CHAPTER -6  THE ROLE OF INTERNATIONAL LAW COMMISSION: 
EVALUATION OF DRAFT ARTICLES ON STATE 
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6.1 Introduction

In August 2001, the ILC adopted its “Draft Articles on the Responsibility of States for internally wrongful acts”, bringing to completion one of the commission’s longest running and most controversial studies. On December 12, 2001, the United Nations General Assembly adopted resolution 56/83, which “commend to the attention of governments without prejudice to the question of their future adoption or other appropriate action”.

The ILC articles address the fundamental questions; when does a state breach an international obligation and what are the legal consequences? Rather than attempting to define particular “primary” rules of conduct, the articles set forth more general “secondary” rules of responsibility and remedies for breaches of a primary rule. Important issues include:

- What is an “internationally wrongful act”?
- When does a “breach” of an international obligation occur?
- When can a state be held responsible for acts (or omissions) of non state actors or of another state?
- What circumstances justify otherwise wrongful conduct?
- What must a state do to remedy of an internationally wrongful act (render compensation, restitution, satisfaction, etc)?
- Which states have standing to complain?
- What kinds of countermeasures are permitted and under what circumstances?

At the outset, the ILC’s first special rapporteur on state responsibility noted, “It would be difficult to find a topic be set with greater confusion and uncertainty”. And throughout the ILC’S consideration of the subject, skepticism and controversy abounded, particularly among those trained in the common law, to which the abstract treatment of “responsibility”, as such, is unfamiliar.
Whatever one’s view of the articles, however, their adoption by the ILC doubtless represents a significant moment in the continuing development of international law. The articles developed over a long time, during which international law and international society underwent significant changes. Non state participants came to play more prominent roles. New conceptions evolved about who holds rights and obligations under international law. And highly developed, specialized legal regimes appeared. Early in its work, the ILC stressed that “careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility”.\(^5\)

During the articles long gestation, most of the action in international law shifted to specialized regimes such as the General Agreement on Tariffs and Trade and the World Trade Organization, regional human rights bodies such as the European Court of Human Rights, bilateral investment treaties and the newly emerging compliance procedures in international environmental instruments. Many have their own dispute settlement procedures and their own *lex specialis* on responsibility. Arguably, this increasing specialization and fragmentation of international law has made the ILC’s project of elaborating a general law of states responsibility a bit anachronistic.

But the trend toward specialized regimes could also have the opposite effect, heightening the importance of general rules that can fill gaps and play a unifying role in international law particularly given the proliferation of international tribunals, which are likely to be the article’s primary consumers.\(^6\) Few, if any, international regimes are fully self-contained. Most do not deal in a comprehensive manner with important issues addressed by the articles, such as attribution, circumstances that preclude wrongfulness, remedies, and countermeasures. Thus, there is a continuing, perhaps even growing, need for clear and comprehensive rules that decision makers can use to fill gaps when deciding particular cases. If the Commission has done its work well, in a way that can be applied effectively in practice, the articles could play such a role, providing reasoned rules or, perhaps more appropriately, useful points of departure in areas where specialized regimes are not yet fully developed. Even before

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the ILC had completed the articles, they had begun to influence the work of international tribunals, including the ICJ. Their completion can be expected to increase their impact.

Indeed, some commentators believe that the real danger is not that the articles will have too little influence but, rather, that they will have too much. As David Caron argues, their seductive clarity, seeming concreteness, and treaty like form, together with the paucity of other sources on some important issues, may tempt decision makers to apply the articles verbatim, rather than treat them only as evidence of the relevant international rule. Caron cautions decision makers not to give the articles such unwarranted authority and urges them to scrutinize the articles rigorously, together with all of their associated context and history, in weighing whether the ILC offers the right result.

All of the contributors weigh the extent to which these judgments result from inductive analysis of state practice or from a more prescriptive approach aimed at the “progressive development” of international law. Separating these elements of course is difficult. Nevertheless, attempting to distinguish between codification and progressive development serves an important function, particularly in areas where the articles may significantly influence the handling of specific disputes. David Bederman considers the extent to which the articles on countermeasures depart from existing law, whether they may ultimately encourage or discourage resort to countermeasures. Dinah Shelton analyzes the treatment of remedies, suggesting that the articles are designed to promote the maintenance of international legality and not simply the adjustment of bilateral disputes.

One important development in the law of international responsibility that the articles do not attempt to codify, much less progressively develop, is the growing importance of non state actors as holder of international rights and obligations. As Edith Brown Weiss discusses in her contribution, not only has international law become increasingly specialized and fragmented, but it increasingly focuses on the

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7 See, e.g., Gabcikovo-Nagymaros Project (Hung/Slovak), 1997, ICJ REP. 7, 39-46, Paras. 49-58 (Sept. 25). For other references to the articles by the International Court of Justice (ICJ) and other important tribunals, see CRAWFORD, supra note 1 at 16 n. 48.
9 David J Bederman, Counter intuitive Counter measures, 96 AJIL 817, (2002).
responsibility of nonstate actors such as individuals and terrorist groups and on the obligations of states toward individuals. These legal relationships largely remain outside the scope of the ILC’S study of international responsibility, which generally adopts a traditional, state to state approach.\footnote{Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96, AJIL, 798, (2002)}

In considering state responsibility, the Commission recognized that its eventual product ultimately had to find a measure of acceptance by states. This led to a charge of direction on more than one occasion, the dropping of some of the most controversial elements (in particular, Article 19 on state crimes), and much streamlining and simplification of the text. As this, the articles provide ample food for thought for both. Although at first glance the articles seems well removed from the contemporary preoccupations of theorists with law and economics, critical legal studies, feminism, and international relations, they raise challenging conceptual issues going to the fundamentals of international obligation. For the diplomat or international legal practitioner, the articles likewise pose difficult and important issues of analysis and application to particular disputes.

### 6.2 A Brief History

Traditionally, the term “State responsibility” has had both a narrower and a broader scope than the ILC articles narrower in that it referred only to a limited subject, namely, state responsibility for injuries to aliens, broader in that it embraced the whole range of issues relating to that subject, including not only “secondary” issues such as attribution and remedies, but also the primary rights and duties of states, for example, the asserted international standard of treatment and the right of diplomatic protection.\footnote{Clyde Eagleton, *The Responsibility of States in International Law*, (1928), p. 9} Although cases like Alabama illustrate that a much broader idea of state responsibility for any internationally wrongful act had already emerged in the nineteenth century, until relatively recently most scholars did not address this broader concept as a distinct subject.\footnote{Ian Brown lie, *System of the Law of Nations: State Responsibility*, (1983), p. 7} Even today, the term “state responsibility” is often used as shorthand for the specialized area of international law on the treatment of aliens.\footnote{See, e.g. International Law of State responsibility for injuries to aliens, supra note 4; L.F.E.Goldie, State Responsibility and the Expropriation of Property, 12 INT’L Law, 63 (1978).}
Early efforts by the League of Nations and private bodies to codify the rules of "state responsibility" reflected the traditional focus on responsibility for injuries to aliens.\footnote{See Edwin M. Borchard, "Responsibility of States" at the Hague Codification Conference, 24 AJIL 517, (1930). See generally, Y. Matsui, The Transformation of the Law of State Responsibility, 20 THESAURUS ACROASIUM 1, (1993)} Foreshadowing the history of the topic in the ILC the League's 1930 codification conference in The Hague was able to reach agreement only on "secondary" issues such as imputation, not on the substantive rules regarding the treatment of aliens and their property.\footnote{Matsui, Supra Note 15, at 32-33} With respect to the later, the League's efforts were defeated by the schism between European and North American proponents of an international standard of justice and the proponents of national treatment.

Given the centrality of the subject in international law as well as the League's extensive codification efforts, state responsibility was an obvious candidate for inclusion on the ILC's initial list of topics. But the ILC did not merely pick up where the League had left off. Instead, in listing state responsibility as a potential topic for codifications, the Commission distinguished it from a separate topic on the "treatment of aliens", reflecting the growing view that state responsibility encompasses the breach of any international obligation, not just those concerning the protection of aliens.\footnote{1949, Y.B. Int'l L. Comm'n 46, 49-50, UN Doc A/CN-4/SER.A/1949}

In 1953 the General Assembly invited the ILC to undertake the codification of state responsibility. Two years later, the ILC appointed F.V Garcia Amador of Cuba as special rapporteur. The ILC has considered the subject in fits and starts ever since, through five special rapporteurs and more than thirty reports.

Initially, the ILC's work got off to a false start when Garcia Amador attempted to return to the traditional focus on responsibility for injury to aliens. He recognized that international responsibility could result from a "practically unlimited number and variety of circumstance".\footnote{Garcia-Amador, Supra Note 3, at 176, Para 11} But precisely because the topic of responsibility is so "vast" he sought to limit it by starting with the narrower topic of diplomatic protection which had already received extensive consideration. In a series of six reports submitted between 1956 and 1961 Garcia Amador engaged in an

Although Garcia Amador’s reports are still cited, and some of his specific proposals ultimately found their way into the articles\footnote{Crawford, Supra Note 1, at 15 and n 45}, his emphasis on diplomatic protection proved divisive and stimulated a heated debate by the Commission in 1957. Subsequently, the Commission never discussed any of his proposals in detail. When his membership ended in 1961, the ILC essentially abandoned his work and appointed a Subcommittee, chaired by Roberto Ago of Italy, to reconsider how to proceed.

In his Subcommittee report of 1963, Ago laid out the approach that has served as the basis for the ILC’s work ever since focusing on the general “secondary” rules of state responsibility rather than particular primary rules of obligation\footnote{Ibid. at 253}. As Ago put it, the ILC should concentrate on “the whole of responsibility and nothing but responsibility”.\footnote{Roberto Ago, Second Report on State Responsibility, (1970), 2 Y.B.Int’l L.Comm’n 177, 178, Para-8, UN.Doc.A/4/SER.A/1970/Add.1} By divorcing the Commission’s work from debates over the primary rules of international obligation, Ago allowed the ILC to elaborate Lawyers Law, which with a few exceptions was not threatening to states.

Ago’s imprint on the articles was decisive. Not only did he reconceptualize the ILC’s work in terms of the distinction between primary and secondary rules, but he also established the basic organizational structure of the articles, dividing them into two Parts: first, the origin of international responsibility including definition of the wrongful act, attribution (or as the issue was referred to them, “ imputation”), and circumstances precluding wrongfulness, and second, the forms and consequences of international responsibility, including the duty to make reparation and the right to apply sanctions.\footnote{Report of the International Law Commission on the work of its Fifteenth Session, (1963) 2 Y.B.Int’l L. Comm’n 187, 224, Para, 55, UN DOC.A/4/SER.A/1963/Add.1}

Following his Sub Committee Report of 1963, the ILC appointed ago as special rapporteur\footnote{Subcommittee Report, Supra note-5, at 228}, but it then turned to other issues and id not revisit state
The Role of International Law Commission: Evaluation of Draft Articles on State Responsibility

responsibility until his first report in the latter capacity in 1969. Over the next ten years, until his election to the ICJ in 1980, Ago completed work on part 1 of the draft articles, addressing the origin of state responsibility. Most of the thirty-five articles adopted during his tenure are reflected in the final draft, with exception of Article 19 on state crimes, which the ILC dropped in the last stages of the project.

Work on the remainder of the articles proceeded slowly through the 1980s and early 1990s. Ago’s version of part 1 had been “coherent and comprehensive”, but as the last special rapporteur, James Crawford of Australia, notes, he “left few clues as to how the text as a whole should be completed”. Initially, this task fell to Willem Riphagen of the Netherlands, who served as special rapporteur from 1980 to 1986. In contrast to Ago, who focused on what David Caron calls the “trans-substantive” nature of the law of responsibility, Riphagen stressed that particular primary rules may specify the consequences of their breach an idea conveyed by the articles through the recognition of *lex specialis*. He also emphasized that the articles should deal only with responsibility for wrongful acts, not liability for injuries arising from lawful acts, a subject addressed by a separate ILC study.

Riphagen’s reports after many interesting theoretical insights but are challenging. Only five articles were provisionally adopted during his seven-year tenure as special rapporteur, the most important focusing on the definition of the “injured state”, which was largely revised by Crawford. Significant progress did not resume until Gaetano Arangio Ruiz’s appointment as special rapporteur in 1988. Arangio-Ruiz’s work helped clarify the consequences of breaches of international obligations, by emphasizing in particular the duty of cease continuing violations and the role of interest in reparation. Over the next eight years, the ILC completed its first reading of part 2 and 3. Although most of these articles are reflected in the final

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27 Crawford, Supra Note 1, at 2, 3
28 Art.55
text, the part addressing dispute settlement perhaps the subject most associated with Arangio-Ruiz did not survive the second reading\(^{31}\).

By 1996, when the ILC appointed Crawford as special rapporteur, the ILC had state responsibility on its agenda for more than forty years and was understandably eager to bring the subject to a close. Moreover, the General Assembly had adopted a resolution in December 1995 in effect pressing the Commission to make progress on the state responsibility articles and other long pending projects\(^ {32}\). Crawford approached the task pragmatically, recognizing that, to reach closure, the Commission would need to abandon much that had been both challenging and controversial in its prior work, including in particular Article 19 on state crimes and the section on dispute settlement. Reflecting both his political and his technical skills and perhaps a certain degree of exhaustion, the ILC moved rapidly through a second reading of the draft articles, adopting what it could agree on and Jettisoning the rest. The result is a text that is highly polished but ultimately sometimes abstract and thin.

### 6.3 Basic Premises

Ever since Ago’s reorientation of the ILC’s work on state responsibility, the articles have reflected two basic premises:

First, the breach of an international obligation gives rise to a new legal regime, with its own distinctive set of legal duties and rights. The object of the articles is to set forth these rules, together with rules governing the conversion from the normal regime of international law to the new regime of state responsibility. Ago characterized both types of rules as “secondary” rules, which differ in kind from the “primary” rules of obligation establishing particular standards of conduct\(^ {33}\). Rather than set forth any particular obligations, the rules of state responsibility determine, in general, when an obligation has been breached and the legal consequences of that violation.

\(^{31}\) A very useful table tracing the ILC’s consideration of the articles from their first through their second reading can be found in CRAWFORD, Supra Note 1, at 315-46

\(^{32}\) GA Res.50/45, Para.3, (Dec.11, 1995)

\(^{33}\) As the commission noted, “It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation”. Report of the ILC on the work of the Its Twenty-Second Session, (1970) 2 Y.B.Int’l L.Com’n. Ago’s distinction between primary and secondary rules differs from the dichotomy drawn by H.L.A. Hart, who characterized Secondary rules as rules about rules, addressing the creation, interpretation, and enforcement of the primary rules of obligation H.L.A. HART, THE CONCEPT OF LAW 91-92(1961)
Second, the secondary rules of state responsibility, as Crawford notes, are “rigorously general in character”\footnote{CRAWFORD, Supra Note 1, at 12}, encompassing all types of international obligations regardless of their source, subject matter, or importance to the international community\footnote{The rules enunciated in the draft articles are intended to reflect a “single general regime of state responsibility” Commentaries, Art.12, Para.5. The one exception to the uniformity of the regime involves serious breaches of peremptory norms under Article 40 and 41 the remaining vestige of the category of state crimes which the ILC acknowledges “necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts”: Ibid Para 7}. They apply to both acts and omissions, to treaty obligations and customary norms, to breaches of bilateral as well as multilateral obligations, and to the whole gamut of particular subject areas human rights law, environmental law, humanitarian law, economic law, the law of the sea and so forth.

