‘responsibility towards all states’ were quickly forgotten. On the contrary the years after the First World War saw many initiatives and to define particularly serious violations of international law, which would give rise to special sanctions and responsibility. These initiatives, however, all have in common that they were treaty-based or treaty-oriented: The most important example is, of course, the Versailles Treaty with its Annex, the Treaty Establishing the League of Nations. While the Versailles Treaty postulated that Germany had committed a crime by starting and conducting the war and that German leaders should be tried for crimes against the Law of Nations, the League of Nations was the first international institution which provide for collective sanctions in case a resorts to war against its stipulations. The Geneva Protocols of 1924 on the Pacific Settlement of International Disputes, which never entered into force, declared the resort to war to be a ‘crime’ against which all nations were called to act\(^ {23}\). In addition to the development of the concept of ‘crime of state’, initiatives were undertaken to establish the international criminal responsibility of individuals.

\(^{21}\) Supra Note 6, p. 5
\(^{23}\) League of Nations, Records of the Fifth Assembly (1924), plenary Meetings, 498: AJIL (1924), p. 9
2.2.4 New Theories and Codification

Bluntschli, Hall and others use theories for reinterpreting the law of state responsibility in the light of new developments. The reason is probably more than simple inertia or a continued belief in sovereignty in the strong sense. Indeed, the 1920s saw a number of new general theories which emphasized the ‘objective’ or ‘community’ character of international law and which reduced the central focus on sovereignty. It is perhaps sufficient only to mention the names of Kelsen and Verdross. It is more plausible to assume that practically all international lawyers at the time felt that such a paradigm change would require the positive creation of new international law and that a mere reinterpretation would not suffice. The 1920s were, after all, the time in which the movement to codify international law reached a new height. The ambiguity, which progressive international lawyers must have felt was expressed by Clyde Eagleton in his 1928 Monograph on the Responsibility of States in International Law. On the one hand, Eagleton cites Hall for the proposition that ‘there can be no doubt that joint action for the support of international rights and for the enforcement of international duties is quite legal, even on the part of states not themselves directly injured’: on the other hand he requires that the ‘mode of collective interference, should be undertaken ‘through an established agency…if proper impartiality is to be secured’. In addition, practically all international lawyers and states during the interwar period felt that the classical object of the law of state responsibility the issue of injuries to aliens, was of a qualitatively different kind than the issue of the paradigmatic international crime, aggressive war. This is confirmed by the fact that the effort to codify the law of state responsibility at the 1930 Hague Conference practically only dealt with injuries to aliens and did not reach the issue of different grades of violations of international law and responsibility beyond the immediately injured state.

2.2.5 The Debate on State Responsibility in the 1930s

It was in the early 1930s, when the hope for successful institution-building and codification had dimmed, that the still dominant opinion was challenged by some authors who asked the question whether positive international law already permitted

24 Supra Note 6, p. 6
qualitative distinctions to be made between different kinds of violations of international law and to enlarge the concept of the injured state beyond that of the immediately injured state.

The most important of these authors was certainly Hersch Lauterpacht. In his 1927 book, Private Law Sources and Analogies in International Law, Lauterpacht had already made a strong attack on what he perceived to be the continental legal positivism with its personification of the state and its rigid formalism. In his 1937 Hague lectures, he took issue with a central premise of the dominant theory, according to which states, because they are sovereign, cannot be punished. Therefore, reparation for individual wrongs is the sole consequence of violations of international law. Lauterpacht challenged this position from the point of view of logic, justice and practice: it would be logical, he argued, to deny any form of responsibility of states on the basis that they are sovereign, but it was completely arbitrary to say that a community (organized in the form of a state), because it has chosen the attributes of sovereignty and dignity, is protected from certain consequences of its violations of the law. It is repugnant to justice, he argued, to abolish criminal law and an important part of tort law by limiting the responsibility to make reparation. This permitted individuals who are organized in the form of a state to acquire a degree of immunity with respect to criminal acts, which they do not possess when acting as individuals. And, finally, in practice, he argued, treaties and arbitral decisions had already established the concept of state crime and punishment of the state. The Treaty of the League of Nations and the Kellogg Pact, according to Lauterpacht, clearly established that states are subject to punishment, and certain arbitral decisions whose terms of reference had not been restrictive had recognized and awarded punitive damages.

It is precisely at this point, however, that Lauterpacht’s position transcends the traditional point of view. By invoking the criteria of ‘domestic analogy’, ‘justice’, and ‘innovative practice’, Lauterpacht relegates the will of the state to a lesser place in international law. He thereby opens the door for a creative development of international law, including by means of interpretation. From a positivist point of view this may appear as a return to natural law thinking. Indeed, in his monograph of 1927

28 Ibid p. 52
29 Ibid p. 58
Lauterpacht had already conceded that he saw himself as part of a movement towards a renaissance of natural law. He added, however: ‘Needless to say, it is not the old law of nature; it is rather the modern “natural law with changing contents”, “the sense of right”, “the social solidarity” or the “engineering” law in terms of promoting the ends of the international society. His specific importance seems to lie in the fact that he challenged the prevailing continental European thinking both about international law in general and about the law of state responsibility in particular.\(^{30}\)

**Roberto Ago**

Lauterpacht’s resubstantiation of our aspect of the law of state responsibility did not receive a full response before the Second World War. Lauterpacht did, however, receive an interesting partial response. In 1939, Roberto Ago himself gave his first Hague Lecture on ‘Le delit International’. In this lecture Ago addressed the question of whether international delicts could be classified ‘according to the legal value which is attributed to the tort by the law, or better, according to the quality which the effect that is produced by this attribution of the legal value can take’.

