CURRENT LEGAL DEVELOPMENTS

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading

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Abstract. In 2001 the International Law Commission finally adopted on second reading the Draft Articles on Responsibility of States for Internationally Wrongful Acts and the commentaries thereto, thereby successfully concluding almost half a century of work on the topic by the ILC. Subsequent to the adoption, the General Assembly welcomed the conclusion of the work of the ILC. This article highlights the main changes made during the second reading 1998–2001, among them the issue of international crimes, the concept of injured state and countermeasures. While the 59 articles are the result of compromise, they undoubtedly are a major achievement in one of the most important and most sensitive areas of international law. Ultimately they may be a useful tool to promote the enforcement of community interests in the international legal system.

1. INTRODUCTION

On 12 December 2001, the General Assembly of the United Nations welcomed the conclusion of the work of the International Law Commission ('ILC') on the responsibility of states for internationally wrongful acts and its adoption of the draft articles and the commentary on the subject.[1] It commended the Articles to the attention of governments without prejudice to the question of their future adoption or other appropriate action.[2] Thus one of the few remaining traditional topics of codification was successfully concluded 45 years after the first Special Rapporteur *F.V. García Amador* (1956–1963) began his work on the subject. Despite García Amador's initial enthusiasm,[3] his approach had not been approved by the

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1. The text of the Articles and the commentaries thereto are reproduced *in* Report of the International Law Commission on the Work of its Fifty-third session, UN Doc. A/56/10, paras. 76 and 77 (2001). *See* http://www.un.org/law/ilc.
2. UN Doc. A/RES/56/83 (2001).
3. Philip Allott described García Amador's first report as being "an extraordinary document […] full of dramatic views as to the very nature of international law and many of its leading principles". P. Allot, *State Responsibility and the Unmaking of International Law*, 29 Harv. Int'l L. J. 1, at 4–5 (1988).

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ILC, partly because he considered the law on state responsibility as being confined to the substantive rules on diplomatic protection. In 1961, the ILC established an inter-sessional sub-committee, chaired by *Roberto Ago*, which recommended that the ILC should focus on the definition of the general rules governing the international responsibility of states. In other words, the rules of state responsibility (the 'secondary norms') should be considered as being generally independent of the substantive rules at issue (the 'primary norms'). The ILC approved this new approach and appointed Ago as Special Rapporteur (1963–1979). He subsequently paved the way for Part One on the "Origin of State responsibility", consisting of thirty-five articles which were provisionally adopted.

In 1979, *Willem Riphagen* succeeded Ago as Special Rapporteur (1979–1986). He presented a complete set of articles on Part Two on the "Content, forms and degrees of international responsibility" as well as on Part Three on the "Settlement of Disputes". The ILC however adopted only five of the articles, which included in particular former Article 40 on the "Meaning of injured State". Under Special Rapporteur *Gaetano Arangio-Ruiz* (1987–1996) the ILC adopted the remainder of Part Two (in particular reparation and the consequences of 'international crimes') and Part Three on dispute settlement. In 1996, the ILC eventually adopted on first reading the text of 60 Draft Articles[4] including two annexes and the commentaries. In the quinquennium 1997–2001, under Special Rapporteur *James Crawford*,[5] the ILC carried out the second reading of the text, which was finalised on 26 July 2001. The present article aims at presenting an outline of the Articles focussing on the main changes made during the process of second reading[6] and at discussing the most important and most debated provisions of the text. It will conclude with a first and rather tentative

4. Report of the ILC on the Work of its 48th Session, 1996 YILC, Vol. II (Part Two), 1, at 58.
5. *See* J. Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490 and Add. 1–7 (1998); J. Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498 and Add. 1–4 (1999); J. Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 and Add. 1–4 (2000); J. Crawford, Fourth Report on State Responsibility, UN Doc. A/CN.4/517 and Add. 1 (2001).
6. For comments on the second reading *see* J. Crawford, *Revising the Draft Articles on State Responsibility*, 10 EJIL 435 (1999); J. Crawford & P. Bodeau, *Second Reading of the Draft Articles on State Responsibility: A Progress Report*, 1 ILF 44 (1999); J. Crawford & P. Bodeau, *Second Reading of the I.L.C. Draft Articles on State Responsibility: Further Progress*, 2 ILF 45 (2000); J. Crawford, P. Bodeau & J. Peel, *The ILC's Draft Articles on State Responsibility. Toward Completion of a Second Reading*, 94 AJIL 660 (2000); J. Crawford, J. Peel & S. Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EJIL 963 (2001); J. Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries 1–60 (2002). A valuable comparison of the text of the Articles at the various stages in 1996, 2000 and 2001 as well as the proposals of the Special Rapporteur during the process of the second reading is provided by G. Hafner, *The Draft Articles on the Responsibility of States for Internationally Wrongful Acts – The Work of the International Law Commission*, 5 ARIEL 189–270 (2000).

evaluation of the Articles and their probable impact on the law of state responsibility in the future.