It is worth emphasizing the distinctive character of this approach to state responsibility. In Common Law countries, there is no general regime of legal responsibility. Substantive rules are classified by their source, each characterized by its own regime of “responsibility” with its own remedies, rules of attribution and invocation, and so forth. Indeed, to many common lawyers, the notion that anything useful can be said of a general nature about obligation or responsibility seems alien. Common lawyers tend to find comfort in Holme’s famous aphorism that the lift of the law is not logic but experience. But the various special rapporteurs, except the last, have come from the civil law tradition and have been more at home with the notion of articulating homogeneous, general rules of responsibility.

Because the secondary rules of state responsibility are general in nature, they can be studied independently of the primary rules of obligation. They evince neutrality on many disputed or controversial substantive matters. This was the key that allowed Ago to unlock state responsibility from the box into which Garcia-Amador had placed it through his efforts to articulate substantive norms governing the protection of aliens. By focusing on general rules of responsibility, stated at a high level of abstraction, Ago created a politically safe space within which the ILC could work and largely avoid the contentious debates of the day about expropriation and valuation of property\footnote{Matsui, Supra Note 15, at 55}.

It should be borne in mind, however, that although the articles are general in coverage; they represent only default or residual rules, they do not necessary apply in
all cases. Particular treaty regimes or rules of customary international law can establish their own special rules of responsibility for example, regarding remedies that differ from those set forth in the articles. Indeed, “self contained” treaty regimes such as the General Agreement on Tariffs and Trade and the European Convention on Human Rights may establish a more or less complete regime of responsibility to which the articles are inapplicable37.

Following Ago, the ILC explained the character of the articles through the distinction between “Secondary” and “Primary” rules. But this distinction has proved elusive and in any event is unnecessary. To some degree, classifying as issue as part of the rule of conduct (the primary rule) or as part of the determination of whether that rule has been violated (the Secondary rule) is arbitrary. What defines the scope of the articles is not their “Secondary” status but their generally; the articles represent those areas where the ILC could identify and reach consensus on general propositions that can be applied more or less comprehensively across the entire range of international law. They express what the ILC believes could be said, in general, of international obligations and their breach.

Consider, for example, the contrasting treatment of fault and injury, on the one hand, and attribution, on the other. The articles decline to address the former on the ground that fault and injury are determined by the primary rules. But the articles do set forth detailed “Secondary” rules of attribution. One could just as well argue, however, that fault and injury relate to whether a particular rule of conduct has been violated (and hence are secondary rules), and that attribution is part of the complete specification of a primary rule38.

Given the elusiveness of the line between “Primary” and “Secondary” rules, commentators have not surprisingly displayed considerable confusion about categorizing particular issues such as attribution and fault. One commentator, for example, criticized the rules on attribution for providing only limited state responsibility for acts of individuals39, only to be told in response not to worry, since the primary rules can create much wider state responsibility for private acts40, a point illustrated by the Tehran Hostages Case and by environmental agreements that

37 See Bruno Simma, Self-contained Regimes, 1985, NETH.Y.B.Int’l L.111 (questioning whether these regimes are fully self-contained.)
38 Supra note 13, at 36,163
require states to limit national emissions of pollutants, including those by private entities.\textsuperscript{41}

As to fault, the Commission correctly notes in the commentary that there is no general rule of international law requiring fault, whether fault is an element of a wrongful act depends on the primary rule in question.\textsuperscript{42} But the absence of a general rule does not in itself imply that fault is a primary rather than a secondary issue. The real point is that the ILC did not find it possible to say anything of a general nature about the issue. The articles reflect the ILC’s belief that trans-substantive default rules exist regarding attribution, justifications, and remedies, but not fault or injury hence, the former issues are included in the articles but not the later.

The ILC articles presume that international law is a unified body of law, with common characteristics that operate in similar ways across its various fields. Whether this is a desirable approach will be a matter of debate. In response to the fragmentation of international law, many see unity and coherence in international law as virtues.\textsuperscript{43} But a one-size fits all approach may come at a certain price, by inhibiting the elaboration of more variegated international norms liability rules, property rules, and so forth, each with their own characteristic set of remedies\textsuperscript{44} which can be used in a more precise way to pursue a complex range of community goals.\textsuperscript{45}

\textbf{6.4 The ILC Articles on State Responsibility: Between Self-help and Solidarity}

International Law is frequently distinguished by its lack of enforceability. As Martti Koskenniemi has observed, “this aspect had always made the distance between domestic and international law seem greatest”\textsuperscript{46}. To remedy this weakness, when proposing that the ILC undertake the project of state responsibility a half a century ago, Sir Hersch Lauterpacht viewed the treatment of breaches as a kind of ersatz criminal law. State responsibility, therein, was to solidify international law with an element of laws that was notably lacking during the inter-war period.\textsuperscript{47} This general

\begin{itemize}
\item \textsuperscript{41} United States Diplomatic and consular Staff in Tehran (U.S V Iran), 1980 ICJ REP.3, (May 24)
\item \textsuperscript{42} Commentaries, Art.2, Paras 3,10
\item \textsuperscript{43} Supra Note 40, at 437.
\item \textsuperscript{44} Guido Calabresi and A Douglas Melamed, Property Rules, Liability Rules and Inalienability: one view of the Cathedral, 85 HARV.L. REV.1089, (1972).
\item \textsuperscript{45} James Crawford, on Re-Reading the Draft Articles on State Responsibility, 92 ASIL PROC. 295, 298-99, (1998)
\item \textsuperscript{47} Ibid. at 337-38., See Glanville.L Williams, International Law and the Controversy Concerning the word “Law”. 22 Brit. Y.B.Int’l L. 146 (1945)
\end{itemize}
approach was systematized by Special Rapporteur Roberto Ago in his 1969 ILC Report\(^48\). There, he distinguishes between primary and secondary norms, i.e., between the obligations themselves and the consequences of breaching any such primary obligation. State responsibility falls in to the latter category. As such, this dichotomy emphasizes that the state responsibility project is the international law equivalent of domestic sanctions (later called countermeasures). In 1998, by the time the ILC appointed James Crawford as the final Special Rapporteur of the project, the principle function of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts was to provide for the enforcement of international obligations\(^49\).

The state responsibility project sought to ensure the abidingness of international law in other words, to provide for its enforcement without an international policing force. To this end, the book is a work of international law professionalism at its finest and is among the greatest single contributions to the field in the history of state responsibility. That said, the ILC’s omission of a democracy discourse in its final draft of the Articles seems odd. Contemporary international practitioners regularly invoke issues such as governance and legitimacy issues that are likely to have effects on the validity and scope of countermeasures in practice. Yet, the final draft of the ILC Articles is silent on this matter.

6.4.1 Overview

Special Rapporteur Crawford begins with a narrative of the ILC’s treatment of state responsibility from the first Special Rapporteur, F.V.Garcia-Amador (Cuba). Crawford analyzes the development of those articles that ultimately comprise the final draft. The account is as selective as it is honest leaving out those areas of state responsibility that were not seriously debated the ILC\(^50\) and bluntly criticizing special Rapporteurs for their failures. Crawford openly discusses the main problems that the ILC faced including state crimes and the invocation of responsibility by non-injured states, the correlation of the Law of treaty obligations to the responsibility for their violation. In sum, the introduction is a concise narrative of the ILC’s fifty year effort

\(^49\) Supra Note 1. at 339
to codify state responsibility, culminating in Crawford’s final draft, which focuses on solidarity\textsuperscript{51}. The commentary is updated with language from recent ICJ decision and arbitral awards. This section also takes accurate of relevant trends and legal developments. For example, it cites heavily from the case law of the World Trade Organization and frequently refers to decisions of the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY). It notes expressly what was included (e.g. continuing violations, circumstances precluding wrongfulness), what was excluded (e.g. state crimes) was and what was not finalized (e.g., issues of admissibility, countermeasures). But the greatest compliment one can pay the commentary is that is extremely clear. The ILC succeeds in making one of the most complicated topics in the field of international law readily comprehensible to the non-specialist\textsuperscript{52}.

6.4.2 Codifying Countermeasures

A. The Solution

Countermeasures are the otherwise illegal actions that a wronged state may take in order to enforce its international right against an international violator\textsuperscript{53}. The traditional view regarding countermeasures was famously portrayed by D.N. Hutchinson in the late 1980s. When an international breach occurs, one (or very few) states injured by the breach will have an enforceable secondary remedy to resort to self help. Because of the relative helplessness of many states, “pressure has long been felt to broaden the number of state which is entitled to react to breaches of multilateral treaties in the name of solidarity”\textsuperscript{54}. Hence, the Draft Article is inherent catch 22; Maximum enforcement and menial vigilantism. While some norms (e.g. the prohibition of genocide) must be enforced not withstanding “national interests” (e.g.

\textsuperscript{51} New York University Journal of International Law and Politics; (2005-06). p. 1
\textsuperscript{52} Supra Note 1, at 341. Historically, the field of state responsibility has been more of an adhoc and contextual one. See Allan Nissel, The Creation of State Responsibility, (1873-1969)
\textsuperscript{53} See The International Law Commission, Articles on State Responsibility, reprinted in the International Law Commission’s Articles on state Responsibility: Introduction, Text & Commentaries, at 61 (James Crawford, 2002). The ILC Articles (and other state responsibility documents) are available online at www.stateresponsibility.com)
\textsuperscript{54} D.N.Hutchinson, Solidarity and Breaches of Multilateral Treaties, 59 Brit. Y.B.Int’l L.151, 156, (1989)
prioritizing oil prices), is not the Charter of the United Nation the final word on the prohibition of forceful intervention.\footnote{Supra Note 51, p.2}

In the proposed ILC regime, those who invoke the right of countermeasures will primarily be injured states. Consequently, each state is left to fend for itself, each according to this own ability and interest. The 1994 genocide in Rwanda remains a dramatic demonstration of this systemic weakness. While some tragedies have united international forces to intervene on behalf of victims, as in the cases of Kosovo in 1998 and Afghanistan in 2001, is this ad hoc approach the best possible solution?

In order to avoid a weak enforcement mechanism in the ILC Articles, Special Rappporteur Crawford instituted a general right of solidarity the right of any state to invoke the responsibility of another state for certain violations and to take measures against that state to ensure cessation of the breach and reparation. But, inescapably, this right is a politically charged one. In international law, as Professor Spinedi notes, there is an “opposition between a bilateralism conception of the obligations contained in treaties and a solidarity conception of these obligations”. This tension is easily seen in the ILC Articles. Article 54 (measures taken by states other than an injured state) “does not prejudice the right of any state, entitled under Article 48, paragraph 1 to invoke the responsibility of another state”\footnote{For an historical introduction on the Political ideologies of solidarity and of solidarism in international Law, see Martti Koskenniemi, The Gentle Civilizer of Nations, 284-91 (2002)}. Article 48 (Invocation of responsibility by the state other than an injured state) allows non injured states to invoke a state’s responsibility if “the obligation breached is owed to a group of states including that state and is established for the protection of a collective interest of the group or the obligation breached is owed to the international community as a whole”.

**B. The Problem**

If the ILC Articles were entirely composed of secondary norms that is, devoid of normative content then we could understand their lack of legitimacy discourse, but Article 50 (obligation not affected by countermeasures), like other provisions of the ILC Articles, consists of additional primary norms without any legitimacy discourse. By ignoring any normative content, the ILC seems to have sneaked a few primary norms into its work with the hope that no one would notice. To be sure, the ILC Articles do more than restate previously established law. Crawford writes candidly in Comment 12 that the work is a “progressive development” of international law.
are, thus left to assess the practical ramifications of this methodology for state responsibility in general and with regard to countermeasures in particular.

Special Rapporteur Crawford’s decision to introduce this right of solidarity is an understandable attempt to compromise between the controversy surrounding the creation of international crimes of state and the undisputed need to establish between international enforcement. However, by passing legitimacy discourse, the ILC’s codification leaves unanswered one of the main questions of state responsibility: what is the appropriate mechanism for taking countermeasures? The ILC Articles leave us with a concept of obligations concerning the international community as a whole. Yet, even understanding the phase “international community”, “involves a prior redefinition of the community itself who are ‘we’ as subjects of security” 57. Lacking a legitimacy discourse in the ILC Articles, one could reasonably characterize Article 43 as a consent based norm and Articles 40 and 48 as simply result oriented provision masked in “communitarian” garb.

The ILC has struggled with the problem of balancing enforcement and legitimacy before. The final draft of Article 54 in 2001 is recognizably different from its 2000 predecessor. The latter was more clearly about enforcement. The 2000 draft entitled third party states to take solidarity measures on two occasions: When an injured state makes a request or by any state in order to ensure the cessation of the breach and reparation in the interests of the victims” 58. Traditionally, this explained by the claim that the in the context of the aftermath of a serious of global atrocities in the 1999s, the ILC veered from unilateral codification to multilateral system maintenance 59. The effort to infuse the ILC Articles with solidarity measures was the most controversial aspect of the Third Reading of the ILC Articles. Many governments believed that the provision would be destabilizing (e.g. Israel) or unduly restrictive (e.g., the United States and United Kingdom). After receiving feedback from various foreign ministries, the ILC deemed state practice solidarity countermeasures to be “limited and embryonic”. Three options remained: deletion, total retention, or limited retention. The ILC selected the third option and in 2001, the final Article 54 “came about as a last-ditch compromise so as to allow everyone to maintain their earlier position”. On the one hand, the new draft leaves in place the

59 Supra Note 1, at 340
tensions of the 2000 draft. The ILC seems satisfied in grounding the state responsibility upon “secondary” rules as they correlate “bilateralism” and “multilateralism”. On the other hand, the 2001 draft can be seen as a more legalistic attempt to root the right of solidarity (i.e. enforcement) more clearly in the specificities of invocation.60

Indeed, the struggle to systematize the right of solidarity is typical of international law. Special Rapporteur Crawford’s reliance on this right of solidarity as the primary mechanism of international law enforcement might be a best effort compromise between a reluctance to create international crimes of state and a desire to implement better international crimes of state and a desire to implement better international enforcement. Clearly then Article 54 is the result of a paradox. International law must differentiate between categories of norms e.g., the right of diplomatic protection and the prohibition of genocide. But at the same time, international law itself functions without a mechanism for distinguishing between the enforcement of these two norms. (The ILC all but left out reference to the “inherent” right of collective countermeasures). Thus the provision will likely serve as a renvoi to the customary international law of countermeasures, which the ILC decided was not yet determine enough to be codified.61

After refuting the second reason for omitting a democracy discourse, we may now revisit the first, namely, that the ILC’s silence was inevitable due to the nature of state responsibility. Perhaps democracy was omitted from the ILC Articles because of an appreciation of international law’s well-known weakness i.e., its horizontal nature and resulting problem of enforcement. Rather than creating a substantive code of detailed provisions, the ILC codified state responsibility in a few relatively ambiguous but uncontroversial provisions. While it is surely idealistic to inject democracy into international law, to expect the ILC to do so might be Utopian. In many ways, the recent history of international law has been a flight away from this debate.62 By conceptualizing the laws of breach into secondary norms, the ILC seems poised to codify in its ILC Articles more positive than natural laws. However, as we saw, even positivists cannot avoid the normative debate. At a basic level, the ILC codified bilateralist interests in Article 42 (injured states). Instrumentally, at a higher level,

61 Supra Note 53. at 56
community interests are codified in Article 48 (other states). As Maratti Koskenniemi writes, “the concepts of fundamental as well as the ideas of *jus cogens* or imperative norms and rules valid in an *erga omnes* way each presuppose relationships of normative hierarchy”\(^{63}\). This expansion of governance in international law inevitably draws on different views of international law; naturalist, positivist, formalist, etc\(^{64}\).