Proceeding from this formulation of the question, Ago developed a theory which could enable classical positivists to accept the concepts of crimes and sanctions in the law of state responsibility: in a first step, Ago criticizes Anzilotti for assuming that the concept of crime would violate the nature of international law because this concept would presuppose an organized community which was non-existent in international law. For Ago, the characteristic legal feature of a crime was not the infliction of a punishment by an organized community, but only the repressive character of a measure. Legal history after all, showed that the application of criminal sanctions by private individuals could often be found at the early stages of legal development.\(^{31}\) In a Second step, Ago criticizes Kelsen for the radically opposite view according to which the normal consequence of an international delict is a sanction with this approach Kelsen had tried to turn Angilotti’s theory, according to which the only consequence of a violation of international law is a duty to make reparation, on its head.\(^{32}\) According to Ago, Kelson’s view does not conform to the practice of states and rests only abstract preconceptions. His result was meager; perhaps, he said, the

\(^{30}\) Ibid p. 59  
\(^{31}\) Supra Note 6, p. 8  
\(^{32}\) Ibid p. 9
consequences of certain war crimes can only be sanctions, and perhaps a certain category of delicts of lesser importance exist which can not be reacted to by way of reprisals.

It is possible to interpret Ago’s 1939 Hague lectures to be of only minor importance. Indeed, in his 1976 report to the ILC, Ago himself modestly noted that in 1939 he had been thinking mainly of the impossibility of making the right to sanctions contingent upon a prior attempt to obtain reparation in cases where it is materially unthinkable in the case of war, for example, that the state committing the breach would agree to make reparation. And he hardly addresses the substantive ‘issue of war-prevention and human rights which had driven Lauterpacht to reconceive the rules of state responsibility. If it was interpreted more restrictively and state oriented, as Ago would have preferred, general international law needed more and different practice to transcend the traditional bilateral model of state responsibility.

### 2.2.6 Developments after the Second World War

One should have expected that the Second World War provided a major impulse for the development of the law of state responsibility form the classical bilateral and unidimensional model to a more ‘progressive’ multilateral and multidimensional model in which different degrees of wrong would lead to different regimes of responsibility. After all, the experience of the aggression by Nazi Germany and its genocide and other systematic human rights violations of unprecedented dimensions provided the best possible illustration for the need to move towards more effective and collective mechanisms for certain particularly serious violations of international law.

In his 1976 report to the ILC, Ago wrote that ‘during the period following the Second World War, the interest of scientific circles in the problem under discussion great in both intensity and scope’. This statement, however, is misleading. It is true that the United Nations Charter provided for a new and comprehensive system of sanctions against aggression; and it is true that individuals were punished in Nuremberg for international crimes; and it is true that serious attempts were made to codify particularly grave violations of international law and to establish international criminal responsibility. These developments, however, did not immediately affect the thinking

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33 ILC Yearbook, (1976), Vol.II Part one, p. 43
34 Ibid p. 45
of the great majority of authors on the law of state responsibility. Indeed, Lauterpacht included new sections 156 a and 156 b in his 1947 (Sixth) edition of Oppenheim’s International Law in which he asserted that states and individuals may be subjected by international law to penal damages and criminal responsibility. As we have seen, however, Lauterpacht in essence had already adopted this position in his Hague Lectures of 1937. It is also true that in 1946 Levin formulated what was to become the official Soviet position, that is, the need to distinguish between international delicts and international crimes. Apart from these two authors, however, Ago could point to hardly any others who until the early 1960s, asserted that the general rules of state responsibility had evolved away from the classical bilateral and unidimensional model. Indeed, Ago acknowledges this by saying, perhaps ironically that ‘the legal literature of the 1950s shows a special interest in what we might call the classical aspects of the theory of state responsibility’.

In fact, the authors of the 1950s were not unaware of the possibilities of developing international law. There are, of course, those, like Accioly, who continued to expound the law of state responsibility without any reference to possible multilateral or multidimensional forms of responsibility. Others, like Philip Jessup, acknowledge ‘that the traditional legal foundations of unilateralism remain largely unshaken’ and advocate the introduction of criminal law type regimes in international law. Georg Schwarzenberger advocated a pragmatic approach with respect to the question of which state had a legal interest to invoke responsibility or to enforce international law but, characteristically, he only mentions the violation of the freedom of the high seas as an example where the ‘maritime powers take a wide view of their own legal interest in any such breach’. Paul Guggenheim and Bin Cheng, finally, both criticize Lauterpacht and expose the reasons why most authors of the 1950s did not follow either Lauterpacht or Levin; Paul Guggenheim requires a centralized, and thus an explicitly agreed upon, mechanism in order to integrate third states into the enforcement of international law. Guggenheim and Bin Cheng have in common that they, implicitly or explicitly, reject an approach to international law, which gives more room to a Lauterpacht type creative

35 In the fifth edition of 1937, Lauterpacht had continued to use Oppenheim’s classical bilateral conception.
36 Supra Note 33, p. 46
interpretation. Like the great majority of authors at the time, they preferred to wait until
the political process had led to sufficient legal sources or practice in order to draw
conclusion\(^{40}\).