2. The Structure of the Articles

The Articles are divided into four parts. Part One governs the general conditions of "The Internationally Wrongful Act of a State" and consists of five chapters (general principles, attribution, breach, responsibility in connection with the act of another state and circumstances precluding wrongfulness). Part Two concerns the "Content of the International Responsibility of a State" and is divided into three chapters (general principles, reparation, and serious breaches of obligations under peremptory norms of general international law). Part Three governs "The Implementation of the International Responsibility of a State" and contains two chapters on the invocation of responsibility and countermeasures, respectively. The concluding Part Four sets forth "General Provisions" which apply to the entire set of Articles.

2.1. Part One: The Internationally Wrongful Act of a State

Part One on the internationally wrongful act of a state governs, as it was formerly called, the "origin of international responsibility" and consists of five chapters. Chapter I sets out some general principles and remained essentially unchanged. The most important of these preliminary Articles is Article 2 determining the two constituent elements of an internationally wrongful act, *i.e.* conduct *attributable* to a state and *inconsistent* with the latter's international obligations. Neither the existence of damage nor fault are constituent elements, since both are governed by the relevant primary norm at issue.

Chapter II (Articles 4–11) defines the circumstances in which the conduct in question is attributable to a state as required by Article 2. The general rule of attribution pervading Chapter II is that the only conduct attributable to the state is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs. In general, Chapter II was significantly simplified and curtailed. Two articles of Chapter II merit a more detailed examination.

First, Article 8 provides that the conduct of a person or a group of persons is attributable to a state if the person or the group is in fact acting on the instruction of, or under the direction or control of, that state in carrying out the conduct. The principle contained in Article 6 was at stake in *Military and Paramilitary Activities* where the International Court of Justice ('ICJ') had to answer the question whether the degree of control exercised by the United States over the *contras* was sufficient to make the illegal acts of the latter attributable to the former. The Court held that despite the high degree of dependency of the *contras* on the United States

in terms of financing, logistic and other support, the United States did not have the required "*effective control* of the military or paramilitary operations in the course of which the alleged violations were committed."[7] In the Court's view, a general situation of dependence and support would be insufficient to justify attribution of the conduct to the state; rather, what is required is *effective control* over the specific operation. Moreover, the conduct of the person must be an integral part of that operation.[8]

This approach of the Court, which was adopted by the ILC, appears to have been modified by the International Criminal Tribunal for the former Yugoslavia ('ICTY'), which applied a less strict standard than the ICJ. In the *Tadić* case the Tribunal held that the requisite degree of control by the Yugoslav authorities over the armed forces of the Republika Srpska was "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations."[9] The Tribunal thus disapproved of the standard applied by the ICJ. The commentary points out that the two cases must be distinguished from a factual as well as a legal point of view.[10] In particular, the mandate of the ICTY is to deal with issues of individual criminal responsibility and not state responsibility. The reason why the ICTY had to address the question of attribution of private conduct to the state in the *Tadić* case was not to establish State responsibility. Rather the Tribunal had to establish the applicable rules of international humanitarian law, and for that purpose it was necessary to attribute the conduct of the armed forces to the Yugoslav authorities. Also, the assessment of the degree of control will vary in each case depending on the particular circumstances. As a consequence, the two approaches appear to be well reconcilable against the background of the respective cases.

Nevertheless, the ILC's arguments are not convincing in every respect. First of all, it must be recalled that the ICTY not just applied a different test but explicitly disapproved of the ICJ's approach. Secondly, while it is true that the individual facts of each case may lead to different results in different circumstances, the underlying general rule of attribution must be identical in all cases.[11] In other words, the general determination of the required legal degree of control is one thing; the ascertainment as to whether this degree has been met in a given case is quite a different question. Accordingly, the distinction between 'effective control' (*Military and Paramilitary Activities*) and 'overall control' (*Tadić*) is not one with

7. Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* USA), Judgment of 27 July 1986, 1986 ICJ Rep. 14, at 62, para. 109 and at 65, para. 115 (emphasis added).
8. Commentary to Article 8, para. (3).
9. Prosecutor *v.* Tadić, Case No. IT-94-1, 15 July 1999, reproduced *in* 38 ILM 1518, at 1546, para. 145 (1999) (emphasis added).
10. Commentary to Article 8, para. (5).
11. Unless of course there is a *lex specialis* rule on the subject, which however was neither argued by the ICTY nor is it stated in the commentary with regard to the discrepancy between the two approaches in Nicaragua and Tadić.