To summarize, the traditional view is that, over the course of the twentieth century, the ties binding the international community evolved from bilateralism to multilateralism. However, this view neglects the tension between Article 42 and 48, i.e. governance without government. Arguably, the better reasoning for the ILC’s omission of a democracy discourse in its infeasibility. Perhaps democracy issues are too complex to be systematized into the primitive structure of international law. In this context, it will be helpful now to turn to some of the central debates surrounding the codification of countermeasures.

### 6.4.3 Elements of the Democracy Debate

While many controversies surround the history of codifying state responsibility in general and countermeasures in particular, we will discuss only those few that relate to the enforcement of international law and the encouragement of democratic governance.

First, one can trace much of the ambiguity surrounding solidarity in the ILC Articles to the overlap between primary and secondary norms. For better or worse, the lack of normative guidance in the text causes many practical problems. What is the difference between the norms and how do they distinguish between injured (Article 42) and other (Article 48) states? What is the correlation between preemptory norms (Article 40) and the invocation of responsibility for breaches of obligations owed to the international community as whole (Article 48)? Which countermeasures are available to other state (Article 54)? Arguably, notwithstanding the intentions of the ILC, the pseudo distinction between primary and secondary rules in the ILC Articles complicates the institutional enforcement mechanisms of state responsibility. Comparing the legal positions of injured to other states, ordinary norms to obligations *erga omnes*, and so forth, we are left with a bundle of norms lacking an organized relationship (Procedural or substantive) to each other. Conceivably, free from


\(^{64}\) Ibid at 566-67
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codifying countermeasures, the catch-all Article 54 (Measures taken by states other than an injured state) leaves their nature and scope as open to debate as in the days of Special Rapporteur Ago in 1969.

Furthermore, the ILC Articles do attempt to distinguish between different kinds of norms and to enforce them without the force of legitimacy. This is not surprising. The same Special Rapporteur Ago, who distinguishes state responsibility by its secondary status, also injects the project with the notoriously controversial Article 19, an attempt to distinguish between those violations that were delicts and those that constitute crimes of state. Special Rapporteur Crawford excludes Article 19 from the final draft, but its normative hierarchy is clearly incorporated into Articles 40 (Jus Cogens norms) and 48 (obligations erga omnes). This conflation of primary and secondary rules is not addressed in the commentary. The introduction to Article 40 merely cites the Vienna Convention on Treaties and Barcelona Traction.

Another debate revolves around legitimacy discourse relevance to the law of state responsibility. We will now consider a few possible ways in which considering democracy may help future attempts at codifying the law of state responsibility. Indeed, by avoiding a discussion of democracy in the ILC Articles, the final product of fifty years work leaves unanswered one of the main questions of state responsibility; what is the appropriate procedure for taking countermeasures? This is far from a mere technical question that can be administered according to secondary norms. The legitimacy of each countermeasure should and will depend on the normative grounds upon which it is based. For example, the commentary expansively interprets the international community as a whole to include international organizations (e.g. the WTO) and entities that are not quite yet states (e.g. Palestine). The work does not, however, elaborate on the notion of international community. Who is a member of this community?

As mentioned above, notwithstanding Professor Crawford’s serious writings about the need to inject international law with the safeguards of democracy, no such discourse is found in his capacity as Special Rapporteur on state responsibility and legitimacy in his capacity as an academic academic.

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66 Crawford, Supra Note 53, at 242-43 (Citing Barcelona Traction, Light and power co. (Belg v Spain) 1970 I.C.J. 3, 32 (Feb 5)

67 Koskenniemi, Supra Note 57, at 472
scholar. In an essay in the European Journal of International Law, published a few years before he became the Special Rapporteur for State responsibility, Crawford writes that “it is regrettable that the ILC Articles do not make it clear that the third party procedure should extend both to the question of the initial unlawful act and to the question of the justification of the countermeasures actually taken. This should be made clear in the commentary”68.

Finally, a central criticism of the ILC Articles revolves around their effectiveness in achieving the primacy purpose originally envisioned for them by sir Hirsch and later developed by Special Rapporteurs Ago and Crawford, increased compliance with international obligations. On the one hand, the ILC may have missed an opportunity to include one of the strongest factors for compliance short of a police force: legitimacy69. While the contents of such an addition would likely have been controversial, they are nonetheless conceivable, especially today. As Crawford stated at his induction as the Whewell Professor of International Law at Cambridge University “with this change has come a new stress on democracy as a value, even a dominant value, in national and international affairs”. On the other hand, perhaps state as opposed to individual responsibility is intrinsically amorphous. Professor Thomas Franck, undoubtedly a pioneer in the field of international law and legitimacy, recently suggested that state responsibility has a different purpose than individual responsibility. Indeed, asks Franck, why ought there to coexist multiple forms of responsibility for the same wrongful act? Because not all international laws are equal and not all wrongs were “justly redressed solely by imprisoning individuals”. Thus, Franck’s view lends support to the conclusion that the ILC viewed state responsibility as a field that could only be elaborated imprecisely. This may explain the ILC’s reluctance to discuss democracy, a discourse that would not necessarily have added clarity to an already amorphous filed.

6.5 Significant Features

The articles vary greatly in their specificity. With respect to some issues, the only rules that could be enunciated to apply across the entire range of international

68 Indeed, before he became the Special Rapporteur, Professor Crawford Stated that the “First principle” of establishing a satisfactory regime for the settlement of disputes is to restrict the scope of reprisals. James Crawford, Countermeasures as Interim Measures, 5 Eur. J.Int’l L. 16, at 76
69 Regarding legitimacy and compliance pull, See generally Thomas M Franck, The Power of Legitimacy Among Nations, (1990)
law were essentially tautologies. In other areas, the articles are quite detailed. Throughout, the ILC and its various Special Rapporteurs had to find balanced results acceptable within the commission and likely to be acceptable to states in the General Assembly and other future “consumers”. Like more overtly political negotiation, the ILC’s deliberations on State responsibility resulted in some provisions that represent least common denominators or rely on creative ambiguity.

6.5.1 Definition of an Internationally Wrongful Act

The articles define how state responsibility comes into play in purely formal terms. Article 1 states that “every internationally wrongful act of a state entails the international responsibility of that state”. Crawford has called this article without apparent irony “as near a piece of genius as the Commission has ever come to.” But it is essentially tautological, pushing into the phrase “internationally wrongful act” key substantive issues, such as whether fault and injury are conditions of international responsibility in particular situations. The articles characterize other core concepts in equally tautological terms. Article 2 defines an “internationally wrongful act” as an act attributable to a state that constitutes a breach of an international obligation. Articles 12 define “breach of an international obligation” as “an act not in conformity with what is required by that obligation”. Together, these articles state what is, in essence, a logical equation, conduct not in conformity with an international obligation and attributable to a state equals an internationally wrongful act resulting in state responsibility.

Like the dog that didn’t bark, the absence of non-tautological elements in the definition of state responsibility (such as substantive requirements of fault and for injury) is highly revealing. Substantive elements such as fault and injury may be conditions of state responsibility in particular cases but, by not addressing these subjects, the articles signal the ILC’s view that they are addressed by the primary rule involved, not by any general secondary rule.

Crawford characterizes the articles as establishing an “objective” regime of responsibility, since they define the breach of an international obligation in objective terms, without reference to the actor’s mental state. But, strictly speaking, the articles are in themselves neutral, they establish neither an objective nor a subjective regime.

Instead, they leave it to the primary rules of obligation to determine whether the wrongfulness of an act depends on fault, intention, lack of diligence, or the like.

6.5.2 Responsibility for Acts not Wrongful

Treating state responsibility as the consequence of wrongful conduct leaves the question of acts that are not wrongful and are conducted with due care, but result in significant harm to areas outside the jurisdiction of the acting states. Ago’s construct did not offer the commission satisfactory tools to address the multiple problems posed by such conduct. Key concepts in Ago’s system that breach of an international obligation is the predicate of international responsibility, and that there are secondary rules of responsibility of general application simply did not correspond to the problem at hand. Accordingly, the commission embarked on these different kinds of tasks in the framework of a wholly separate agenda item.

The Commission considered various approaches over the years. One was to attempt to define a class of activities that, if they resulted in physical harm to another state, would engage the responsibility of the state that had acted or under whose jurisdiction the action had been taken. The key notion would be that an act of a particular character had caused the harm, rather than a “wrongful act”. The problems posed by this approach were at least two fold. First, there is nothing resembling widespread much less universal, acceptance of any such strict liability. It is recognized only by some states and then only pursuant to specific treaty regimes. Second, the legal regime and the obligation owed by the state implicated in the damage are quite different in character from those involved in the case of a wrongful act. This divergence was made brilliantly clear in the reports of the initial special rapporteur, professor R.Q. Quentin-Baxter, particularly his 1982 report laying out a schematic outline for the liability topic. The outline shows that what is at issue in cases of harm or risk of harm where there is no wrongdoing state or operator is as much a regime of international cooperation to minimize risk and harm and maximize benefit as a regime of compensation for the victim.

Thus, it became obvious that the Commission’s challenge in this area was not to isolate generally applicable secondary rules following Ago’s model for state responsibility. Instead, the goal was to identify primary rules of conduct applicable in

certain types of situations. The Commission explored various approaches to this task. As its forty-ninth session in 1997, it concluded that the item raised two sets of issues, those related to “prevention” and those related to “international liability”. The Commission decided to focus on prevention and, at its fifty-third session in 2001, completed work on “prevention of transboundary damage from hazardous activities”, drawing substantially on the approach contained in the Convention on the Law of the Non-Navigational Uses of International Watercourses\(^\text{72}\). The fifty-sixth General Assembly welcomed the completion of the draft on prevention and asked the Commission to resume its consideration of the liability aspects of the topic. The commission at its fifty-fourth Session responded positively to the request, appointing P.S. Rao of India as special rapporteur and establishing a working group to address the topic.

The Commission’s recent draft on prevention is collection of primary rules pure and simple, and its relationship to the state responsibility article is no different from that of any other primacy rules. On the liability issue, whether the Commission will be dealing with primary rules, secondary rules, or some other approach will become clear only after it begins to do some drafting. It must be noted that a significant body of opinion on the Commission, albeit a minority, has expressed implicit or explicit doubts as to whether a broadly acceptable normative instrument on liability is achievable. The lack of enthusiastic support for, or even acceptance of some of former Special Rapporteur Barbosa’s drafts suggests that there may be grounds for the pessimistic view.

### 6.5.3 Attribution

The degree to which states should be held responsible for conduct involving private actors is an increasingly significant contemporary issue, as non-state actors such as Al Qaeda, Somali warlords, multinational corporations, and non-governmental organizations play greater international roles, and as governments privatize some traditional functions and enter into a variety of public-private collaborations with international organizations and private actors. Articles 4-11 address these matters through rules of “attribution” that indicate when an act should

be considered an act of a state. These rules are generally traditional and reflect a
codification rather than any significant development of the law.

Despite their apparent concreteness, the standards stated in some rules involve
important ambiguities, and their application will often require significant fact finding
and judgment. What constitutes “Governmental authority” for purposes of Articles 5
and 9, for example? What does it mean to be under a state’s “direction or control” for
purposes of Article 8? As the commentaries note, important international tribunals
have approached these questions in quite different ways. The commission was well
aware that the articles on attribution sometimes suggest more precision or
concreteness than is found in the world. Article 4 (2), for example, defines a state
organ to include any person or entity having that status under a state’s internal Law.
But, as the commentary notes, national law may be an imperfect or incomplete guide,
or have nothing to say on the matter at all, so that particular factual circumstances
rather than national law will be determinative.

Nevertheless, the rules of attribution after starting points for assessing
responsibility for private conduct or for conduct mixing state and nonstate actors.
Article 5 concerns the variety of entities that are not formally organs of the state and
that may not fall under its immediate direction or control, but that nevertheless carries
on aspects of governmental authority, including private security firms. Article 8
deals with cases where a person or group acts under a state’s instructions, direction, or
control. In failed or poorly functioning states, Article 9 provides for state
responsibility if nonstate actors step into perform governmental functions in the
absence or default of official authority. And Article 11 posits attribution where a state
acknowledges and adopts private conduct, as in the Hostages case. This rule operates
retroactively, making a state responsible for prior conduct by private parties if it
“acknowledges and adopts the conduct as its own”.

73 Article 8 makes conduct by a person or group attributable to the state if the person or group “is in
fact acting on the instructions of, or under the direction or control of that state”.
74 The commentaries note the different approaches to the meaning of “control” taken by the
International Court of Justice in its 1986 Nicaragua Merits Judgment, as compared with the
seemingly less demanding standard applied by the International Criminal Tribunal for the Former
Yugoslavia in prosecutor V Tadic in assessing individual criminal responsibility. Commentaries,
Art 8 Paras 4,5
75 Commentaries, Art. 4, Para.11
76 Commentaries, Art 5, Para 1-7
77 United States Diplomatic and Consular Staff in Tehran (U.S. V Iran), 1980 ICJ REP.3 (May 24)
Still, the rules of attribution set forth in the articles represent only the tip of the iceberg as to when private acts can create state responsibility. Most such responsibility arises as a result of private conduct. Thus compliance by states with environmental agreements depends in many cases not simply on state action, but on the actions of private parties, whose failure to reduce their pollution to the levels required by an agreement may cause a state to violate its obligations. Similarly some human rights agreements, such as the Convention on the Elimination of Racial Discrimination, require states to prevent abuses by private parties.

Perhaps the most dramatic contemporary example of the challenges in applying the ILC’s rules of attribution and their potentially limited role in relation to relevant primary rules is posed by the question of potential state responsibility for Al-Qaeda’s actions connected with the September 11 terrorist bombings. Several articles might be relevant, such as Articles 5 (Persons exercising elements of governmental authority), 8 (conduct directed or controlled by a state), and 11 (conduct acknowledged and adopted by a state). However, whether any of these articles applied would depend upon an inquiry into murky underlying facts. Responsibility seems more likely to arise through the operation of primary rules, such as customary or conventional rules prohibiting aggressive uses of territory or harboring terrorists, and binding Security Council resolutions.

6.5.4 Criminal Responsibility

Throughout the articles long history, perhaps more ink was spilled over the issue of state crimes than any other. This debate often produced more heat than light. Some considered it important for the commission’s rules to reflect that not all violations of international obligations are of equal consequence. Certain types of conduct, the violation of certain rules, are profound matters and should be recognized as such. Those on the other side argued that the proposed civil-criminal distinction

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had no clear foundation in international law, nor much operational significance, as the consequences proposed for more grievous varieties of breaches did not differ greatly from those foreseen for ordinary breaches.

As work on the articles reached its final stages, the gap between the camps narrowed. There was considerable agreement that not all violations of primary rules are alike, accompanied by growing acceptance that the articles should somehow reflect this distinction, albeit perhaps not through the disputed vocabulary of “Crimes of States”. Finally, some recognized that certain obligations involve community rather than individual interests, and that a broader range of states, not simply a single stage suffering particularized injury, should be able to invoke them.