2.2.7 The Garcia Amador Proposal to the ILC

It should not be forgotten, however, that the 1950s saw the first, and failed,
attempt by the ILC to codify the Law of state responsibility. In his report, special
Rapporteur Garcia Amador addressed the issue of whether international law knew only
the traditional ‘civil’ responsibility of states; which could lead merely to reparation or
whether it by then also encompassed forms of ‘criminal’ responsibility. Garcia Amador
indeed alleged that ‘the present state of international law does not allow doubts
whatsoever, and idea of international criminal responsibility has become so well
identified and so widely acknowledged that it must be admitted as one of the
consequences of the breach or non-observance of certain international obligations’\(^{41}\).
He derives this conclusion, however, mainly from two questionable arguments. First, he
takes sides in the classical dispute over whether the duty to make reparation can also
encompass punitive functions. This issue had been inconclusively debated with
reference to a number of arbitral awards which were rendered between the second half
of the Nineteenth Century and the Second World War, the majority of authors having
rejected the notion that a punitive function played a significant role. Secondly he refers
to the Nuremberg crimes\(^{42}\). These international crimes, however, concern the punish
ability of individual and do not necessarily suggest a change in the general rules of
responsibility between states. Ultimately Garcia-Amador refrained from taking a clear
position on the ‘really crucial question’, that is, whether punitive damages can be
imposed on the state as such, and he limited himself to including the international
criminal responsibility of individuals in his proposed framework. Despite his
circumspection, the Commission did not accept Garcia-Amador’s approach of
including ‘criminal aspects in the codification effort\(^{43}\). Thereafter, he limited his
subsequent draft to the question of state responsibility for injuries to aliens.

\(^{40}\) I.Brownlie, *International Law and the use of Force by States*, (1963), p. 150
\(^{41}\) ILC Year book, (1956), Vol II, p. 183
\(^{42}\) Ibid p. 208
\(^{43}\) ILC Year book, (1957), Vol II, p. 105
2.2.8 The New Approach after Decolonization

The rest of the story is better known. It is told in more detail by Marina Spinedi. In the early 1960s, the ILC decided to embark on a new attempt to codify the law of state responsibility. The mandate for the new Special Rapporteur, Roberto Ago, was the result of a compromise between the traditional western approach of viewing the law of state responsibility as primarily one of responsibility for injuries to aliens, and the demanded by representatives from the socialist and some third world states to codify the rules of responsibility for the violation of the most important rules of international law in particular those relating to peace and security\textsuperscript{44}. The compromise, as it was proposed by Ago himself, consisted in a mandate to codify the general rules, that is, the Secondary rules of state responsibility. This compromise enabled a distinction to be drawn between more or less serious violations and to codify important aspects of the law of responsibility for injuries to aliens without giving this field a predominant place. However, it took until the early 1970s for the ILC actually to start work on the project. By that time, the concept of \textit{jus cogens} had been recognized by Articles 53 and 64 of the Vienna Conventions on the law of Treaties, and the International Court of Justice had decided the \textit{South West Africa and the Barcelona Traction Cases}\textsuperscript{45}. Today, when the international community has become some what less antagonistic than during the time of the cold war, it appears more legitimate again for international lawyers to wait for states to agree on how differentiated the regime of state responsibility should be. In this perspective, the latest developments in the law of state responsibility, the Draft Articles that have been adopted by the ILC on the basis of James Crawford’s reports\textsuperscript{46} appear to fit into a long-term perspective.

The law of state responsibility has evolved over the centuries as a principal area of concern within public international law\textsuperscript{47} and has become subject to authoritative codification. Under U.N. General Assembly mandate, the ILC produced Draft Articles on State Responsibility. The General Assembly adopted part I of the Draft Articles

\begin{itemize}
  \item \textsuperscript{45} \textit{Barcelona Traction, Judgment, ICJ Reports}, (1970), P, 3; \textit{South West Africa Case, Judgment, ICJ Report}, (1966), p. 4
  \item \textsuperscript{47} \textit{Harward Human Rights Journal}, (1994), p. 7
\end{itemize}
(Articles 1-35) between 1973 and 1980. According to Draft Articles 3: There is an international wrongful act of a state when:

a) Conduct consisting of an action or omission is attributable to the state under international law; and

b) That conduct constitutes a breach of an international obligation of the state⁴⁸.