regard to the facts of the case but touches on the legal standard governing the attribution of certain conduct to the state. Likewise, while the overall mandate of the ICTY is of course directed towards issues of individual criminal and not state responsibility, the preliminary question of attribution which the Tribunal had to answer in the *Tadić* case was – similar to *Military and Paramilitary Activities* – a general one, *viz.* whether a certain conduct may be attributed to the state in order to determine whether the applicable rules of humanitarian law are those concerning international or non-international armed conflicts. Viewed from this perspective, the ICJ and the ICTY indeed appear to have applied different degrees of control and with it different rules of attribution. It is open to debate whether the context or the purpose of attribution (state responsibility in *Military and Paramilitary Activities* and determining the applicable rules of humanitarian law in *Tadić*) indeed justify the assumption and application of different rules of attribution under general international law.

The second noteworthy provision of Chapter II is Article 11, which provides that conduct which is in principle not attributable to a state be nevertheless considered an act of that state if and to the extent that the state acknowledges and adopts the conduct in question as its own. While the rules on attribution generally assume that the status of the person or body as a state organ, or its mandate to act on behalf of the state, are established at the time of the alleged wrongful act, Article 11 provides for the attribution to a state of conduct that was not, or may not have been, attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the state as its own.[12] Article 11 thus incorporates the finding of the ICJ in *United States Diplomatic and Consular Staff in Tehran*. There the Court held that the decree of the Iranian Head of State which expressly approved and maintained the seizure of the United States Embassy and its personnel, as well as the repeated endorsement of this decree by various other state authorities "translated continuing occupation of the Embassy and detention of the hostages into acts of [the Iranian] State."[13]

The second element of state responsibility, *i.e.* the question of breach, is dealt with in detail in Chapter III of Part One. Compared to the first reading text, Chapter III was even more condensed than Chapter II. While

12. Commentary to Article 11, para. (1). Cases of acknowledgement and adoption are to be distinguished from cases of mere support, approval or endorsement of 'private' conduct. This is indicated by the phrase "acknowledges and adopts the conduct in question *as its own*", *see id.*, at para. (6) (emphasis added).
13. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Rep. 3, at 35, para. 74. Note, however, that the Court found Iran already responsible for its failure to take any appropriate steps to prevent an attack against the premises and the staff or to compel the militants to withdraw and to free the staff, *see id.*, at 31–33, paras. 63–68. While the Court considered the later acknowledgement and adoption a separate violation of international law, such prior responsibility is not necessary for the purposes of Art. 11. *See* commentary to Article 11, para. (4).

the text at first reading of Chapter III contained 11 articles (including former Article 19 on international crimes), the final version consists of no more than four articles (Articles 12–15). A considerable modification of Chapter III is the deletion of former Articles 20, 21 and 23 which distinguished between obligations of conduct, of result and of prevention. The major points of criticism against this distinction were, first, that it reversed the original understanding of the classification as it is known in continental European legal systems and, second, that it did not entail any significant consequences in the rest of the Articles.[14] But even where this distinction was considered relevant, it produced an unsatisfactory result; this was particularly true for former Article 22, which unduly restricted the application of the local remedies rule to obligations of result. There are however many other obligations which do not necessarily fall under the category of obligations of result, but which – for functional reasons – nevertheless require the exhaustion of local remedies in case of their breach.[15]

Therefore, Articles 20, 21 and 23 were deleted and the only reference to the distinction between obligations of conduct, of result and of prevention is now contained in Article 12, which provides that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." The word 'origin' is intended to indicate that the Articles are of general application. In particular, neither the kind of source (treaty, custom, general principle of law or other), nor the particular subject-matter of the obligation breached have a bearing on the scope of the Articles.[16] As regards the local remedies rule, the ILC abandoned what is called the 'substantive' or 'substantial' approach to the rule and adhered to the procedural view according to which the non-exhaustion of local remedies does not affect the existence of a breach but rather the enforcement or invocation of responsibility. Since international judicial practice predominantly considers the exhaustion of available and effective local remedies a prerequisite for the admissibility of a claim to which the local remedies rule applies,[17] the relevant provision, *i.e.* Article 44(b), is now located in Chapter I of Part Three on the implementation of state responsibility.

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14. For a critical discussion *see* J. Combacau, *Obligations de résultat et obligations de comportement: quelques questions et pas de réponse*, *in* D. Bardonnet, *et al.* (Eds.), Mélanges offerts à Paul Reuter: le droit international, unité et diversité, 181 (1981); P.-M. Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EJIL 371 (1999).
15. *Cf.* Crawford, Second Report, *supra* note 5, at paras. 141–147. *See also* S. Wittich, *Direct Injury and the Incidence of the Local Remedies Rule*, 5 ARIEL 121, at 165–167 (2000).
16. Commentary to Article 12, paras. (3)–(10). In the first reading text, these two aspects were dealt with in Arts. 17(1) and 19(1).
17. *See*, *e.g.*, Elettronica Sicula S.p.A. (ELSI) (USA *v.* Italy), Judgment of 20 July 1989, 1989 ICJ Rep. 15, at 46–48, paras. 59–63. *See*, *generally*, C.F. Amerasinghe, Local Remedies in International Law 319–358 (1990).