In the end, the articles manage only a limited resolution of these long contested issues. Articles 40 defines a general category of “serious breaches of obligations under peremptory norms of general international law”, the commentary suggests that these included aggression, slavery, genocide, racial discrimination, apartheid, torture, and violation of “the basic rules of international humanitarian law” and of the right to self-determination. But Article 41 sets forth only limited consequences for such breaches, states shall cooperate to bring them to an end, and not recognize or help maintain situation resulting from them. Significantly, the state committing the violation incurs no additional obligations as a result of committing a serious breach of a peremptory norm; the additional consequences pertain to other states. At this stage in the development of international law, the commission could not articulate more extensive propositions regarding the special consequences of grave breaches of international law, leaving the matter to be clarified through future practice.

6.5.5 Consequences of an International Breach

Commentators have sometimes contrasted an obligation and a right based approach to state responsibility, although, since rights and obligations are logical correlatives, whether this is a distinction with a practical difference remains unclear.

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82 Commentaries, Art.40, Paras. 1, 4, 5. Dinah Shelton’s essay suggests reservations about the prominence given to peremptory norms in Article 40. Shelton, Supra Note 10, at 841-44
83 At the final stages of its deliberations, the commission deleted a related provision dealing with damages reflecting the gravity of such breaches. ILC 53rd Report, Supra Note 1, Para 49
84 See, e.g. Crawford, Supra Note 1, at 25, 38-39
85 See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913)
In any event, the articles are framed in language utilizing both approaches. The breach of an international obligation entails two types of legal consequences; it creates new obligations for the breaching state, principally, duties of cessation and nonrepetition (Article 30), and a duty to make full reparation (Article 31), and it creates new rights for injured states, principally, the right to invoke responsibility (Article 42 and 48) and a limited right to take countermeasures (Articles 49-53). The obligations of breaching states are set forth in part 2 of the articles, the rights of other states in part 3.

Duties of the breaching state as developed more fully in Weiss’s essay, the articles focus predominantly on the interstate dimension of the international legal system. Although they articulate the secondary obligation of cessation non repetition, and reparation in general language, as obligations of the responsible state for the breach of any primary duty, Article 33(1) characterizes these secondary obligations as being owed to other states or to the international community as a whole. Article 33 acknowledges that states may also owe secondary obligations to nonstate actors such as individuals or international organizations, but only in a sovereign clause providing that the articles do not prejudice rights occurring directly to a person or entity other than a state.

The traditional state centered orientation of the ILC’s work is even more apparent in the articles regarding the invocation of responsibility (Article 42-48). As Weiss indicates, these articles do not deal with how state responsibility is to be implemented if the holder of the right is an individual or an organization (for example, an individual affected by human rights violations or an international organization). Thus, the articles do not address the substantial body of practice reviewed in Weiss’s essay concerning the capacity of nonstate parties to assert international claims.

The principal element of progressive development in this area is Article 48, which provides that certain violations of international obligations can affect the international community as a whole such that state responsibility can be invoked by states on behalf of the larger community. This provision picks up on the ICJ’s

86 CRAWFORD, Supra Note 1, at 11 (noting the rejection of proposal for Article 1 to qualify the term “obligation” by “towards another State” or “to an injured State”); see e.g., Article 12 (breach of an obligation occurs whenever there is non conforming conduct, regardless of the origin or character of the obligation)

87 Art.33 (2)
celebrated suggestion in Barcelona traction that some obligations are owed *erga omnes*, toward the international community as a whole. However, the regime established by the articles is communitarian only to a limited degree. Article 48 permits any state to invoke responsibility for such violations without an authorizing community decision. It thus recognizes community right but does not predicate their assertion on community decision.

### 6.5.6 Remedies

The rules on restitution, compensation, and so forth in part 2 are stated as obligations of the breaching state rather than as “remedies”. This reflects the fundamental conceptual architecture of the articles, namely, that the breach of an international obligation gives rise to a new legal regime, with its own characteristic obligations and rights. These obligations exist whether or not they are ever invoked by another state or ordered by an international tribunal.

The basic obligations set forth in part 2 explored by Shelton in much more detail are to cease the wrongful conduct and in some cases to after appropriate assurances and guarantees of non repetition, and to make full reparation (if possible, through restitution, and otherwise through compensation and satisfaction, in that order of priority). Consistently with their overall philosophy, the articles take a one size fits all approach, subject to an important qualification, the secondary obligations of responsibility are the same, regardless of the gravity of the breach or the subject matter or type of obligation involved. As Shelton observes, the commission’s approach, particularly the primacy given to restitution, manifests the continuing power of Chorzow Factory. However, it also reveals the splendid isolation of the ILC and to some extent international law generally from developments in other areas of law, where scholars and some courts have sought to elaborate a more nuanced,

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88 *Barcelona Traction, Light and Power co. (Belg. V. Spain)* New Application, 1970 ICJ REP.4, 32 (Feb 5)
89 Art. 30
90 Art.31, 35-37. Notwithstanding the seemingly absolute wording of these articles, Crawford argues that they are intended to preserve the ability of claimant states “to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution or it may content itself with declaratory relief”. CRAWFORD, Supra Note 1, at 44
91 Art. 40,41
92 *Chorzow Factory (Ger V. Pol)*, 1928 PCIJ (Ser.A.) No.17 (Sept.13)
variegated set of consequences responding to different sorts of breaches in different ways in some cases, through sanctions, in other through pricing mechanisms.\(^{93}\)

### 6.5.7 Countermeasures

As Bederman observes that, self-help typically plays an important role in legal system lacking strong vertical enforcement mechanisms. Despite pleas by some countries not to legitimize countermeasures given the potential of their abuse, Articles 49-54 attempt to steer a middle course they accept the lawfulness of countermeasures but make them subject to significant substantive and procedural qualifications that seem largely to reflect existing customary law.

Substantively, countermeasures may be used only to induce a state to cease a wrongful act and to make reparations, they must be commensurate with the injury suffered, and they may not affect obligations that benefit individuals or the international community as a whole. Procedurally, the offended state generally must first call on the responsible state to fulfill its obligations, notify it of any intention to take countermeasures and then suspend the countermeasures if the wrongful action has ceased and the dispute is pending before a binding decision making body.\(^{94}\) Bederman’s essay speculates on whether these provisions will serve as a “gentle civilizer of nations”\(^{95}\) by limiting states resort to countermeasures and, if so, whether this result would be desirable in view of the lack of strong vertical enforcement in international law.

### 6.5.8 Dispute Settlement

Particularly during the tenures of Special Rapporteurs Riphagen and Arangio-Ruiz, the commission was faced with proposals to include substantial dispute settlement machinery in the articles. The first reading text approved in 1996 included an elaborate hierarchical structure for the settlement of dispute regarding the interpretation or application of the articles.\(^{96}\) It contained provisions on negotiation, good offices, conciliation and mandatory arbitration of disputes involving resort to countermeasures; all rounded out by annexes on conciliation commissions and arbitral

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93 See Calabresi and Melamed, Supra Note 44, Robert Cooter, Prices and Sanctions, 84 COLUM L. REV. 1523 (1984)
94 Art. 52 (1), (3)
95 Supra Note 9 at 817 (citing Martti Koskenniemi, The Gentle Civilizer Of Nations: The Rise And Fall Of International Law, 1870-1960(2001))
96 First Reading Articles, Pt 3 (Arts. 54-60 and Annexes I, II), reprinted in CRAWFORD, Supra Note 1, at 362-65
tribunals. The commission also considered elaborate proposals for dispute settlement procedures to assess whether an international crime had been committed\textsuperscript{97}.

The proposed linkage between resort to counter measures and compulsory dispute settlement was highly controversial, not least because it permitted a target state to toward the good faith use of countermeasures through false recourse to settlement procedures\textsuperscript{98}. Ultimately, the commission omitted dispute settlement procedures, compulsory and otherwise, from its final text, leaving it to the General Assembly “to consider whether and what form of provisions for dispute settlement included in the event that the Assembly should decide to elaborate a convention\textsuperscript{99}.

State responses to the draft on dispute settlement in their written comments and statements in the General Assembly were not encouraging. A majority of those who spoke to the issues saw them in a negative light. Some members of the commission were particularly impressed by the argument that the commission’s system gave the misbehaving party the capacity to invoke third-party procedures and that this option was inherently unjust. Both the considerable numbers of states speaking against compulsory dispute settlement and the strength of some of their negative comments could not be ignored nor could the fact that the Commission did not usually make recommendations concerning dispute settlement, generally leaving such issues for decision by a more political body or conference of states. The Commission was also mindful of its own decision to leave open the question of the form that its draft should be given, that is, whether it should be a treaty or a declaration by the General Assembly endorsing or noting the appended articles. Moreover, those commission members most sympathetic to including dispute settlement provisions derived some comfort from the fact that the excellent 1996 draft to which Sir Derek Bowett had contributed so much was in its record and available for states to take up if they wished.

In the end, the Commission took a balanced position, reflecting its nature as an independent body of experts rather than representatives of states, but a body whose clients, to whom it reports and who can give life to its work product, are states. The commission was prepared at an earlier stage of its work to support a first reading text that posed a measured challenge to states to take positive steps to replace self help

\begin{thebibliography}{9}
\bibitem{98} Supra Note 9, at 824
\bibitem{99} ILC 53rd Report, Supra Note 1, Para 60
\end{thebibliography}
with the rule of law. However, at the stage of final adoption, the commission chose not to include a body of provisions requiring compulsory dispute settlement that might render the totality of its work suspect in the eyes of many of its customers. In like vein, the commission’s earlier rejection of Arangio-Ruiz’s proposals concerning so-called crimes of states and other peace and security issues reflected member’s recognition that such proposals simply would not fly and that it would be counterproductive to urge them.

### 6.6 Issues of Technique

The ILC texts are lawyers’ documents. Much of their wording is lean and polished, reflecting years of debate and the ministrations of skilled drafting committees. As Caron’s essay suggests, this confident, direct quality adds to their seeming authority and certainty. Indeed as Caron warns their seeming clarity and formal presentation may lead readers to take the articles too much at face value, believing that they indeed state “the law”. This impression can be deceptive. The texts not infrequently embody either elements of “progressive development” or the commission’s judgments regarding the state of existing law, judgments that become apparent only in the commentaries or perhaps through study of a text’s entire history.

Article 25 on necessity as a “circumstance precluding wrongfulness” illustrates both the sorts of judgments that underlie some of the ILCS texts and the powerful effect of these texts on the law even before their formal adoption like some of the countermeasures provisions discussed by Bederman, the doctrine of necessity as articulated in Article 25 had a bootstrapping quality, helping to shape the law to match the draft.

The existence of a general defense of necessity in international law by no means enjoyed universal acceptance prior to adoption of the articles. Basic English language treatises on international law such as those by Akehurst, Brownie, Sorenson, and Von Glahn did not refer to the doctrine or treated it only in the context of the use of force in self-defense, although some continental writers accepted it more broadly. Moreover, as the commentary points out the tribunal in the rainbow

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100 Supra Note 9, at 819-22 (discussing “feedback loops” between the ILC and the ICJ)
101 See e.g., 1 Charles Rousseau, Droit International Public, 141-42, Sec 118 (1970)
warrior arbitration declined to apply the concept as recently as 1990\textsuperscript{102}. The arbitral awards and bits of state practice stitched together in the commentary to support the principle of necessity may strike some readers as dated ambiguous, or otherwise not particularly compelling\textsuperscript{103}.

Nevertheless, the principle came into the articles through Ago’s work\textsuperscript{104} and remained there unscathed through the years. In 1997 the ICJ gave it a powerful boost in the \textit{Gabcikovo-Nagymaros Case}\textsuperscript{105}. Focusing on the draft articles, the court agreed that necessity can preclude wrongfulness under international law, although it declined to apply the principle in the specific dispute. This recognition, in turn, provided sufficient sanction for the ILC to conclude that “on balance, state practice and judicial decisions” justified including necessity in the articles, subject to severe restrictions. Accordingly, to the extent that the ICJ judgment is cited in support of Article 25, legal development had a circular quality, the ILCS draft helped produce that judgment. Article 25 thus played an important role in its own validation.

\textbf{6.6.1 Issues Deferred}

The articles not infrequently defer significant matters for later clarification in the context of specific disputes. This reduces their usefulness to tribunals in the near term but should also allow the law to develop in a more flexible and experiential manner.

The articles repeatedly postpone issues in this fashion when they bump up against other systems of international law rules. In these cases, the commission does not attempt to sort out the consequences, which might often require analysis of primary rules. Instead, it inserts various savings clauses as dividing walls between the different systems providing that the articles are “without prejudice” other potentially

\begin{footnotesize}
\begin{itemize}
\item[102] Rainbow Warrior (N.N./Fr), 20 R.I.A.A. 217,254, 82 Ilr 499,555 (1990); Commentaries, Art.25 para.10
\item[103] Commentaries, Art.25, Para 5. The Commentary uses a key authority in an unfamiliar way, secretary of state Webster’s exchange with the British minister following the 1837 Caroline incident is invoked to support a necessity defense even though it is more commonly understood as having to do with self defense. R.Y.Jennings, The Caroline and McLeod Cases, 32 AII 82, 92(1938)
\item[105] Gabcikovo- Nagymaros Project (Hung/Slovak), 1997 ICJ REP. 4, 39-45 (Sept. 25)
\end{itemize}
\end{footnotesize}
relevant rules\textsuperscript{106}. These clauses sometimes indicate the commissions desire not to freeze other areas of law that are undergoing change\textsuperscript{107}.

As noted above in connection with the rules of attribution, the application of some articles to concrete cases may pose difficult issues of evidence and proof. And in other cases, the legal standards proposed seem deliberately vague and open ended. These vague formulations perhaps leave room for future development of the law though specific cases, but they leave a great deal to be resolved. For example Article 25 on necessity relies heavily on words of judgment. The commentary freely acknowledges this quality, observing that whether particular interest are “essential” so as to justify the invocation of necessity “depends on all the circumstances, and cannot be prejudged”\textsuperscript{108}.

Article 35 provides for restitution unless it results in a burden “out of all proportion to the benefit deriving from restitution”. Article 38 on interest does not indicate which of several possibilities are “the date when the principal sum should have been paid” the date the injury occurred or the date of the amount of liability was established or liquidated.

\textbf{6.6.2 The Key Role of the Commentaries}

Especially given such ambiguities and the sometime lean drafting and abstract character of the articles the commentaries provide vital insights. Most are marked by high quality, although the writers are not immune from the tautologies found elsewhere. A few commentaries are small gems of legal writing. They often identify or at least hint at lurking issues and provide crucial clarifications. The commentaries also present important propositions or qualifications not found in the articles at all\textsuperscript{109}. For example, the commentary to Article 16(on aid or assistance in committing a wrongful act) adds important limitations not contained in the text of the article. The commentary to Article 10(1), on attribution to a state of an insurrectional movement,

\textsuperscript{106} E.g., Art.19 (Articles 16-18 are “without prejudice to” a state’s responsibility where another state aids or assists, directs and controls, or coerces it in performing a wrongful act). There are clauses with similar effect in Articles 27, 33, 41,50,54,55,56,57,58 and 59. Articles 55 and 56 are “Supersaver” clauses, confirming the continued operation of Lex Specialis rules and other legal rules affecting states responsibility.