A set of Draft Articles was finally adopted by the ILC’s members in 1996. States were asked to provide responses by the beginning of 1998. Some did, which thus required more drafting⁴⁹. The ILC’s codification project of the law on state responsibility lasted for decades and went through several iterations, finally culminating in the 2001 Drafting Articles on Responsibility of States for Internationally Wrongful Acts⁵⁰.

Against these historical backgrounds, we must analyze and appraise the transformation of the law of state responsibility through the work of codification by the United Nations Organs⁵¹. The Structure of international community has undergone a profound change since the Second World War, and as the result, the foundation, which once supported the traditional law of state responsibility, has definitely and eternally lost⁵². On the other hand, there have emerged many new principles and rule of international law to be covered by the law of responsibility. Thus, it has been also a historical necessity for the law in this field to be purified into the “Secondary” rules divorced from the “Primary” rules. It must be noted that resolutions and decisions to this effect have been unanimously adopted without exception in the ILC as well as in the General Assembly.

The final outcome of the codification of the law of state responsibility by the ILC remains unknown yet. But, one thing seems certain at least, that the law of state responsibility cannot be the same now as the traditional one. And the work of the commission in this field will exert a great influence, visible as well as invisible, on the future law of state responsibility.

2.3 State Responsibility under International Law

In the International law, state responsibility can attach in several ways. They are

a) Original responsibility.

b) Responsibility by endorsement, and

c) Vicarious responsibility.

(a) Original Responsibility

Oppenheim defines original responsibility as the responsibility “borne by a state for acts which are directly imputable to it, such as acts of its government, or those of its officials or private individuals performed at the governments command or with its authorization”\textsuperscript{53}. Under customary international law, as embodied in the Articles on State Responsibility, the conduct of any state organ is imputed to the state\textsuperscript{54}. Imputability also applies to any person or entity empowered by the law of the State to exercise elements of governmental authority\textsuperscript{55}.

The definition of original responsibility stated above also covers acts of persons or organizations who are not organs or employees of the state, but who are acting as its agents. The variety of original responsibility is restated in Article 8 of the Article on State Responsibility, which reads “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”\textsuperscript{56}. Thus, the acts of private persons sent by a state are imputed to the state and original responsibility attaches.

In Nicaragua V United States\textsuperscript{57}, (merits) case, the International Court of Justice (the “ICJ”) addressed the responsibility of the U.S. for, among other things, attaches against various targets in Nicaragua committed by individuals paid by and acting under instructions of the United States. The Court therefore decided infavour of Nicaragua, concluding that the U.S. “acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another state”.

\textsuperscript{53} Sir Robert Jennings & Sir Arthur Watts, Oppenheim’s International Law, (9th Ed, 1992), p. 119
\textsuperscript{54} State Responsibility: Titles and Text of the Draft Articles on Responsibility of States for International Wrongful Acts adopted by the Drafting Committee on Second Reading.
\textsuperscript{55} Ibid Art, 5
\textsuperscript{56} Ibid Art, 8
\textsuperscript{57} I.C.J. (1986), p. 195
Using this line of reasoning, terrorist individuals and organizations who are not state organs, but who are supported and directed by a state, become agents of the state. Therefore, the state is responsible for terrorist attacks committed by those entities under its planning, direction and support, and will be responsible to other states injured as a result, just as if it were state organs that carried out the attacks. The Nicaragua Court envisioned the kind of “support” to which responsibility would attach as “the provision of weapons or logistical or other support” i.e. supports in kind.

The theory of original responsibility has limitations. It cannot be used to hold a state responsible for a terrorist attack committed by persons or organizations that the state does not control, even if that state’s breach of its international obligations made the terrorist attack possible.

(b) Responsibility by Endorsement

International law also recognizes that acts of private persons may be imputed to a state by endorsement. Although acts of private persons, who are not agents of the state, do not translate into acts of state, a state has the duty to exercise due diligence to prevent wrongdoing and to punish those who commit wrongful acts on its territory, that injure other states. When a state, in fact, does the opposite-acquiescing or even permitting acts by private persons and then expresses official approval of those acts, the state is considered to have endorsed them. A poignant example of the acts of private persons imputed to a state by endorsement is the ICJ case of the American hostages in Iran from 1979 to 1980, known as the Teheran Hostages Case.

In Teheran Hostages, the U.S. brought suit against Iran for the attack, takeover, and ransacking of its embassy and consulates in Iran in November 1979, and for the capture and continued detention of over 50 American diplomatic and consular personnel as hostages. Although the attack itself was carried out by a student group that called itself the “Muslim Student Followers of the Imam’s Policy”, which had no official status within the Iranian Government, the Court took note of several facts implicating the Iranian government in the attack. First, all Iranian Security Personnel routinely posted around the embassy “simply disappeared from the scene”. Second,
“the attack continued over a period of three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion”. Third, the Iranian government made concerted efforts to stop similar attacks on embassies, both before and after the attack on the U.S. embassy.\(^{61}\)

Although Iran had clearly failed to discharge its duty to protect foreign diplomatic missions from the attack, the Court was unable to impute the attack itself to the Iranian State. Such a finding would have required that the attackers act as agents or organs of the Iranian government, but no evidence indicated that to be the case. Even the rhetoric of the Iranian head of state, Ayatollah Khomeini, calling generally for students to attack the U.S. and Israel, could not be considered to impute the embassy attacks to the state. However, on the day after the attack, both the Iranian Foreign Minister and the Ayatollah himself publicly endorsed it. The Ayatollah went further, declaring “the Premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran”. The Court therefore concluded “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.\(^{62}\)” The result of officially adopting the actions of private persons was to convert all their actions from that point forward into acts of state.