The remaining articles of Chapter III deal with the effect of the time factor on the origin of state responsibility (Articles 13 and 14) and the difficult issue of a breach consisting of a composite act (Article 15).

Chapter IV of Part One concerns the responsibility of a state in connection with the act of another state. Compared to the first reading text, which only devoted two articles to Chapter IV, it was expanded and now consists of four articles (Articles 16–19). It distinguishes between aid or assistance in the commission of an internationally wrongful act (Article 16), direction and control exercised over the commission of an internationally wrongful act (Article 17) and coercion of another state (Article 18). Article 19 serves as a saving clause which, *i.a.*, preserves the responsibility of the state having committed the breach or of any other state to whom the internationally wrongful conduct might also be attributable.[18]

Chapter V concludes Part One of the Articles and contains seven circumstances precluding wrongfulness: consent, self-defence, countermeasures, *force majeure*, distress, necessity and compliance with peremptory norms. Chapter V remained substantially the same and was to a large extent only subject to drafting changes. However, one change that appears to be a minor drafting change may amount to a significant broadening of the hitherto very limited and exceptional conditions of state of necessity (Article 25). The text at first reading justified the invocation of necessity only when "the act was the only means of safeguarding an essential interest *of the State* against a grave and imminent peril" (emphasis added), whereas the new text provides that necessity may be invoked if the act is "the only way for the State to safeguard an essential interest against a grave and imminent peril." Thus, Article 25 allows a state to invoke necessity not only if an essential interest of itself is in danger, but also in cases of grave danger to the interest of another state or even of the international community as a whole.[19] In the end, the invocation of state of necessity may thus become a further means to enforce community obligations.

The Commission incorporated into Chapter V a specific limitation on the right to invoke a circumstance precluding wrongfulness. Article 26 provides that the circumstances precluding wrongfulness in Chapter V do not authorise or excuse any derogation from a peremptory norm of general international law.[20] Although Article 26 is formally applicable to all circumstances precluding wrongfulness, some of them appear to include the limitation imposed by peremptory norms separately – at least implicitly. For instance, as regards consent as a circumstance precluding wrongful-

18. *See* commentary to Article 19, paras. (1)–(4).
19. This intention of Art. 25 is affirmed by the commentary to Article 25, para. (2), which provides that "necessity consists […] in a grave danger either to the essential interest of the State or of the international community as a whole."
20. The initial proposal of the Special Rapporteur was quite different. He proposed as an additional circumstance precluding wrongfulness the case that the wrongful act is required in the circumstances by a peremptory norm of general international law. *See* Crawford, Second Report, *supra* note 5, at paras. 306–313.

ness, the question whether the consent has been 'validly' given, or only in breach a peremptory norm of international law, may fall under Article 20 as well as Article 26. Likewise, Article 50(1)(d) explicitly provides that countermeasures shall not affect obligations under peremptory norms of general international law and hence reiterates the content of Article 26.[21]

The last Article of Chapter V is again a without prejudice clause and deals with the consequences of invoking a circumstance precluding wrongfulness. In particular, Article 27(b) provides for the possibility that the state invoking the circumstance precluding wrongfulness may nevertheless be bound to make up for the material loss suffered by another state. While former Article 35 restricted this reservation of 'compensation' to cases of consent, *force majeure*, distress and state of necessity, the new Article 27(b) applies in principle to all circumstances precluding wrongfulness. However, apart from this questionable broadening of the scope of compensation for loss absent wrongful conduct,[22] there is also a conceptual problem with this aspect of Article 27(b). Usually it is only in case of circumstances precluding fault that a person who has caused damage in violation of the law is nevertheless liable to compensate for the damage. Moreover, in the absence of wrongful conduct, a duty to compensate would amount to an obligation of compensation for injurious consequences of lawful conduct. Such a form of liability, however, is at best recognised in the context of damage arising out of (ultra-)hazardous activities. Unfortunately, neither Article 27(b) nor the commentary thereto say on what basis such an obligation is to be established.[23] In any event, it would appear that this question depends on the relevant primary norm at issue wherefore it would have been better to omit this provision and to refer in the commentary to the rule of *lex specialis* in Article 55, or the general saving clause in Article 56.