\textsuperscript{107} Commentaries, Art. 54, Para 6. The Commission was similarly careful in not attempting to list norms regarded as peremptory. Art. 40; Para 6. See also American Journal of International Law October 2002, p.10

\textsuperscript{108} Commentaries, Art.25, Para 15

\textsuperscript{109} Commentaries, Art. 16, Para.3
adds another significant qualification to the text, warning that the basic rule “should not be pressed too far in the case of governments of national reconciliation.”

Like the articles themselves, the commentaries may convey a deceptive degree of clarity and authority. Not surprisingly, they make heavy use of international court judgments and arbitration awards. Such materials can provide clear and groused statement of the law but there can be room for doubt whether states actually behave the way judges and arbitrators say they should. The commentaries rarely delve deeply into state practice or try to tease out the hazy manifestations of “law in practice”\textsuperscript{110}.

6.7 **The ILC’s Draft Articles on State Responsibility: Toward Completion of a Second Reading**

6.7.1 **The Second – Reading Process on State Responsibility**

In 2000, as its Fifty-Second Session, ILC completed an initial reconsideration of parts of the Draft Articles on state responsibility, as adopted on first reading in 1996.\textsuperscript{111} The Drafting Committee provisionally adopted a complete text of the draft articles and referred it to the General Assembly for comment.\textsuperscript{112} The intention is to adopt a final text, together with commentaries, in 2001.\textsuperscript{113} In the meantime the ILC itself has taken no substantive decision on the Drafting Committee’s text, which remains open to further revisions in the light of any comments made.

The second reading of the draft articles began in 1998, on the basis of detailed comments by Governments.\textsuperscript{114} The first reading text alone had taken more than thirty years to prepare, under the leadership successively of Special Reporters Robert Ago (1962-1979), Willem Riphagen (1980-1986) and Gaetano Arangio Ruiz (1987-1996). The basic conception of the draft articles and the content and structure of part 1 were the work of Ago. The initial articles in Part 2, including especially Article 40 defining the “injured State”, were prepared under Riphagen, whose sketch for the rest of Part 2 was then substantially revised and completed under Arangio-Ruiz, Part 3, dealing

\textsuperscript{110} See International Incidents, The law that counts in world politics (W. Michael Riesman and Andrew R. Willard, Eds., 1988)


\textsuperscript{112} American Journal of International Law, October, 2000, at p.1

\textsuperscript{113} Ibid p.2

with the settlement of disputes was added on the assumption that the text as a whole would become a Convention. In 1988 and 1999, the ILC completed a thorough revision of Part 1 (Articles 1-35).\textsuperscript{115} Although it made many changes in detail and considerably simplified the text, the basic conception and structure of Part 1 was maintained.\textsuperscript{116} There are still five chapters, which deal successively with general principles, attribution of conduct to the state, the breach of an international obligation, involvement of one state in the internationally wrongful act of another, and circumstances precluding wrongfulness. Of these chapters, the third, on the breach of an international obligation, was most significantly revised, having been reduced from ten to four articles. Particularly controversial was former Article 19, with its distinction between “international delicts” and “international crimes”. Quite apart from whether a distinct category of “state crime” exists in international law, Article 19 had no consequences within the framework of Part 1. For example, the same rules of attribution applied to “delicts” as to “crimes”, as did the so-called principle of objective responsibility embodied in Articles 1 and 2. After a divisive debate on the issue in 1998, the ILC decided that (a) Draft article 19 would be put to one side for the time being while the commission proceeded to consider other aspects of part one,(b) Consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (\textit{erga omens}), Peremptory norms (\textit{Jus Cogens}) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issue raised by article 19.\textsuperscript{117}

Thus, the issue remained to be dealt with, among many others, in the context of the second reading of Part 2.

Part 2 of the first reading text, originally entitled “Content, Forms and Degrees of International Responsibility” treated several complex and controversial issues, in particular the definition of the concept of an “injured state”, reparation, and countermeasures. During the ILC’s fifty second session; the special reporter


\textsuperscript{117} 1998, Report Supra Note 115, Para. 331
introduced five sections of his third report dealing with different aspects of part 2.\textsuperscript{118} The Commission successively discussed these sections and referred the proposed draft articles to the Drafting Committee. In the process the draft articles underwent significant restricting and rearrangement. In addition to part 2, now entitled “The content of State Responsibility”, there are two new parts; Part 2 bis dealing with the implementation of state responsibility (including countermeasures) and part 4, containing general provisions.\textsuperscript{119} This note briefly describes the major structural and conceptual changes from the first reading text of part 2.\textsuperscript{120}

### DRAFT ARTICLES ON STATE RESPONSIBILITY (2000)

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\textsuperscript{119} Part 4 Contains articles on Lex Specials(Art.56) and the relationship of the draft articles to the charter of the United Nations (Art.59), as well as saving clauses concerning responsibility of or for the conduct of an international organization (Art.57) and individual responsibility (Art.58)

\textsuperscript{120} Further information, in addition to the text of the reports and government comments, can be found online http://www.cam.ac.uk/rcil/ilcsr/statesp.htm & http://www.un.org/law/ilc/inded.htm
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6.7.2 Reconsideration of Part- 2

The text of part 2 of the draft articles as adopted on first reading was characterized by both positive and negative features on the positive side, the detailed and careful reports of Special Reporteur Arangio-Ruiz constituted the basis formulating the articles on cessation, reparation, and aspects of countermeasures, which marked a distinct advance. On the negative side, the articles parts 1 and 2 were poorly coordinated and the first reading had given inadequate attention to several crucial issues. These included, in particular:

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121 Aspects of that work have already been approved by international tribunals: for example, the general approach to countermeasures in Gabcikovo-Nagymaros Project (Hung.V.Slock.).Merits.1997 ICT REP.7 (Sept.25) and the inclusion of cessation as well as reparation as a consequence of responsibility in the Rainbow Warrior arbitration, 20 R.I.A.A.217, 270, Para 114(1990)

122 Supra Note 112, p.6
The identification of states entitled to invoke responsibility, either as an “injured state” or as one with a more general legal interest in the breach of the international obligation (the “differently injured” states);\(^{123}\)

- the choice between the forms of reparation by injured states and the relationship between the modes of reparation available to a state primarily affected by the breach and other legally interested States;

- the implementation of responsibility by injured states and other states with a legal interest in the breach (for example, the invocation of responsibility and cases involving a plurality of states); and

- the legal consequences flowing from what former Article 19 referred to as an “international crime” or, alternatively, from conduct amounting to a serious breach of an obligation to the international community as a whole.

(i) **States Entitled to Invoke Responsibility**

In the first reading text, Article 40, elaborating the concept of an “injured state, was a key provision. Indeed, it served as the hinge between the concept of the breach of an international obligation in part 1 and the “rights of the injured State” in part 2. Part 1 was concerned exclusively with obligations, part 2 exclusively with rights (including the right to take countermeasures), and Article 40 formed the sole link between them. That article identified, in a non exclusive way, the cases where a State or States right be considered to have a right correlative to the obligation breached. These varied from the basic right duty relationship of a bilateral treaty or a judgment of an international court between two states, to cases where the right arose under a rule of general international law or a multilateral treaty and all or many of the states bound by the rule or party to the treaty could be considered “injured”. Article 40(3) also stipulated that in the case of “international crimes”, all other states were injured and had a right to act.

This text of Article 40 presented many difficulties. The conversion from the language of obligation to the language of right was premature, and appeared to imply that all responsibility relations can be assimilated to classical bilateral right duty relations (an assumption contradicted by the ICJ in the Barcelona Traction Case.)\(^{124}\)

The article also seemed to equate all categories of injured state, apparently ascribing


124 *Barcelona Traction Light and Power Co., Ltd. (Second Phase) (Belg.v.Spain)*, 1970 ICJ REP.3(Feb.5)
the same independent (Subjective”) rights to all. Even though the Commentary warned that the different categories were not identical in terms of their consequences, later articles in part 2 failed to spell out the ways that multilateral responsibility relations differ from bilateral ones. In particular, Article 40 was prolix in its treatment of bilateral responsibility, and erratic and uneven its treatment of multilateral obligations. For example, it distinguished for no apparent reason between treaty and non-treaty obligations, whereas the draft articles generally proceed on the basis of equality of treaty and custom for the purposes of responsibility. It made the unjustified assumption that regimes of common interest can be created only through express stipulations in multilateral treaties. It singled out human rights for special treatment in vague and overly broad terms and in a way that conflicted or overlapped with other aspects of the definition.

These deficiencies necessitated a complete reformulation, leading to two new articles. One (Article 43) defines in considerably narrower and more precise terms the concept of the injured State, drawing in particular on the analogy of Article 60(2) of the Vienna Convention on the Law of Treaties.\textsuperscript{125} The second (Article 49) deals with the invocation of responsibility in the collective interest, in particular with respect to obligations owed to the international community as a whole, giving effect to the Court’s dictum in the Barcelona Traction Case. The new articles thus draw an essential distinction for the purposes of state responsibility between breaches of bilateral obligations and (in particular, obligations to the international community as a whole). The former category covers the breach of an obligation owed to a state individually. Also treated as “injured states” are those which are particularly affected by the breach of a multilateral obligation, either because they are “specially affected”\textsuperscript{126} or is integral in character, so that a breach “affects the enjoyment of the rights or the performance of the obligations of all the state concerned”.\textsuperscript{127} Article 43 specifies the category of “Injured States” in this narrower sense:

A state is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed:

(a) To that State individually; or

\textsuperscript{125} Supra Note 112, p.7
\textsuperscript{126} Second Reading, Supra Note 112, Art.43(b)(i)
\textsuperscript{127} Ibid Art. 43(b)(ii)
(b) To a group of states including that state, or the international community as a whole, and the breach of the obligation:

i. Specifically affects that State; or

ii. Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned.

The contrast is with the “other States” entitled to invoke responsibility, which are specified in Article 49(1): any state other than an injured state is entitled to invoke the responsibility of another state if:

a) The obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest;

b) The obligation breached is owed to the international community as a whole.

This category recognizes that other states, by virtue of their participation in a multilateral regime or as a consequence of their membership in the international community, have a legal interest in the performance of certain multilateral obligations.

(ii) Modes of Reparation

On the commission of an internationally wrongful act, certain consequences ensue as a matter of law; the general principles involved are set out in chapter 1 of part 2. The responsible state is under a duty to continue to perform the obligation breached (Article 29) and to cease the wrongful act and after appropriate assurances and guarantees of non-reparation (Article 30). That state is also under an obligation to make full reparation for the injury caused, whether material or moral, by its wrongful conduct (Article 31). It may not plead its internal law as an excuse for failure to comply with these obligations (Article 32).

Chapter II goes on to elaborate the forms that reparation by the responsible state may take, in particular, it refers, as did the draft articles on first reading to restitution, compensation, and a satisfaction. Restitution is maintained as the primary form of reparation, but if it is unavailable or insufficient to ensure full reparation, compensation is payable for “financially assessable” loss. Where injury results that cannot be made good by either restitution or compensation, the responsible state is

129 Supra Note112, P.8
130 Ibid p.9
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obliged to give satisfaction for the injury caused. An important addition to this chapter is an article dealing with interest. Such an article had been proposed by special reporter Arangio-Ruiz, despite a considerable measure of support for the basic principle in the plenary debate, his proposal miscarried and was dropped. Instead, interest was mentioned briefly and vaguely in the article on compensation. On second reading, a separate article on interest was endorsed. It provides that “interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation”. It goes on to refer in general terms to the interest rate and mode of calculation, and provides that “interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled”.  

(iii) Election between the Forms of Reparation by an Injured State

Part 2 as adopted on first reading appeared to conceive of all the consequences of an internationally wrongful act as arising automatically, by operation of law. This assumption required that those consequences be defined a priori and in terms that apparently allowed for no element of choice or response by other states, or indeed by the responsible state itself. This approach ignored the distinction important in practice as well as in theory between the consequences that depend upon the subsequent reactions of the parties. The latter may range from refusal to make reparation (leading to the possibility of countermeasures) to waiver by the injured State (leading to loss of the right to invoke responsibility) with various intermediate possibilities. These issues concern the implementation of responsibility and are the subject of part 2 bis.

The first chapter of part 2 bis deals with issues concerning the modalities of and limits upon invocation of responsibility by an injured state, including the right to elect the form of reparation. In general, an injured state is entitled to choose between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the Chorzow Factory Case, and as Finland eventually chose to do in its settlement of the Great Belt Case. Or it may contend itself with declaratory relief, in general or in relation to a particular aspect of its claim.

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131 Second Reading, supra note 112, Art.39. For discussion of interest, including compound interest, see third report, supra note 118, add.1, paras.196-214. Chapter II also provides for account to be taken, in the determination of reparation, of the “contribution to the damage by willful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought” [Article.40].
132 1927 PCIJ [Ser.A] NO.9, at 21 (July 26)
133 Passage Through the Great Belt (Fin.V.Den) (Provisional Measures), Order 1991 ICJ Rep.12 (July 29)
In the first reading text, the right to elect between the forms of reparation was not spelled out, though it was intended to be encompassed in the formula “The injured state has the right”, which began each of the articles on reparation. These articles are now expressed in terms of the obligations of the responsible state. This step was taken, in the first place, to allow for those cases where the same obligation it owed simultaneously to several, many, or all states. But it also helps clarify the right of election that an injured state may have between the forms of reparation, which is helpful since the position of third states interested in (but not specifically injured by) the breach will be affected by any valid election of one remedy rather than another by an injured state. On the other hand, the right to choose is not unqualified and the present draft recognizes it rather indirectly by the combination of the provisions on invocation (Article 44(2)) and waiver (Article 46(a)).

(iv) Implementation of Responsibility: Other Issues

Although the secondary legal relationship of responsibility may arise by operation of law on the commission of an internationally wrongful act, in practice some other injured states must respond, so as to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfill the obligation, through formal protest and consultations, to some form of third party settlement. The basic requirements are that the injured state must draw the attention of the responsible state to the situation and call upon it to take appropriate steps to cease the breach and provide redress. These requirements are flexibly expressed in Article 44, which provides that an injured state that invokes the responsibility of another state shall give notice of its claim to that state, and may also specify the conduct that the responsible state should adopt to cease the wrongful act, if it is continuing, and the form reparation should take. The latter specifications do not bind the responsible state, which is only to comply with its obligations under part 2. Nonetheless the responsible state may find it helpful to know what would satisfy the injured state, in the interest of facilitating resolution of the dispute. If a state that has protested a breach is not satisfied by any response by the responsible state, it is entitled to invoke that state’s responsibility by seeking, such measures of cessation, reparation, etc., as are provided for in part 2. While the draft articles do not concern the judicial and admissibility of any claim pursued by the injured state before an
international court or tribunal, certain questions that would be classified under admissibility before an international court are more fundamental they are conditions for invoking a state’s responsibility in the first place. The most obvious examples are the requirements of nationality of claims and exhaustion of local remedies, dealt with in Article 45. The Commission expressed both conditions in a general and flexible manner, recognizing that a detailed elaboration of the relevant rules relating to each will be considered in its study on diplomatic protection.

A further issue that falls under the fabric of the invocation of responsibility by an injured state is the loss of the right to invoke responsibility. By analogy with Article 45 of the Vienna Convention on the Law of Treaties, the Commission has specified two circumstances in Article 46 where the responsibility of a state may not be invoked: waiver of the claim by the injured state and unreasonable delay. Waiver may be directed to the breach itself, or to its consequences, and may apply to only one aspect of the legal relationship between the injured state and the responsible state.