(c) **Vicarious Responsibility**

In contrast to responsibility by endorsement, vicarious responsibility is the mechanism by which a state may be held responsible for acts not committed by state organs and not endorsed or adopted by it. The difference between original responsibility and vicarious responsibility is that in the former, responsibility flows from the injurious act, and in the latter, responsibility flows from the failure to take measures to prevent or punish the act\(^ {63}\).

Vicarious responsibility has two species. Its traditional meaning denotes responsibility for act injurious to other states committed by its own officials without

\( ^{61} \) Supra Note 58, p. 4
\( ^{62} \) Ibid p.5
\( ^{63} \) Opeenheim, *International Law*, (7th Ed), p. 501
Vicarious responsibility has a broader meaning, however, it attaches to a state that knowingly acquiesces to the injurious acts of private persons within its control. A state has an obligation to prevent and punish such injurious acts, and when the actions of a state do not conform to its international obligation, that obligation is deemed breached. A breach of an international obligation is an internationally wrongful act and a state is responsible to other states for the injury inflicted as a result of that wrongful act. For vicarious responsibility to attach, the state must know the injurious act will occur or has occurred, and take no action to prevent it, to cause the private persons to make reparations for it, or punish those private persons for the act. An example of the application of these principles in customary international law is the ICJ decision in the Corfu Channel case.

The Corfu Channel case stemmed from a 1946 incident in which two British Warships traveling through the Corfu Strait struck mines in Albanian territorial waters. The Corfu Strait is an international highway and as such, vessels of other states may exercise the right of innocent passage to transit through it, despite the fact that it lies in the territorial waters of Albania the Court refused to find Albania directly responsible for the mining, because Great Britain could not prove that Albanian Vessels had laid the mines or that Albania had engaged another state (allegedly Yugoslavia) to do so. It could not impute knowledge to the Albanian government of the mines merely through their existence in Albanian territorial waters.

However, the Court found through indirect evidence that Albania must have known of the existence of the mines, independent of any connivance with another party in their laying. Albania was known to have jealously guarded its side of the Corfu Strait. It had previously demanded that British ships not pass through the Channel without its consent, and five months before the incident Albanian forces even fired on two British cruisers passing through the strait. During the trial it was shown that the minefield must have been laid at a time when that area was under close watch by

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64 Ibid p. 502  
65 Supra Note 58, p. 5  
66 Article 31 reads, “The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act”, Ibid Art.31  
67 The Corfu Channel (merits), 1949, I.C.J. 4 (April 9)  
68 Ibid p. 17  
69 Ibid p. 18
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Albanian authorities\textsuperscript{70}. The Court also noted that when the Albanian government protested the presence of British ships three weeks later, it did not even mention the mines, “which, if effected without Albania’s consent, constituted a very serious violation of her sovereignty”. Further more, Albania’s conduct proved to be in stark contrast to the conduct of neighboring Greece, which immediately launched an investigation\textsuperscript{71}. The Court therefore concluded that “the laying of the minefield which caused the explosions could not have been accomplished without the knowledge of the Albanian government”\textsuperscript{72}.

Albania’s conduct was characteristic of a State that knew of the existence of the mines field, desired its continued existence, and desired its secrecy. Albania made no effort to issue a general warning to mariners or to notify nearly vessels of the danger, as it had a duty to do. Therefore, the Court found Albania responsible for the damages caused by the mines.

State responsibility means that a state must bear the consequences for breaching its international obligations. In Tort Law, a person found jointly and severally liable for a breach of duty is responsible for restitution to the injured party, regardless of whose breach actually resulted in the injury. Similarly, in international law, when a state is responsible to another state for an injury, whether originally, vicariously, or by endorsement, that state is deemed to have committed the injurious act, without regard to the identity of the persons who actually carried it out, if the injury amounts to use of force, that use of force is considered to have been committed by the responsible state.

2.4 Critiques of the Traditional Law of State Responsibility.

The demand for change of international law a whole has been, as cited above, so to speak a general background for the transformation of the law of state responsibility. In contrast to this, critiques of the traditional law of state responsibility have been one of the most important and direct factors leading to the transformation of this branch of law. In terms of the present codification of the law of state responsibility, these critiques had made their first appearance during the debate at the ILC in 1957\textsuperscript{73}. Among them, the following one by Padilla Nervo had been most famous and often cited:

\textsuperscript{70} Ibid p.19
\textsuperscript{71} Ibid p. 20
\textsuperscript{72} Ibid p. 22
\textsuperscript{73} Supra Note 51, p. 58
“As for as Latin American was concerned, the history of the institution of state responsibility was the history of the obstacles placed in the way of new Latin American countries-obstacles to the defense of their recent independence, to the ownership and development of their resources, and to their social integration…

…With state responsibility international rules were established, not merely without reference to small states but against them, and were based almost entirely on the unequal relations between great powers and small states. Probably ninety five percent of the international disputes involving state responsibility over the last century had been between a great industrial power and a small newly established state. Such inequality of strength was reflected in an inequality of right the vital principle of international law, *par in parem non-habet imperium* being completely disregarded” 74.