2.2. Part Two: Content of the International Responsibility of a State

2.2.1. Reparation in general

Part Two of the Articles underwent substantial restructuring during the process of second reading. Portions of the existing Part Two were taken out and, together with new provisions, now form two additional Parts: one concerning the implementation of state responsibility (including issues of invocation and admissibility of claims as well as countermeasures), and

21. *See* commentary to Article 50, para. (9).
22. By contrast, the Special Rapporteur proposed to limit the issue of compensation to distress and necessity, *see* Crawford, Second Report, *supra* note 5, at paras. 341–345.
23. Similarly, though with respect to former Art. 35, K. Zemanek, *The Legal Foundations of the International System*, 266 RCADI 9, at 264–165, para. 551 (1997). A further problem is that Art. 19 is not in tune with Art. 27(2).

the other laying down general provisions. In other words, the new Part Two governs what is called the 'secondary relationship' of state responsibility, *i.e.* the rules of reparation in its broad sense, including cessation and assurances of non-repetition, Part Three deals with the 'tertiary relationship', and concluding Part Four contains general provisions applicable to the entire text.

Part Two consists of three Chapters, the first being devoted to general principles which are by and large uncontroversial. Noteworthy are Articles 30 and 31, which lay down the main legal consequences of an internationally wrongful act, *i.e.*, cessation and reparation. According to Article 30, a responsible state has to cease the wrongful act, if it is continuing, and, if circumstances so require, to offer appropriate assurances and guarantees of non-repetition. Compared to the first reading text, which considered assurances and guarantees of non-repetition as a form *sui generis* of reparation,[24] Article 30 considers cessation and assurances as the two sides of one and the same coin. While cessation is directed to bringing a continuing breach to an end and thus is concerned with the 'negative' aspect of performance of the obligation breached, assurances and guarantees of non-repetition serve a preventive function and are more future-oriented in that they are designed to affirm, and in this sense guarantee, the further performance of the obligation in the future.[25] In any event, common to both cessation and assurances is that they serve to reaffirm or reinforce the continuing validity of the primary obligation breached. Cessation is uncontroversial and generally accepted in theory and practice, although in many cases it will be difficult to distinguish cessation from restitution.[26] By contrast, assurances and guarantees of non-repetition have until recently played a marginal role in the law of state responsibility. However, since the ICJ in the *LaGrand* case appears to have strengthened the role of assurances of non-repetition,[27] the Commission decided to retain them in the text. Given that – as already mentioned – there are good reasons to treat them not as an aspect of the secondary obligation of reparation but rather of the continuing primary legal relationship affected by the breach, they were coupled with cessation in Article 30.[28]

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24. *See* former Art. 46 and G. Arangio-Ruiz, Second Report on State Responsibility, UN Doc. A/CN.4/425, 1989 YILC, Vol. II(1), 1, at 56, para. 191, Art. 10.
25. Commentary to Article 30, para. (1).
26. *Id.*, at paras. (7) and (8). In this respect, much will depend on the interpretation of the relevant primary norm at stake, *see* Rainbow Warrior case (New Zealand *v.* France), Arbitral Tribunal, Award of 30 April 1990, 20 RIAA 217, at 264–266, paras. 102–106, and 267–271, paras. 111–115 (1994).
27. LaGrand (Germany *v.* USA), Merits, Judgment of 27 June 2001, paras. 124–127 (not yet published). The ILC had decided to postpone any decision on assurances until the Court rendered its judgment in that case. On the divided views within the ILC on the reading of the LaGrand Judgment with regard to assurances of non-repetition *see* Crawford, Peel & Olleson, *supra* note 6, at 987.
28. Crawford, Third Report, *supra* note 5, at paras. 53–59.

Article 31(1) states the general principle that the responsible state is obliged to make full reparation for the injury caused by the internationally wrongful act. Paragraph 2 provides that injury includes any damage, whether material or moral, caused by the breach. This 'inclusive approach' to injury involves several important assumptions. First, the issue of injury, though not an *a priori* condition for there being an internationally wrongful act, is relevant in assessing the form and amount of reparation. Secondly, there is no uniform definition of damage or injury in international law. From an etymological point of view, 'injury' conforms to the Latin *iniuria*, which denotes a certain category of acts contrary to what is prescribed by the law (that is, illegality), whereas 'damage' derives from the Latin *damnum* and denotes the loss, *i.e.* the actually harmful result, of the wrongful or illegal act.[29] In general, this etymological and terminological distinction between injury and damage entails a conceptual distinction which is generally acknowledged in doctrine[30] and which has implications beyond mere theory.[31] However, this fine distinction would appear inappropriate as a basis for a general definition, not least because there are no exact equivalencies between the terms in the other official languages of the United Nations.[32]