Although a waiver may be inferred from the conduct of the states concerned, or from a unilateral statement, the conduct or statement must be clear and unequivocal. Somewhat more controversial is the loss of the right to invoke responsibility arising from delay in bringing the claim. The authorities present an overall picture of considerable flexibility. Contrary to what the expression “delay” may suggest, international courts have not engaged in a mere exercise of measuring the lapse of time and applying clear cut time limits. Rather, they have found the decisive factor to be whether the respondent could have reasonably expected that the claim would no longer be pursued. This notion of unreasonable delay amounting to prejudice underlies Article 46(b), which precludes the invocation of responsibility, where the injured state “is to be considered having, by reason of its conduct, validly acquiesced in the lapse of the claim”.

One matter not expressly dealt with in the draft articles adopted on first reading was the general topic of claims of responsibility relating to the same act or

134 For example, the principle in Monetary Gold, Removed from Rome in 1943, Preliminary Question. 1954 ICJ REP 19(June 15)
135 As adopted on first reading, Art.22, Exhaustion of local remedies, clearly adopted a “Substantive” view of that requirement. Its formulation in Article 45(b) is much more neutral and even tends toward the “Procedural” view.
136 Supra Note 112, p.9
138 See the review in Third Report, Supra Note 118, Add.2, para.258
transaction but involving a plurality of states. This problem differs from that of multilateral obligations, though it overlaps with it to a degree. The legal basis for asserting the responsibility of each of the states involved in particular conduct might well be different, and even if it were the same, the obligation in question might be owed severally by each of the responsible states to each of the injured states. In respect of both situations (the invocation of responsibility by several states and the invocation of responsibility against several states), the general position taken by international law seems to be straightforward. Each state is responsible for its own conduct with respect to its own international obligations. Each injured state in the strict sense used in Article 43 is entitled to claim against any responsible state for reparation with respect to the losses flowing from and properly attributable to the act of that state. Two provisions apply to such claims: on the one hand, the injured state may not recover, by way of compensation, more than the damage it has suffered and on the other hand where more than one state is responsible for the same injury, questions of contribution may arise between them. The Commission included two new articles, Articles 47 and 48, in the revised text to cover these situations of a plurality of injured and responsible states. They are without prejudice to special regimes of joint and several liabilities that may be provided for in specific agreements.139

(v) Relation between Forms of Reparation Available to Injured and other State

The distinction between injured states and other states entitled to invoke responsibility affects the relationship between the modes of reparation available to each.140 Where a state is the particular victim of a breach of a collective or community obligation, its position is assimilated, in effect, to that of an injured state in the bilateral context. Thus, a “specially affected state” or a state injured by virtue of the violation of an integral obligation may seek both cessation and reparation in all aspects, and may validly elect to receive compensation rather than restitution, for example, in cases where the breach has made future performance of no value to it. Where a number of states are particularly injured by the breach, the draft articles do not impose any legal requirement of coordination or joint action on them, since each

139 For a review of some of these, See Third Report, Supra Note 118, Add.2, Para 268-76
140 The Drafting Committee did not accept the Special Reporter’s terminology of “states having a legal interest” for the latter category or the granted that injured states also have a legal interest, and as a result of disagreements over the interpretation of key passages in the Barcelona Traction Judgment.
is affected by definition in terms of its own legal and factual situation and should be free to respond to the breach in its own right. The position of the broader class of states interested in the breach of a collective or community obligation is to some extent ancillary or secondary. They have the right to call for cessation of the internationally wrongful act and for assurances and guarantees of non repetition. They may also insist that the responsible state comply with the obligation of reparation under chapter II of part 2, though only in the interests of the injured state, which is the one that is primarily interested in resolving the dispute. On the other hand, collective or community obligations may be breached without injuring any state, for example, where the primary victim is a human group or individual, or where there are no specific identifiable victims at all. Where the primary victim is not a state, any state party to the relevant collective obligation has the right to invoke responsibility by seeking cessation, assurance and guarantees of non repetition, and where appropriate, reparation in the interests of the injured person or entity.\(^{141}\)

In the case of “victimless” breaches lacking an injured state or particular beneficiary of the obligation breached in whose interest reparation can be sought; third states may be limited to seeking cessation and assurance or guarantees of non repetition.

\((vi)\) Countermeasures

If cessation or reparation is denied by the state responsible for an internationally wrongful act, the draft articles provide a further mechanism for the purpose of implementing responsibility, countermeasures. In the first reading text draft Articles 47-50 dealt with countermeasures. These articles were refined on second reading particularly to stress the instrumental function of countermeasures in ensuring compliance,\(^{142}\) to delimit both the prohibited subject matter and the effects of countermeasures\(^{143}\) and to clarify the procedural conditions for their exercise.\(^{144}\) Two new articles were added, dealing with (1) “multi lateral” countermeasures and (2) the termination of countermeasures.\(^{145}\) Articles 50-53 (formerly 47-50) define the permissible scope and effect of countermeasures taken by an injured state, as define in Article 43. Such a state or states may take countermeasures on their own accounts

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141 Second Reading, Art.49(20)
142 Endorsed by the International Court in Gabcikovo-Nagyamaros Project (Hung.V.Slovk) Merits.1997 ICJ REP.7, 56-57 Para 87 (eppt.25)
143 Second Reading, Articles 51, obligations not subject to Countermeasures
144 Particularly the requirement that Countermeasures should be commensurate with the injury suffered, Id., Article.52, Proportionality
145 Ibid Art.55
subject only to the substantive and procedural conditions set out in Articles 52 and 53. The position is somewhat different as regards the right of the states to take countermeasures the right of states legally interested in a breach of a collective or community obligation does not accrue to them for their personal interest, but in the collective interest. It is distinct from the interest of a state, person, or entity that is the specific victim of the breach (a state subjected to an armed attack, a people denied the right of self-determination etc). states not directly affected\textsuperscript{146} that assert a legal interest in compliance are not seeking cessation or reparation on their own behalf but on behalf of the victims and or in the public interest.

The primacy of the interests of the actual victims needs to be acknowledged in the taking of countermeasures. Where a state is the victim of a breach (and other states interests, if any, are more general), the victim state should have the right to decide whether and what countermeasures should be taken within the overall limits laid down by the draft articles. By analogy to the International Courts approach to collective self-defense in the \textit{Nicaragua Case},\textsuperscript{147} third states cannot, in effect, intervene in a dispute by taking countermeasures if the principal parties wish to resolve it by other means. Countermeasures by third states may thus be taken only at the request and on behalf of an injured state subject to any conditions that it lays down and to the extent that it is itself entitled to take those countermeasures. In particular, all the countermeasures taken are to be considered in determining whether, overall, the response is proportionate, and if the responsible state is cooperating with the injured state in resolving the dispute, other states are bound to respect that process. This concept of “collective” or “multilateral countermeasures” is embodied in Article 54(1), according to which the “interested” states referred to in Article 49 may take countermeasures “at the request and on behalf of any state injured by the breach, to the extent that state may itself take countermeasures”. Countermeasures against breaches when there is not injured state are dealt with in the framework of serious breaches of obligations to the international community as a whole, which are discussed in the following section.

\textsuperscript{146} Such as Ethiopia and Liberia in South West Africa (Eth. V.S.Afr. liber.V.S.Afr.) (Second phase) 1996 ICJ REP.6 (July 18)
\textsuperscript{147} In Military and Paramilitary Activities in and Against Nicaragua (Nicar.V.U.S.). Merits, 1986 ICJ REP.14.105.Paara199 (June27) the International Court noted that action by way of collective self defense could not be taken by a third state except at the request of the victim (the state subjected to the armed attack). The fact that the rules relating to the use of force give rise to obligations erga omnes (i.e., collective obligations) makes the analogy a reasonable, if not compelling, one.
(vii) The “Article 19” Problem: Serious Breaches of Obligations to the International Community

As already noted, the most controversial issues raised by the first reading text of the draft articles was the category of “international crimes” in Article 19, and the Consequences attaching to that category in Articles 40(3) and 51-53. In 2000 the commission returned to these questions, seeking to address the concept of international crime within the framework of serious breaches of obligations to the international community as a whole. In effect, this approach amounted to a compromise between the positions of the advocates of a district category of the most serious wrongful acts. Broadly, the elements of the compromise are as follows. First, Article 19 itself was deflected and the term “Crime” does not appear in the text. This is not just a terminological matter. Part 1 proceeds on the basis that a state’s internationally wrongful acts form a single category and that the criteria for such acts (in particular, the criteria for attribution and the circumstances precluding wrongfulness) apply to all without reference to any distinction between “delictual” and “criminal” responsibility. Second, the notion of “international crime” was broken down into district components, more closely related to the twin concepts of peremptory norms and obligations to the international community as a whole, which provided its legal underpinning’s. Thus peremptory norms are referred to expressly or implicitly, in situations involving nonderogability, while obligations to the international community as a whole serve as the vehicle for articulating the widest category of legal interests of states for the purpose of invoking responsibility.

In both cases the draft articles focus primarily on the character of the obligation breached, rather than the circumstance of the breach. Third, part 2 includes a chapter concerned with serious breaches of obligations to the international community as a whole. That chapter seeks to embody the values underlying former Article 19, while avoiding the problematic terminology of “crimes”. But it required the ILC to consider two further issues: whether any additional consequences should be attached to

149 Questions of the individual responsibility (Whether Civil or Criminal) of state officials are reserved by Article 58. These are treated as distinct from state responsibility
150 See Second Reading, Arts.26(2) (a), 30, 46, 51 (1) (d)
151 See id., Arts.41, 49, 54 (1) and (2)
“serious breaches” by way of reparation; and whether other interested states could take countermeasures in response to such breaches.

One of the principal criticisms of the treatment of international crimes in the first reading text was the limited nature of the consequences that attached to the commission of an international crime, over and above the normal legal consequences flowing from commission of any internationally wrongful act. Former Article 52 set forth only the following consequences regarding responsibility for the commission of a “crime” as distinct from a “delict”.

- restitution was required, even if the burden of providing restitution was out of all proportion to the benefit gained by the injured state instead of compensation (whereas proportionality was a requirement for delicts);
- restitution could seriously jeopardize the political independence or economic stability of the responsible state; and
- likewise, measures by way of satisfaction could ‘impair the dignity’ of the responsible state.

These “Consequences” are largely incidental and even unreal. They were deleted from the reformulated provision dealing with the consequences of serious breaches of obligations to the international community (Article 42). In their place the Commission endorsed the possibility of the award of damages proportionate to the gravity of the breach; such damages would reflect the egregious nature of the breach and seek to deter its commission in the future.\(^{152}\) They would be initiated by the state that was itself the victim of the breach, or when there is no such state, by any other state acting on behalf of and in the interests of the individual victims of the breach.\(^{153}\)

**Collective Countermeasures:** “Collective countermeasures” is the somewhat ambiguous term used in the third report to describe reactions to breaches of collective obligations taken by states that are not directly affected by the violation on behalf of the victim or in the community interest. These measures are not limited to situations, where some or many states act in concert. The collective element may also be supplied by the fact that the reading state is asserting a right to respond in the public interest to a breach of a multilateral obligation to which it is a party, though it is not individually

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\(^{152}\) Article 42 subsumes this aspect of former Article 45, dealing with the award of substantial damages by way of satisfaction.

\(^{153}\) In addition to obligations on the responsible state, in cases of serious of obligations to the international community as a whole; the revised draft retains the obligations placed on third states by former Articles 51-53, though in a consolidated and abridged form
injured by that breach or by the fact that the measures are coordinated by a plurality of involved states. Despite its admittedly sparse and selective nature, state practice regarding collective countermeasures\textsuperscript{154} suggests the following observations:

- no distinction based on the legal source (conventional or customary) of the collective obligation that was violated appears to exist;
- responses are generally made only in opposition to serve violations of collective obligations; and
- in cases involving one directly injured state, that state’s reaction seems to have been treated as legally relevant, if not decisive.

This practice provides at least some support for Article 54, which limits the extent to which states that are not themselves directly injured by the breach of a multilateral obligation can take action by way of countermeasures. In case, where the violation of a collective obligation directly injures one state, other states bound by the obligation are entitled to take countermeasures on behalf of the injured state, with that states consent and within the scope of the consent given. In asserting the proportionality of the reaction, the conduct of each state that takes countermeasures is to be taken into account. A second situation concerns countermeasures in cases where no state is “injured” notably, breaches of human rights obligations owed to the international community as a whole that affect only the nationals of the responsible state. The difficulty here is that, almost by definition, the injured parties will lack representative organs that can validly express their wishes on the international plane, and such cases run a substantial risk of being exacerbated if third states are rarely allowed to take countermeasures based on their own appreciation of the situation. On the other hand, it is hard to envisage that, faced with obvious, gross, and persistent violations of community obligations, third states should have no entitlement to act.

As a matter of policy, one finds a substantial reduction in the constraints and inhibitions against collective countermeasures in particular, concern about due process for the allegedly responsible state, and the problem of intervention in and possible exacerbation of an individual dispute where the breach concerned is gross, well attested, systematic and continuing. As a compromise between the reservations about collective countermeasures and the inappropriateness of allowing gross breaches to continue without allowing any state to intervene, the text limits such

\textsuperscript{154} Revived in third Report, Supra Note 118, Add.4, Para 391-90
countermeasures to those which are taken in response to serious and manifest breaches of obligations to the international community.\textsuperscript{155} States taking such countermeasures are obliged to co-operate so as to ensure that substantive and procedural conditions are fulfilled.\textsuperscript{156}

### 6.8 Revising the Draft Articles on State Responsibility

Since Part 1 of the Draft Articles was adopted in 1980, it has become part of the mental landscape of international lawyers, so much so that reviewing those 20 years later conveys an unusual feeling of intangibility. The central elements of the text seem sacrosanct, whether or not they have been generally accepted. Indeed, sometimes it seems as if two decades of controversy (as for example, with the distinction between composite and complex wrongful acts are the treatment of exhaustion of local remedies) is as entitled to respect as two decades of approval and application (as with the distinction between completed and continuing wrongful acts, or the principle embodied in Articles 1,3,4,5 and 10). And then there is the powerful idea, imperfectly formulated in Article19, that some questions of state responsibility concern the international community of states as a whole concern the international community of states as a whole, an idea which has certainly been controversial, has been widely approved, but at the same time has rarely been applied and in the form proposed in the draft articles is handily capable of application.\textsuperscript{157}

The first reading of the draft articles involved not one but four uneven periods of development, corresponding to the exigencies of the ILC’s timetable as well as to the activity of successive special reporters. The first period, under Garcia Amador, focused on the substantive rules of injury to aliens and their property. It is generally regarded now as a false. Start, notwithstanding the quality of much of the work and the survival of some of it’s (under the species of secondary rules) in the reports of his successor, Robert Ago. Ago was appointed in 1963, but the major consideration of his reports spanned the decade of the 1970s, being completed only after Ago’s election to the International Court. The Ago period established the basic conceptions underlying the project, even though only part 1 could be completed. There were then two

\textsuperscript{155} Second Reading, Art.54(1)  
\textsuperscript{156} Ibid. Art.54(3)  
\textsuperscript{157} As witness the fact that the notion of obligations erga omnes was announced by the court in a case involving diplomatic protection of a failed company, and was avoided, unsatisfactorily, in the two cases where it might have been applied: South West Africa Case (Second phase), ICJ Reports (1966) and case concerning East Timor, ICJ Reports (1995) 90
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Attempts to complete parts 2 and 3, first by Riphagen (1981-1986), and then by Arangio-Riug (1987 – 1996), under whom much important work on part 2 was elaborated. The second half of the first reading was completed, in some haste, in 1996, without any attempt to co-ordinate it with the earlier work.