This critique by Nervo of the traditional law of state responsibility has echoed by many members of the Commission. It is true that some members from developed countries have tried to refute this proposition. For example, Briggs, argued, “It was a complete misnomer to call the law of state responsibility, which dealt with the treatment of aliens a colonial or imperial Law”, citing many cases in this field resolved peacefully. To this Tunkin disagreed and said, “Whereas it was true that in a number of cases disputes concerning the responsibility of the states had been settled by peaceful means, in hundreds of other cases armed intervention had been resorted to allegedly for the purpose of protecting aliens.” 75 Based on these discussions Pal, then Chairman of the Commission stated at the Sixth Committee of the Assembly in 1962:

“The existing written rules and what was termed ‘generally established practice’ possessed no absolute value. They were the outcome of circumstances and must change as circumstances changed….sometimes the so-called ‘generally accepted’ norms might merely reflect a situation of relative power or weakness that no longer existed and to perpetuate them would be to deny the existence of a new balance” 76

Thus, it seems that critiques to the traditional law of responsibility have almost become an established doctrine in the ILC. And these critiques have been repeated all the more strongly in the assembly’s Sixth Committee.

74  YBILC, 1957-I. p.155
75  YBILC, 1962-I, p. 9
76  Supra Note 51, p. 59
For example, Endre Ustor (Hungary) recalling the words of Nervo, expressed his belief that “in view of the development of a socialist economic system coexisting with the capitalist system and the attainment of independence by many former colonial territories, the concept of state responsibility, in so far as concerned the protection of aliens, had become entirely obsolete”.

Also, Castaneda characterized the traditional international law as a “ruler’s law” in Roling’s words and stated, “the important principle governing the responsibility of states, under which an alien could legally claim rights superior to those of a country’s nationals, was in practice, if not in theory nothing more than as offshoot of that “ruler’s law”.”

2.5 Invoking State Responsibility in the Twenty-First Century

At the beginning of the twenty-first century, the international community is globalizing, integrating, and fragmenting, all at the time. States continue to be central, but many other actors have also become important: international organizations, non-governmental organizations, corporations, ad hoc transnational groups both legitimate and illicit, and individuals. For the year 2000, the yearbook of international organizations reports that there were 922 international intergovernmental organizations and 9988 international non-governmental organizations. If organizations associated with multilateral treaty agreements, bilateral government organizations, other international bodies (including religious and secular institutions), and internationally oriented national organizations are included, the number of organizations reaches nearly thirty thousand. Another twenty four thousand are listed as inactive or unconfirmed. Corporations that produce globally are similarly numerous. As of September 27, 2002, an estimated 6,252,829,827 individuals lived on our planet.

Some of these individuals and groups have made claims against states for breaching their obligations, particularly for human rights violations. In short, international law

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77 Ibid p. 60
79 2001/2002 Y.B.INT’L ORGS, p.15
80 Ibid, The year book’s data base codes international bodies according to fifteen types of organizations and then groups them into five clusters: international organizations; dependent bodies; organizational substitutes; national bodies; and dead, inactive and unconfirmed bodies.
inhabits a much more complicated world than the one that existed fifty or even thirty years’ ago.

The Peace of Westphalia more than 350 years ago led to the establishment of the classic system of international law, which centered exclusively on sovereign states that had defined territories and were theoretically equal. States made international law and were accountable to each other in meeting international legal obligations. The articles on state responsibility of the ILC\textsuperscript{82} largely reflect this traditional view of the international legal system. They focus on states and the rules they use to hold each other accountable for the substantive obligations to which they have committed themselves.

But the initial ILC report in January 1956 observed that it was important to do more than codify the law; it was “necessary to change and adopt traditional law so that it will reflect the profound transformation which has occurred in international law to bring the ‘principles governing state responsibility’ into line with international law at its present stage development”\textsuperscript{83} Almost fifty years since the United Nations General Assembly adopted the resolution that authorized the commissions work on state responsibility, the international legal system has evolved significantly to reflect the changing nature of international society and the growing role of non state actors. While the Commission’s almost exclusive concern with states may have been appropriate at the bringing of its work, it does not reflect the international system of the twenty-first century. The detail study of ILC articles on invoking state responsibility will be discussed in the Sixth Chapter.