Finally, Article 31 addresses the issue of a causal link between the internationally wrongful act and the damage. Pursuant to international judicial practice, Article 31(2) does not prescribe a specific 'test' for allocating the damage to the breach (*e.g.*, remoteness, directness, foreseeability, proximity etc.), but rather leaves this allocation, as well as the question of concurrent causes, to the primary obligation breached and the factual circumstances of the breach.[33] As the commentary points out,[34] the notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the damage should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

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29. *See* H. Grotius, *De iure belli ac pacis libri tres*, reproduced and translated by F.W. Kelsey & J.B. Scott (Eds.), The Classics of International Law, Book II, Chapter XVII, Sec. II, at 430 (1913).
30. *See*, *e.g.*, B. Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, 185 RdC 8, at 35 (1984 II); Crawford, First Report, *supra* note 5, at para. 105.
31. For instance, the term direct *damage* refers to the question of restricting indemnifiable damage by requiring a sufficient factual, causation-related link between the wrongful act (*i.e.* the injury) and the loss or harm suffered (*i.e.* the damage). By contrast, direct *injury* – inasmuch as it concerns the incidence of the local remedies rule – refers to the breach or the nature of the illegality of the act itself, regardless of the factual detrimental consequences (*i.e.* the damage) of the act. Another example is the general conceptual distinction between state responsibility for internationally wrongful acts (*i.e. injury*) and liability for *damage* resulting from acts not prohibited by international law.
32. On the question of damage and injury *see also* Crawford, The International Law Commission's Articles, *supra* note 6, at 29–31.
33. Commentary to Article 31, paras. (9)–(13).
34. *Id.*, at para. (10).

Chapter II covers the forms of reparation, *viz.*, restitution, compensation and satisfaction, which may be required by the responsible state either singly or in combination (Article 34). Contrary to the first reading text, the forms of reparation are formulated as an obligation of the responsible state rather than a right of the injured state. This was a consequence of the restructuring of the concept of the 'injured state' (former Article 40).[35] Article 35 upholds restitution as the primary form of reparation.[36] If restitution is either not possible, disproportionate or insufficient to provide full reparation, the responsible state must pay compensation (Article 36(1)), which "shall cover any financially assessable damage including loss of profits insofar as it is established" (Article 36(2)). Compared to the first reading text, the term 'financially assessable damage' replaces 'economically assessable damage' and denotes "any damage which is capable of being evaluated in financial terms."[37]

Where neither restitution nor compensation can make good the damage caused by the wrongful act, the responsible state has to give satisfaction (Article 37(1)), which "may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality" (Article 37(2)). Previous forms of satisfaction, *viz.* nominal, aggravated or punitive damages and disciplinary action against, or punishment of, individuals responsible for a breach, were deleted.[38] As the list of modes of satisfaction is not exhaustive, other forms may be appropriate depending on the circumstances of the case.[39]

2.2.2. Serious breaches of obligations under peremptory norms of general international law

Chapter III of Part Two covers what has remained of international crimes of state. As is well known, former Article 19 proved to be highly contro-

35. *See infra* Section 2.3.1.
36. *Cf.* commentary to Article 35, para. (3).
37. Commentary to Article 36, para. (5).
38. *Cf.* former Art. 45(2)(b)–(d). The value of nominal damages as a distinct form of satisfaction was doubted, since it is not clear what could be achieved by them which could not be achieved by declaratory relief (Crawford, Third Report, *supra* note 5, at para. 188). As regards aggravated or punitive damages, they were simply not acceptable (*see infra* notes 52–53 and accompanying text). Finally, the punishment of individuals (agents or private persons) was not retained because the responsible state cannot be required to punish a person not yet convicted of a crime or not even charged with a criminal offence, as this would be at variance with the presumption of innocence of this person and the latter's right to a fair trial. *Cf.* Zemanek, *supra* note 23, at 272; Crawford, Third Report, *supra* note 5, at para. 192.
39. *Cf.* commentary to Article 37, para. (5). The most common form of satisfaction in international judicial practice, *viz.* the declaration of wrongfulness of the act by a competent court or tribunal, is not listed because such declaration must emanate from a judicial organ with jurisdiction, and the Articles are not concerned to specify such an organ or to deal with issues of judicial jurisdiction. *Id.*, at para. (6).