The time taken for the first reading is discreditable, even if it is dated from 1963 rather than 1956. There are both justifications and excuses for it. As for excuses, for much of the time the special reporteurs struggled to be heard amidst the successive demands of the law of the sea, the law of treaties, the law of state succession and later and mostly lesser projects. Little of Garcia Amador’s work was debated, and Riphagen was given time only for five preliminary articles in part 2, even though he proposed a complete version of the whole. As for justifications, the exercise involves nothing less than the formulation of the general secondary rules of the international law of obligations, concerned with breach by states of international obligations of whatever kind, and the legal consequences of those breaches in terms of reparation. This is a major task, equal in weight to the work on the law of treaties.

The draft article as adopted on first reading are a substantial basis for a completed text despite their unevenness and revising and completing them is undoubtedly worth while. The task is, nonetheless, substantial. It involves bringing into account the more recent case law of the International Court. (e.g. Diplomatic and Consular Personnel, Nicaragua, ELSI, Phosphate Lands, Gabcikovo – Nagymaros), relevant cases of the various tribunals (especially the Iran- United States Claims Tribunal and ICSID tribunals, more recently WTO panels and the Appellate Body) together with the jurisprudence of the human rights courts and committees, and integrating them within the classical structure of the Draft Articles. If achieved, this will contribute to the unity of international law, a unity under considerable institutional and political stress. This task is essentially independent of such strategic issues as the eventual form of the draft Articles, or whether to deal in detail with such topics as countermeasures or what approach to take to dispute settlement, or what to do about the notion of ‘international crimes of states’.

158 This is ably reviewed in the context of the Draft Articles by H.Dipla, La responsabilité de l’Etat pour violation des droits de l’homme. Problèmes de disputations (1994) and E.Wyler, Lillicite et la condition des personnes privées (1995)
As of April 1999, after only one four ILC sessions planned for the second reading, the work is still in a relatively early stage,\textsuperscript{159} and many of the key strategic questions remain to be resolved. Two things have however been done at this level. First, the basic structure of the Draft Articles, and the underlying distinction between the primary and secondary rules on which it is based, have been affirmed.\textsuperscript{160} Indeed, it is likely to be reinforced in the process of the second reading, in order to ensure that the articles are manageable in scope and size. Secondly, a start has been made in thinking about the devise issue of Article 19 and the distinction between ‘international crimes’ and ‘international delicts’.\textsuperscript{161}

In an annex to this note is set out the texts of the Draft Article so for provisionally adopted by the Drafting Committee (Article 1-15 bis), with those provisionally recommended for chapter III-V of part1 (Articles16-35), together with some brief explanations of each provision. The reasons for retaining,\textsuperscript{162} dropping\textsuperscript{163} or changing\textsuperscript{164} existing articles or for recommending new ones\textsuperscript{165} have been set out in details elsewhere.\textsuperscript{166}

6.8.1 Some Key Issues

(i) The Place of ‘Fault’ in the Draft Articles

The centerpiece of the Draft Articles is chapter I, which simply defines state responsibility at the attribution to the state of conduct which breaches its international obligations. Every such breach entails the responsibility of the state in question, subject to the Draft Articles but without any specified additional element such as ‘fault’ or ‘damage’.

Professor Gattini’s Witty and Wise remarks\textsuperscript{167} about the place of fault in the Draft Articles do not call for extensive comment. The essential point is this, that


\textsuperscript{160} See further Crawford, First Report; UN DOC.A/CN.4/490, Add4, and ILC Report.1998 (UNDOC A/53/10), at112

\textsuperscript{161} Ibid, at 118-147

\textsuperscript{162} As with Articles 1,3,4,5 and 6 (merged), 9 [as to state organs] 10, 16, 28 (2), 30, 32, 33,34 (renumbered as 29 ter (1))

\textsuperscript{163} As with Articles, 2, 7(1), 11-14, 17, 18.(2) – (5), 23, 26, 29.

\textsuperscript{164} As with Articles 8,15,16, 18(1), 22, 24, 25, 31, 34, 35 (now 35 (b))

\textsuperscript{165} As with Articles 15 bis, A, 28 bis, 29bis, 30 bis, 29 ter (2), 34 bits, 35(a)

\textsuperscript{166} See Crawford, First Report, Supra Note 159, and Add 1-5, Second Report, UN DOC .A/CN.4/498 and Add 1-2

\textsuperscript{167} See Gattini, Smoking/No Smoking; Some Remarks on the current place of fault in the ILC Draft Articles on State Responsibility
different primary rules of international law impose different standards, ranging from ‘due diligence’ to strict liability, and that all of those standards are capable of giving rise to responsibility in the event of a breach. There is any general rule, principle or presumption about the place of fault in relation to any given primary rule, since it depends on the interpretation of that rule in the light of its object or purpose. There should be, since the functions of the many different areas of the law which are underpinned by state responsibility vary so widely. The same remark goes for ‘absolute’ or ‘strict’ liability, and shows it is a serious error to think that it is possible to eliminate the significance of fault from the Draft Articles and not only in relation to former Article 19. It is particularly significant in chapter V of part 1 and in part 2, on each of which professor Gattini makes perceptive suggestions.

Thus decision to preserve Article 1 and 3 unchanged should not be interpreted as affirming a single category or rule of objective responsibility. Rather it puts the role of the secondary rules of state responsibility in their proper perspective. Responsibility is ‘objective’ in the sense that is governed by international law, but the requirements for responsibility vary from one primary rule to another. If the primary rules require fault (of a particular character) or damage (of a particular kind) then they do, if fault might seem to be a false debate, but whether or not this is true, it is not a debate into which the ILC is compelled to enter, at a general level, in relation to this topic.

(ii) Attribution of Conduct to the State

Professor Chinkin correctly points out that, despite the different appearance of Chapter II in the form provisionally adopted in 1998, the substance remains essentially unaltered. The dropping or merging of the ‘negative attribution’ articles (Articles 11-14) has little effect since those articles were circular in substance as well as expression. Article 11, for example, said only that the acts of private parties are into attributable to the state unless they are attributable to under the other articles of Chapter II. Moreover Article 3 itself plays a sufficient role as the key ‘negative attribution’ article, since it specifies that attribution is one of the two requirements for responsibility. Article 15 bis deals with the special, though not uncommon, case of the subsequent acknowledgement or adoption of conduct, but this is a refinement, not a major change in direction so too are the particular drafting changes.

168 Chinkin, ‘A critique of the public/private Dimension’.
It is said that these articles embody a ‘very traditional’ Western concept of the State and of the public sector that this fails to take into account the interpenetration of public and private spheres and that it enforces an ideological reference for the public sphere which is discriminatory, in effect if not intent. To a large extent that is a criticism of the whole system of international law and indeed of the structure of thought and practice which sustains the state system. In the context of Chapter II of the Draft Articles, the responses to it age necessarily specific and even technical, they are also necessarily partial.

An initial response to the charge of ‘Western’ bias is to note that all of the criticisms of Chapter II, in terms of its rigidity and failure to cope with the changing function of the state come from western governments. Third world (Latin America, African and Asian) governments are amongst the strongest defenders of the notion of domestic jurisdiction and of the limited external responsibility of the state.

But there are more constructive ways of responding to the criticisms, as Professor Chinkin notes. From the perspective of Chapter II, the most important point is that the extent or impact of the law of state responsibility depends on the content and development of the primary rules, especially in the field of the obligations of the state with respect to society as a whole. There has been a transformation in the content of the primary rules since 1945, especially through the development of the international law of human rights. But it is the case, overall, that the classical rules of attribution have proved adequate to cope with this transformation. This is so because of their flexibility and because of the development, as part of the substantive body of human rights law, of the idea that in certain circumstances the state is required to guarantee rights, and not simply to refrain from intervening. Thus, for example, the state may be responsible if state law authorizes private action (e.g. excessive corporal punishment of children by parents or private schools), or if it fails to provide proper safeguards against private abuse of persons in need of special care. It may be responsible if it maintains on the books unenforced laws which cause apprehension as to interference in individual lives. The results taken together may change the balance between the private and public sectors, but they do not involve any change in

169 See e.g. UN DOC a/CN.4/488, at 36[Germany], at 40, 43 [United Kingdom].
170 Costello Roberts V. The United Kingdom 19 EHRR (1998) 112
172 See e.g. Norris V. United Kingdom, ECHR, Ser.A, Vol.142 (1988) with reference to earlier cases. The Human Rights Committee applies the same principle
the general law of attribution, nor may Lex Specials is the field of human rights. If international law is not responsive enough to problems in the private sector, the answer lies in the further development of the primary rules (for example, in the field of economic, social and cultural rights), or in exploring what may have been neglected aspects of existing obligations.

Other aspects of the flexibility of the classical law of attribution include Article 10, under which the fact that state agents or organs acted ultravires does not preclude the state’s being responsible. Thus if police or army officers commit outrages using official premises or facilities, the state will be responsible for their conduct. Moreover, the rules of responsibility do not, generally speaking, rest on a distinction between conduct *iure imperii* and conduct *iure gestionis*,\(^{173}\) if the state acts or fails to act, its responsibility is potentially engaged and remaining questions are left to be resolved by the interpretation and application of the relevant primary rules.

It is not relevant here (in the context of the ILC’s work on state responsibility) to defend the existing primary rules, and it is certainly not necessary to do so in order to uphold the general balance struck by the law attribution in Chapter II. But to take the subject of torture, it must be stressed that the Torture Convention is not only manifestation of an international law against torture. Even the special attribution rule contained in Article 1 of the Torture Convention, limiting torture to conduct of state officials, is capable of a more flexible interpretation than was envisaged by its framers.\(^ {174}\) The general prohibition of torture in the international human rights treaties is not limited in the same way. Thus, under the ICCPR and its regional equivalents, the state has a positive duty not to authorize or allow torture, and this does much to attenuate the impact of the public/private distinction in that field.\(^ {175}\)

(iii) Obligations of Conduct and Obligations of Result

One of the less successful aspects of the Draft Articles is the series of distinctions made between different kinds of obligations in Chapter III. In fact there are two sets of distinctions, that drawn in Articles 20, 21 and 23 between obligations of conduct, of result and of prevention and that drawn in Article 18 (4)-(6), and deviate and complex wrongful acts. These distinctions have been much criticized both

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174 It also has important consequences for jurisdiction over state officials, including former heads of state. See RV Bow Street Metro Politian Magistrate, Ex.v. Pinochet Ugarte (No.3) (1992) 2 ALLER 97. So there can be unforeseen gains through narrow definitions
by governments and in the literature. The notion of ‘Complex’ acts was subjected to a
decisive critique by Jean Salmon in 1980.\textsuperscript{176} Professor Dupuy has contributed
substantially to these critiques, most recently in his piece where he addresses the
distinction between obligations of conduct and result.\textsuperscript{177}

The terms ‘obligation of conduct’ and ‘obligation of result’ have become a
minor but still an accepted part of the language of international law, no doubt in part
because of Ago’s influence. But there are serious difficulties with them, for various
reasons. First, they have no consequences in the rest of the Draft Articles (Unlike the
distinction between completed and continuing wrongful act, this has consequences
\textit{inter alia} in relation to cessation). Secondly, as Dupuy once again shows, Articles 20
and 21 virtually reverse the distinction as it is known to some European legal systems.
It is not unusual for domestic analogies to be modified in the course of transplantation
to international law. Indeed, it is unusual for them not to be. But I know of no other
example where the effect of a national law analogy has been reversed in the course of
transplantation. In French law, obligations of result are stricter than obligations of
conduct. According to Ago obligations of result were less strict because the state had
discretion as to means which it did not have with obligations of conduct. In
International life, a state’s power to decide what specified action is to be taken is an
aspect of its sovereignty, which on a crude view is diminished by an obligation to
carry out specific defined, conduct. In Article 20 and 21 this question of determinacy
is crucial, it is because the state retains some discretion as to what it is to do or how it
is to respond that obligations of result are conceived as less onerous. Thus the value of
state sovereignty subverts a standard legal concept.\textsuperscript{178}

Seen from the perspective of Ago’s distinction, obligations of prevention are
like obligations of result, in that they leave discretion to the state concerned as to how
to act. From the perspective of the original French law distinction as Dupuy points
out obligations of prevention are obligations of conduct, i.e., best efforts obligations
rather than guarantees.

But even if all this is true, the question is what is to be done? Pierre Dupuy
asks, rightly, whether a reversion to the original understanding of the terms would not

\textsuperscript{176} See Salmon, ‘Le fait etatique complexe: une notion contestable; 28, AFDI, (1982) 709
\textsuperscript{177} See Dupuy, ‘Reviewing the Difficulties of Codification: on Ago’s Classification of Obligations of
Means and Obligations of Result in Relation with State Responsibility.
\textsuperscript{178} What nearly happened to the analogy of the ‘mandate’ after the South West Africa Cases (second
phase), ICJ Reports, (1996), at.6.
be better and would not shed light on the many international obligations of due diligence which are more properly seen as obligations of conduct according to its original understanding. Here again, as he points out, we get involved in the question of damage. An obligation of best efforts might be breached even though the end result was not achieved (e.g. because of the intervention of a third party or just as a matter of pure luck). Or it might be breached only by the combination of the failure to act and the consequent occurrence of the result, i.e. of damage. Which of these two interpretations is the right one? It can be stated that it depends entirely on the primary rule. Some obligations of conduct or means may only be breached if the ultimate event occurs (i.e., damage to the protected interest), others may be breached by a failure to act even without eventual damage. It cannot be thought international law has, or needs to have, a presumption or rule either way. It depends on the context, and on the entire factor relevant to the interpretation of treaties or the articulation of custom.

If this rights, then whether to retain Articles 20 and 21, however they may be phrased, depends on whether any consequences within the Draft Articles flow from the distinction between obligations of means and of result. In French law there are consequences in terms of the proof of responsibility, but the Draft Articles, an especially part 1 are not concerned with proof or other adjectival issues. In the absence of any consequences within the Draft Articles it seems that Articles 20 and 21 relate only to the classification of primary rules and if that is true, it is very doubtful whether they have a place in part 1.

(iv) **Obligations to the International Community as a Whole**

The existence of obligations in the field of state responsibility towards the international community as a whole was affirmed by the International Court in the *Barcelona Traction Case*, and must be taken as a datum. Articles 19 and 40(3) sought to translate that idea into the Draft Articles by reference to the notion of ‘international crimes of state’, but reservations as to this terminology were reflected in a footnote to Article 40, as well as in the comments of many governments.\(^{179}\) Others continue to support the idea in some cases strongly,\(^{180}\) although again without necessarily being

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179 See UN DOC.A/CN 4/488, at 51 (Austria), at 54-55 (France), at 55-59 (Ireland), at 60 – 61 (Switzerland), at 61 (United Kingdom), at 61-63 (United States), at 137-138 (Germany), UN DOC.A/CN 4/492 (Japan)

180 See UN DOC.A/CN 4/488, at 53-54 (Denmark on behalf of the Nordic Countries) at 59 (Mongolia), UN DOC.A/CN 4/488/Add.2, at 4-5 (Italy), UN.DOC.A/CN 4/492 (Greece)
wedded to the terminology. One difficulty with taking the idea, of ‘international crimes’ further is that even its supporters are reluctant to accept a full scale ‘punitive’ regime, involving not merely punitive damages (deliberately omitted from article 45) but the wide range of sanctions which might well be appropriate in the case of the “Criminal” State. It remains that the idea of international crimes as expressed in the draft articles is unnecessary and divisive, and has the potential to destroy the project as a whole. On the other hand, the idea that some obligations are held to the international community as a whole and not only to individual state, and that grave breaches of those obligations may attract special consequences, is important and necessary. The problem is to translate it into the Draft Articles in a way which will be generally acceptable.