2.6 Trend Analysis

One of the primary contributions of the codification effort of the ILC is to develop a methodology of State Responsibility and its separation of the primary rules of substantive international law from the secondary rules of state responsibility, and focus on the later\textsuperscript{84}. The Pre-World War II rules of state responsibility were intimately


\textsuperscript{84} \textit{European Journal of International Law}, (2006), p. 3
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connected to issues surrounding diplomatic protection, state treatment of foreign nationals and the development of foreign nationals and the development of the ‘international minimum standard’, generally detested in the developing world\(^85\). The ILC’s Codification project of the law on State responsibility lasted for decades and went through several iterations, finally culminating in the 2001 Draft Articles on Responsibility of State for Internationally Wrongful Acts.

The ILC laid down the basic principles of state responsibility in a very “straight forward” manner. “Every international wrongful act of a state entails the international responsibility of that state” and there is such a wrongful act when (a) conduct is attributable to the state under international law, and (b) that conduct constitutes a breach of an international obligation of that state\(^86\).

2.6.1 The Current Regulation of State Responsibility

The present regulation of this difficult area of international law has gradually grown over the years. It has been greatly influenced by the works of the UN ILC. The reports prepared by a number of successive outstanding Special Rapporteurs. (F.V.Garcia Amador, R.Ago, W.Riphagen, G.Arangio-Ruiz, J.Crawford), the debates in the Commission, and the reaction of states expressed both individually and in discussion in the UN General Assembly, have gradually led to the laying down of general rules that to a large extent reflect existing law, while in some respects progressively developing that law. These rules are expected to become the subject of a sort of ‘restatement of law’, possibly to be enshrined in a General Assembly Declaration rather than becoming a codification convention to be adopted by a Diplomatic Conference\(^87\).

The salient traits of the new law may be as follows,

First, the law of state responsibility has been unfastened from the set of substantive rules on the treatment of foreigners, with which it had been previously bound up. Chiefly R.Ago must be credited for this major clarification of the matter. It is now generally acknowledged that a distinction can be made between ‘primary rules’ of international law, that is, those customary or treaty rules laying down substantive obligations for states on state immunities, treatment of foreigners, diplomatic and

\(^{87}\) Antonio Cassese, International Law, (2001), p. 185
consular immunities, respect for the territorial sovereignty of other states, etc and ‘secondary rules,’ that is, rules establishing (i) the conditions on which a breach of a ‘primary rule’ may be held to have occurred and (ii) the legal consequences of this breach. The latter body of international rules encompasses a separate and relatively autonomous body of international law, the law of state responsibility.

Second, current rules on state responsibility have clarified and given precision to a number of previously controversial rules; for instance the question of whether fault is necessary, the nature of the damage required for a state to be considered ‘injured’ by the wrongful act of another state, the circumstances precluding wrongfulness, etc.

Third, agreement has now crystallized on the need to distinguish between two forms or categories of state accountability; responsibility for ‘ordinary’ breaches of international law and a class of ‘aggravated responsibility’ for violations of some fundamental general rules that enshrine essential values the first class embraces responsibility for breaches of bilateral or multilateral treaties or general rules laying down ‘synallagmatic’ obligations, that is rules protecting reciprocal interests of states. The consequence of any breach of any such rule creates a ‘bilateral relation between the delinquent’s state and the wronged state hence the whole relation remains a private matter between the two states. ‘Aggravated responsibility’ has markedly distinct features from ‘ordinary responsibility’ if arises when a state violates a general rule laying down a ‘community obligation’ that is a customary obligation _erga omnes_ protecting fundamental values (i.e., peace, human rights, self-determination of peoples’) or an obligation _erga omnes_ contracts laid down in a multilateral treaty safeguarding those fundamental values, and entitling respectively any state or any other party to the multilateral treaty to demand cessation of any serious violation , in the case of this ‘aggravated responsibility’ the material or moral damage if any is not an indispensable element of state responsibility. In addition, all the states entitled to demand compliance with the obligation that has been infringed might take a host of remedial actions designed to impel the delinquent state to cease its wrongdoing or to make reparation.

Third as pointed out above previously in cases of international wrongdoing the injured state could decide whether immediately to take forcible action so as to ‘punish’ the delinquent state or instead to first request reparation. Furthermore, if no reparation
was made that state could again decide on its own whether to try to settle the dispute peacefully by resorting to the various procedures and mechanisms available including arbitration or rather enforce its right to reparation by using military or economic force. In contrast, this is no longer permitted now. A general obligation evolved following the expansion of the scope of Article 33 of the UN Charter. The requirement to endeavor to settle disputes by peaceful means before resorting to possible counter-measures currently obligates states to take a set of successive steps. They must first request reparation; then, if no reparation is made or reparation is considered unsatisfactory, they must endeavour to settle the dispute peacefully, by having recourse to negotiations, conciliation, arbitration, or other means of setting disputes. Only if such recourse proves to be of no avail, can the injured state take peaceful counter-measures.