versial in doctrine[40] as well as in the opinion of states.[41] Apart from the various drafting deficiencies of former Article 19, the main points of criticism were that the 'concept' of international crimes of State would unnecessarily lead to a 'criminalisation' of international law, that the international legal structure was not sufficiently developed for dealing with such criminalisation and that – given the seriousness of the breach – the consequences envisaged in case of international crimes (former Articles 51–53) were so trivial that the distinction between crimes and delicts was not justified.[42] In view of the many shortcomings of the 'concept' of international crimes in the first reading text, the Special Rapporteur considered several alternatives,[43] and upon his proposal the Commission decided on a compromise to the effect that Article 19 be deleted, but that the Articles should nevertheless single out serious breaches of certain obligations of fundamental importance to the international community and that such serious breaches should entail specific consequences.[44] Accordingly, the new Article 40(1) provides that Chapter III is applicable "to the international responsibility which is entailed by a serious breach […] of an obligation arising under a peremptory norm of general international law." Thus two criteria distinguish this serious kind of breach from other types of breaches. The first concerns the content or character of the obligation breached, which must arise under a peremptory norm of general international law.[45] The second criterion affects the 'quality' or 'nature' of the breach, which must be serious. Paragraph 2 defines that a "breach of such an obligation is serious if it involves a gross or systematic failure by the

40. For an overview of the literature *see* N. Jørgensen, The Responsibility of States for International Crimes 299–314 (2000) and the references *in* Crawford, Peel & Olleson, *supra* note 6, at 976, n. 53.
41. Crawford, First Report, *supra* note 5, at paras. 52–60.
42. *See* in detail Crawford, Third Report, *supra* note 5, at paras. 380–385; Crawford, The International Law Commission's Articles, *supra* note 6, at 16–20.
43. Crawford, Third Report, *supra* note 5, at paras. 76–101.
44. As to the drafting history of Chapter III *see* in more detail Crawford, The ILC's Articles, *supra* note 6, at 35–38. For an evaluation of new Chapter III of Part Two *see* I. Buffard, *Was wurde aus den internationalen Verbrechen? "Serious Breaches of Obligations under Peremptory Norms of General International Law" als Ersatz für "International Crimes" im endgültigen Entwurf der ILC über die Staatenverantwortlichkeit*, *in* I. Marboe, A. Reinisch & S. Wittich (Eds.), Österreichischer Völkerrechtstag 2001, Favorita Papers 02/2002, 144–166 (2002).
45. The commentary lists the following examples of obligations under peremptory norms: the prohibitions of aggression, slavery, slave trade, genocide, racial discrimination, *apartheid*, and of torture, the basic rules of international humanitarian law applicable in armed conflict, and the obligation to respect the right of self-determination, *see* commentary to Article 40, paras. (4) and (5). Note that Article 41(1) as provisionally adopted by the Drafting Committee in 2000 referred to obligations *erga omnes*, *i.e.* obligations "owed to the international community as a whole," a phrase coined by the ICJ in its famous *dictum* in Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain), Second Phase, 1970 ICJ Rep. 3, at 32, para. 33. This phrase however proved to be too general and was not accepted in the context of Part Two, Chapter III. It nevertheless reappears in Arts. 42 and 48. *See infra* Section 2.3.1.

responsible State to fulfil the obligation." The term 'systematic' denotes a violation carried out in an organised and deliberate way, whereas 'gross' refers to the intensity of the violation or its effects. As the commentary emphasises, the two terms are not mutually exclusive.[46]

Article 41 then sets out the particular consequences of a serious breach of an obligation arising under a peremptory norm. Accordingly, states shall cooperate to bring to an end through lawful means any such serious breach (paragraph 1), and no state shall recognise as lawful a situation created by such a serious breach, nor render assistance in maintaining that situation (paragraph 2). The commentary to Article 41 states that

> [i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law.[47]

By contrast, the obligation not to recognise as lawful a situation created by a serious breach in the sense of Article 40 is supported by the ICJ.[48]

Finally, paragraph 3 states that Article 41 is without prejudice to the other consequences referred to in Part Two and to such further consequences that a serious breach may entail under international law. Thus Article 41(3) stipulates that, first, a serious breach of an obligation arising under a peremptory norm of international law entails the complete range of obligations of the responsible state (cessation, assurances and guarantees of non-repetition and, in particular, full reparation); and, secondly, that international law may provide additional and probably more severe consequences of serious breaches of obligations arising under a peremptory norm. While Article 41 does not itself stipulate such consequences, it does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.[49]

With the deletion of former Article 19 and the abandonment of the 'fiction' of international crimes, the ILC rectified a conceptual deficiency which placed the entire text in jeopardy. While it may be maintained that the consequences of serious breaches of obligations under peremptory norms still are not adequately adapted to the seriousness of the violation, it must be emphasised that in the final text, the relation between the gravity of the breach and the ensuing consequences is less disproportionate than in the first reading text.