The current position of the debate in the commission is reflected in the following passage in the 1998 report, which was adopted by consensus:

it was noted that no consensus existed on the issue of the treatment of ‘crimes’ and ‘delicts’ in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that, (a) without prejudice to the views of any member of the commission, draft article 19 would be put to one side for the time being while the commission proceeded to consider other aspects of part one, (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (erga omes), peremptory norms (jus cogens) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues by article 19, (c) this consideration would occur in the first instance, in the Working Group established on this topic and also in the special reporteur’s second report, and (d) in the event that no consensus was achieved through this process of further consideration and debate, the commission would return to the questions raised in the first report as to draft article 19, with a view to taking a decision thereon.

No less than four of the contributions to this subject address the question from different perspectives. They speak for themselves, and it is not possible (or indeed necessary) to respond in detail in the space available here. I would only say that, to the extent that the notion of ‘international crime’ is intended to reflect a qualitative

181 See the careful and balanced remarks of the Zech Republic :UN DOC.A/CN 4/488, at 52
182 See Crawford, First Report, Supra Note 160, at Adds 1-3
difference between breaches of obligations owed to the international community as a whole and obligations owed to one or a few states, the idea is acceptable but the language of “crime” “delict” is unnecessary. On the other hand, to the extent it is intended to reflect a ‘criminalization’ of the state (akin to the international criminalization of individuals before the Yugoslav or Rwanda Tribunals, or to the defect to criminalization of Iraq, Libya and Yugoslavia in recent practice), then issues of structure and organization, of due process and dispute settlement clearly must be addressed otherwise the language of crime degenerates into name calling, and will tend only to accentuate the power of the powerful, and especially of the permanent members of the Security Council, acting as such or in their considerable individual capacities. To put it at the level of technique, general code of obligations does not need to embody to penal consequences of criminal acts, and if them ‘criminal’ is being used in some mysterious new sense (divorced from adequate procedures for the determination of criminal responsibility), why use the term at all?

(v) Circumstances Precluding Wrongfulness

Chapter V of Part I enumerates six ‘circumstances precluding wrongfulness’, and reserves the possibility of compensation for actual loss or damage incurred with respect to four of them. Professor Lowe argues, first that chapter V adopts the approach of exculpation rather than excuse, and secondly, that (rather than releasing the state from the obligation) it would be preferable to ‘maintain the obligation in force but excuse the breach maintain the obligation in force but excuse the breach of it by the state in the various special circumstances’.

Actually it is not clear precisely what approach is adopted in the Draft Articles. Circumstances precluding wrongfulness certainly do not release the state from its obligations, in the way that termination or even suspension of a treaty would do. Whether they entirely exonerate a state acting otherwise than in conformity with its obligations is uncertain, at least as a matter of drafting. Article 1 says that ‘every internationally wrongful act of a state entails the international responsibility of that state, which implies that acts which are not wrongful do not entail responsibility. Article 3 says that an internationally wrongful act when two conditions are met (1) attribution of conduct to the state which (2) is a breach of its international obligations. Article 16 defines a ‘breach’ as conduct ‘not in conformity’ with what is required by

184 See Tunc, Supra Note 167, at 48-50
185 See Lowe, Precluding Wrongfulness or Responsibility: A Plea for Excuses, p.5
the obligation in question. Yet it is not the case that, where wrongfulness is precluded, the conduct in question ‘conforms’ to the obligation. Nonetheless, the responsibility that would otherwise flow from that fact under Article 3 is precluded under chapter V. 186

The impression is there by given of a sort of ‘wrongfulness in the abstract’ that is to say, of conduct which is wrongful in itself but where the responsibility of the state is precluded in the particular circumstances. It is as if responsibility is precluded rather than wrongfulness. But this is not equally the case for each of the six circumstances in chapter V. For example, conduct which satisfies the conditions for self defense is lawful, indeed under Article 51 of the Charter it is an expression of an ‘inherent right’. Conduct taken in circumstances of necessity is different, since it is performed deliberately (i.e. not under force measure) in order to preserve the overriding interest of the state concerned. As Lowe argues such conduct is in some sense wrongful although there may be an excuse for it.

This suggests that at least two categories of circumstances are covered by chapter V and this is implicitly confirmed by Article 35, which allows the possibility of compensation to an injured state in four of the cases covered by chapter V but not in two others (self defense and countermeasures). This is plainly right for self defense, and it is equally right to allow for the case for a more explicit distinction between justifications (such as self-defense) and excuses (such as necessity). That distinction may also give a better conceptual foundation to Article 35.

But to speak of justification suggests a further distinction, between what we might term the intrinsic conditions for wrongful conduct, which are part of the primary rule, and extrinsic general justifications for what would otherwise be wrongful conduct, such as self defense. It is not useful to think of Article 51 of the Charter as incorporated in every primary rule. It is an external justification, applicable to some (but not all) obligations. The Draft Articles make no attempt to specify the intrinsic conditions for wrongfulness, since to do so would involve codifying most of international law. But it seems useful to identify the general external justifications, and subject to some particular concerns, chapter V does so rather successfully. 187

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186 There is a similar lack of precision in the formulation Article 28, which treats that conduct of a state that has been coerced as nonetheless wrongful, despite the fact that under Article 31, at least in clear cases, coercion would amount to force majeure and preclude wrongfulness.

187 As indicated, e.g. by the International court’s treatment of necessity in the case concerning the Gabcíkovo-Nagymaros Project, ICJ Reports (1997), at 7.
This further distinction raises an issue with respect to one of the circumstances dealt with in chapter V, viz., the consent of the ‘injured’ state. Lack of consent is an intrinsic condition for unlawfulness in the case of many but by no means all primary rules. For example, the exercise of jurisdiction on the territory of another state with the consent of that state is perfectly lawful. Similarly, overflight over the territory of another state pursuant to an air services agreement. In such cases, to regard the consent as a circumstance precluding unlawfulness is very odd, since consent validly given in advance renders the conduct intrinsically lawful. Consent given after the event would be quite different, and would be in the nature of waiver of a responsibility which had already arisen. But part1 of the Draft Articles is concerned with the origin of responsibility, not with issues of waiver. This suggests that the treatment of consent in Article 30 of the Draft Articles requires further consideration. But it does not cast doubt on the distinction between external justification and excuse.

(vi) The Balance between Restitution and Compensation

Dr. Gray’s interesting account of the relationship between restitution and compensation raises issues which clearly will have to be considered in the review of the articles in part 2. She stresses the priority given in part 2 to restitution over compensation, which accords with most classical formulations especially the famous dictum in the Chorzow Factory Case. I could be agreed that the matter is more difficult than it seems. In some cases (for instance, those involving the freedom of persons wrongfully detained or of state territory wrongfully occupied) restitution is indispensable, in other cases, it may not be. Whether Articles 43 and 44 strikes an appropriate balance at a general level is a question to which the commission must return, having regard to the various government comments.188

But her contrast between the Great Belt and the Beard Cases is perhaps overdrawn. Not only was neither case ever decided on its merits (and so one is left to speculate on where the merits lay). The two cases concerned fundamentally different questions. Finland’s Claim in the Great Belt Case arose by reason of its asserted right of passage. Paraguay’s claim arose from a failure of notification in relation to a procedure (the trial and punishment of Beard) which was otherwise a matter for the United States. Claims to restitution following a violation of incidental procedural rights raise very difficult issues from cases where what is denied by the respondent

188 See e.g. UN DOC.A/CN.4/488, at 107-108 (France, United States, Uzbekistan), UN DOC.A/CN.4/492 (Japan)
state is the very subject matter of the international obligation. For the issue of restitution even to arise in Beard it would have been necessary to show that the procedural failure had direct consequences in terms of the verdict and sentence. By contrast, the obstruction of a strait through which another state has a right of passage raises no issue of causation or directness, the question is reduced to one of breach.

No doubt there are still problems as to the choice between restitution and reparation, even in the latter type of case. For example, it might have been true that the construction of the bridge was a violation of Finland’s rights of passage, and yet the social and economic advantages to Denmark of having the bridge might have outweighed its impact on Finland, or on the environment of the Baltic. Some of these factors might well be taken into account in the application of the primary rule, but not necessarily. The question whether the inured state has an unfettered right to insist on restitution is however, addressed in Article 43, and it is not clear that the balance struck there is flawed or defective.

Finally, it could not be thought that the distinction between primary and secondary rules prevents the commission from formulating different secondary rules for different categories of primary rules. Such distinctions are drawn in parts 1 and 2, and while they are not all equally valuable, they are not excluded in principle. What is excluded is the specification of the content of particular primary rules. But once it is clear that there exist rules of different types (e.g., obligations erga omnes as compared with obligations erga singulis), there is no need to specify which norms fall into which categories, and indeed this ought to be avoided.\textsuperscript{189} It is sufficient that the categories exist and have consequences within the field of the Draft Articles, including consequences for the “choice” between restitution and compensation.

6.9 Achievements

The ILC’s work has led to the creation of a number of treaties and other works of international law that are key to the present international legal order, for example.

✓ The Vienna Convention of the Law of Treaties.
✓ The Vienna Convention on Succession of States in Respect of Treaties.
✓ The Vienna Convention on Diplomatic Relations.

\textsuperscript{189} The only attempt to do so is Article 19 (3), probably the least successful provision in the entire text.
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✓ The International Criminal Court first proposed in 1949 at the request of the UN General Assembly.

6.10 Conclusion

In her Hague lectures, Rosalyn Higgins commented that “State Responsibility is surely a topic of which it can be said that less is more” 190. The ILC heeded Higgin’s advice in significant measure. By focusing only on general residual rules of responsibility, the ILC took a narrow approach, jettisoning or deferring many difficult and controversial issues:

• fault and Injury are left to the primary rules;
• the issue of causation is noted but not addressed substantively; 191
• the responsibility of states to individuals, international organizations, and other non-state actors is not directly addressed;
• the rules of attribution deal only partially with the potential responsibility of states for non-state conduct; most responsibility for such conduct remains to be assessed under the primary rules of obligation; and
• the separate regime of criminal responsibility was ultimately dropped.

Moreover, key parts of the articles seem to be no more than tautologies, or leave important issues open. Indeed a skeptic might contend that a movie on the ILC’s work on state responsibility could be entitled “The Incredible Shrinking Articles”. To many common lawyers, this might seem just fine one should not attempt to elaborate general rules regarding fault or injury or causation, instead, these issues should be addressed in particular contexts, through specification of primary rules in treaties, state practice, or decisions in particular cases.

But the Skeptic’s perspective sells the articles short. In many situations they will offer a well considered legal reference point, comfortable for both common lawyers and civilians. Indeed, significant portions of the articles such as those addressing the legal regime following breach (cessation, restitution, compensation, interest, countermeasures), seem likely to play important roles in the resolution of

190 Rosalyn Higgins, Problems and Process: International Law and How we use it, 168 (1994)
191 See Commentaries, Art.31, Para 9-10
future disputes. The articles need to be treated with both respect and care, lest they be
used mechanically and in ways that do not recognize the legal subtlety and richness
often lurking behind deceptively simple texts.

In general, the articles tend to be more backward than forward looking. They
contain a few modest steps forward, emphasizing the duty of cessation,
acknowledging that some duties are owed to the international community as a whole,
and articulating a notion of serious breaches of peremptory norms. But, in general,
they are fairly traditional. They do not address new types of international
responsibility growing out of human rights and international criminal law. And even
within the domain of interstate responsibility, the commission found attempts at
innovation such as the concept of crimes of state too controversial and complex to
include in the final draft. Thus, the value of the articles lie less in their legal
innovation than in consolidation and clarification of many traditional secondary rules
of state responsibility.

For a mixture of reasons, the ILC choose to forward the articles to the
General Assembly without recommending the negotiation of a treaty on state
responsibility. As a result, whether they accurately reflect existing practice or
represent accurately reflect existing practice or represent acceptable accommodations
of competing interests will not be subjected to the crucible of a diplomatic conference.
Instead, at least for the near term, the articles will be tested and perhaps reshaped
through the varied processes of application by international legal advisers, scholars,
and international courts and tribunals.

This is probably the right result. Given the articles esoteric and sometimes
abstract aspects, few governments seem likely to approach a diplomatic conference
committed either to the concept of a convention or to maintaining the careful balances
the ILC struggled for years to find. Moreover, many useful features of the articles
(countermeasures, the obligation to provide compensation, and Article 48, to name
just three) could easily become politicized and be undone in a conference.

For the invisible college of international lawyers, the ILC’s completion of the
articles is a considerable success. Whether it will represent a comparable success for
the states, international organizations, non-governmental organizations and
individuals that constitute international society will now be seen.

192 See Caron, Supra Note 116, at 861-66 (indicating the ILC’s reasons for recommending that the
Assembly simply note the Articles)
The ILC understandably decided to conceptualize the principles of state responsibility so as to appease all of the commissioners (and governments) and to allow for a flexible system of international law enforcement. Yet, one might have hoped that the commentary at least would have begun to point in more substantive and legitimating directions than it currently does. It is not immediately clear whether the ILC Articles would have even benefited from a more explicitly normative discourse. Either way, despite its brevity, the ILC’s Articles on State Responsibility: Introduction, Text and Commentaries is one of the most authoritative treaties on the topic of state responsibility more succinct, user friendly, systematic, and annotated than standard text books on the topic.

The Commission recommended, and the General Assembly agreed, that a period for reflection and experience be permitted before deciding whether to send the state responsibility articles to a diplomatic conference. Giving the General Assembly some time to think rather than pressing for an early diplomatic conference seems a sensible approach in view of the importance of the topic, the extent to which the ICJ and arbitral tribunal have demonstrated the utility of the present text, and the article’s general nature as a guide to thinking more than as a statement of primary rules. This characteristic of the articles is a key reason why there is no rush to adopt a treaty.

The state responsibility articles are bound to clarify and organize legal thinking, planning, and states conduct for the foreseeable future. It may be possible to criticize the articles for not being more detailed. However, it will not be possible to deny that here, as in the case of the ILC’s work on privileges and immunities, the Law of the Sea and the Law of Treaties, the Commission has constructed a solid foundation for future development of the law in the light of changing circumstance. It will be clear that the new text raises significant issues, both of substance and of formulation. Indications are that it enjoys broad (but not universal) support within the ILC, although it must be repeated that the present text has not been formally adopted and cannot be regarded settled.

It is of course too early to reach any conclusion on the second reading process, given the range of issues yet unresolved, but if the various responses made above to the contributions in this. It is the need to adhere rather closely to the distinction between primary and secondary rules. It has been suggested that this distinction is an artifact, borrowed from H.L.A. Hart’s the concept of law. But there is nothing wrong with artifacts, if they are useful, and the distinction enables general principles of
responsibility to be formulated without trespassing on the vast and fluctuating field of the material content of the rights and obligations of states. A principled approach to the distinction seems to be a key to developing a concise, manageable and sustainable text, one which will remain useful as the content of international law changes and develops.