Fourth, individual criminal liability, as opposed to state responsibility, has enormously expanded. Individuals, be they state officials or private persons, are now accountable for serious breaches of international law (war crimes, crimes against humanity, genocide and terrorism) both in time of peace and in time of war. In addition, not only simple soldiers and junior officers, as in the past, but also military leaders as well as senior politicians, members of cabinet, industrialists, etc., may be held accountable for any international crime. National and international prosecution and punishment of these crimes ensure that the international rules of human rights law and international humanitarian law are respected and enforced. This body of international criminal law has developed as a separate branch from the international law on state responsibility, although overlaps may come about between individual criminal liability and state responsibility.

Fifth, current needs have resulted in the possibility for states to be held accountable for lawful actions. This is provided for in rules that of course no longer pertain to state responsibility proper. Thus, for instance, under article 110 of the 1982 Law of the Sea Convention the warship of a state may be stopped and searched a foreign merchant vessel on the high seas if ‘there is reasonable doubt for suspecting’ that the ship is engaged in piracy, or the slave trade, or in unauthorized broadcasting, or is without nationality, or if the ship, though flying a foreign flag or refusing to show its flag, is in reality of the same nationality as the warship. However, if it turns out that the suspicions are unfounded, the state to which the warship belongs must pay compensation ‘for any loss or damage that may have been sustained by the merchant
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vessel. Similarly, under same treaties on the use of outer space (for example, the 1972 Convention on International Liability for Damage Caused by Space Objects) or on the exploitation of nuclear energy (for example, the 1960 Convention on Third Party Liability in the field of nuclear energy, or the 1962 Convention on Liability of Operators of Nuclear Ships) state are liable to pay compensation, either under international law or within a municipal law system to states or persons injured by their lawful but ultra hazardous activities.

2.6.2. The Future of State Responsibility

The Articles on State Responsibility are clearly at odds with the relevant precedent; therefore, there are two options for the future. One option is for the ILC to bring the Articles into conformity with the precedent by providing that elements of both command and control must be evident before liability can be attached to the state. Alternatively, the Articles on State Responsibility can be viewed by courts as changing the precedent and expanding on the concept of state responsibility for the actions of individuals.

The later option is not very plausible. The commentary itself seems to emphasize that elements of both command and control are required to find liability. Furthermore, the commentary emphasizes the narrow nature of the Article 8 exception to the general rule that the conduct of private individuals “is not attributable to the state”.

However, changes in the Articles on State Responsibility from their original draft from the form as adopted suggest that perhaps the ILC sought to allow for greater state responsibility under the Articles as adopted. Additionally, there is a greater interest internationally in holding state responsible for their conduct with respect to private individuals, as evinced by recent General Assembly resolutions regarding terrorism.

The ball is now in the ILC’s Court to take some action with respect to the Articles on State Responsibility. If the standard is to remain that of command and

88  Ibid p. 187
effective control, the ILC must revise the commentary to Article 8 to reflect that standard. If the ILC meant to expand on the standard of liability under the precedent, the Commission must do more than simply change some language. The ILC must thoroughly explain the standard it is establishing and update the case references that the commentary makes in support of the standard.

The Articles in their present state, however, support the conclusion that the ILC did not intend to expand upon the liability set forth in the precedent. Therefore, any analysis of state’s responsibility for an individual’s actions in conformity with a statement from a head of state must be entails both an analysis of command and control.

2.7 Conclusion

The international law of state responsibility remains today blemished by significant uncertainties, while lawyers are reductionists by trade, always attempting to glean from a varied and multifaceted practice the fundamental elements that can be held up as guiding principles, there are dangers in attempting to move too quickly.

The great majority of international lawyers for too long have remained under the spell of Anzilotti’s formal Pre-First World War conception of the Law of State Responsibility, which emphasized sovereign equality over community interests. This reading of history would see Lauterpacht as the shining exception that was finally validated by state practice after decolonization forced the Eurocentric mainstream of international lawyers to recognize the new quality of international law. It is also possible, however, to provide a less simplistic interpretation. Such an interpretation would proceed from the experience of the inter war period. At the beginning of this period, international lawyers hoped that the new ideas of multilateral responsibility and gradations of violations would be integrated into international law by regular procedures, and by unquestionable sources, that is, by way of treaty. It was only when the hopes for such a development had dissipated in the 1930s that individual attempts were made to recognize these ideas by way of reinterpreting existing law.

The experience of the post-colonial approach by Ago, however, shows that the reluctance of the mainstream international lawyers was not without foundation. It is one thing to recognize the principles of gradations of injury and multilateral responsibility; it is another to translate these principles into applicable norms and regimes. Without
pressure on the part of states, the third world countries after decolonization, and without controversies, international lawyers can hardly be expected to radically, reinterpret the existing law. Today, when the international community has become somewhat less antagonistic than during the time of the cold war, it appears more legitimate again for international lawyers to wait for states to agree on how differentiated the regime of state responsibility should be. In this perspective, the latest developments in the law of state responsibility, the Draft Articles that have been adopted by the ILC on the basis of James Crawford’s reports, appears to fit into a long-term perspective.

The final outcome of the codification of the law of state responsibility by the ILC remains unknown yet. But, one thing seems certain at least, that the law of state responsibility cannot be the same now as the traditional one. And the work of the commission in this filed will exert a great influence, visible as well as invisible, on the future law of state responsibility.