Yet some critical remarks must nevertheless be made with regard to Article 41(3). In the first place, the value of the without prejudice clause

46. Commentary to Article 40, para. (8).
47. Commentary to Article 41, para. (3).
48. *Id.*, at paras. (6)–(10) with particular reference to the Advisory Opinion of the ICJ in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Rep. 16, at 56.
49. Commentary to Article 41, para. (14).

in respect of "such further consequences that a breach to which this Chapter applies may entail under international law" is doubtful, the more so as this reference appears to be already covered by the general saving clause in Article 56. But even if the reference to general international law may be justified in this specific context, it would have been desirable, or at least useful, to find in the commentary some clue as to such 'further consequences.' However, the paragraph of the commentary dealing with this aspect of Article 41(3)[50] is completely silent on this issue and does not mention a single candidate of additional consequences. This is indeed astonishing, given that one such candidate was hotly debated in the ILC and even formed part of the provisional draft. Article 42(1) as provisionally adopted by the Drafting Committee in 2000 provided that a serious breach of an obligation owed to the international community as a whole might involve "damages reflecting the gravity of the breach."[51] Despite the insistence of the Special Rapporteur on its inclusion, the Commission however deleted this provision since such aggravated or punitive damages were not acceptable to the majority.[52] Therefore, one would have expected at least a discussion on non-compensatory damages in the context of Articles 40 and 41. Other possible consequences might be the criminal or disciplinary prosecution of individuals responsible for the breach.

Furthermore, the relationship between the duty to cooperate and the traditional rules of neutrality is unclear. Given the fact that in case of aggression – which is a serious breach of an obligation under peremptory norms of general international law within the meaning of Article 40 – the aggressor state is not always easy to determine, states may well choose to stay neutral. The question thus arises as to whether the neutral states violate the duty to cooperate under Article 41(1). Regrettably the commentary again does not take a view on this question.[53]

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50. *Id.*
51. UN Doc. A/CN.4/L.600 (2000).
52. The Special Rapporteur emphasised the distinction between aggravated, afflictive or exemplary damages on the one side, and punitive damages on the other side, in order to justify the inclusion of the former in the text. *See*, *e.g.*, Crawford, Third Report, *supra* note 5, at paras. 189–191; Crawford, The International Law Commission's Articles, *supra* note 6, at 36. However, while this subtle distinction may be established in some domestic legal systems, it can hardly be maintained in international law. Where damages are payable according to the seriousness of the wrong done and in principle regardless of the actual harm suffered, such damages necessarily will have a strong punitive connotation, whether they are called punitive damages proper or not. Even in common law the terms punitive, exemplary, afflictive, aggravated or vindictive damages are generally used interchangeably, *see*, *e.g.*, B.A. Garner, Black's Law Dictionary 396 (1999). On the issue of punitive damages in international law in general *see* N.H.B. Jørgensen, *A Reappraisal of Punitive Damages in International Law*, 68 BYIL 247 (1997); S. Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility*, 3 ARIEL 101 (1998).
53. It is interesting to note that the text provisionally adopted in 2000 spoke of the obligation to "cooperate as far as possible to bring the breach to an end," *see* Art. 42(2)(c), UN Doc. A/CN.4/L.600 (2000). It would appear that under this provision the other states would have had more freedom of action with regard to the continuing breach.

Overall, however, the Chapter on serious breaches of obligations arising under a peremptory norm forms a satisfactory substitute for international crimes. The Articles thus recognise that there may be particularly grave breaches of certain obligations fundamental to the international community as a whole without establishing a special 'regime' of 'crimes.' With the deletion of the artificial distinction between 'delictual' and 'criminal' responsibility, there is only one single category of internationally wrongful acts to which the general criteria of Part One apply in an indiscriminate manner. In a sense it appears as an 'irony of codification' that with the deletion of Article 19 the ILC eventually returned to Ago's initial "unitary concept of State responsibility, which it should be possible to invoke in every case" and "without embarking upon the task of defining the various categories of wrongful acts and the consequences of those acts."[54]

2.3. Part Three: The Implementation of the International Responsibility of a State

2.3.1. Invocation of the responsibility of a state

(a) Injured and Other States. Part Three deals with the implementation of state responsibility and consists of two chapters. Chapter I regulates the invocation of state responsibility and includes also questions such as the admissibility of claims, the loss of the right to invoke responsibility, and cases of plurality of responsible and injured states. The most important provisions of Chapter I certainly are Article 42 on the invocation of the responsibility by an injured state and Article 48 dealing with the invocation of responsibility by a state other than the injured state. These two articles are the result of a substantial restructuring of former Article 40 on the meaning of injured state and will be discussed in the following.

Former Article 40, which linked the origin of responsibility with its consequences and hence was vital to the entire draft, suffered from many severe conceptual and drafting deficiencies.[55] In particular, it was too narrow and too broad at the same time. On the one hand, the provisions of former Article 40 dealing with community obligations, *viz.* paragraphs 2(e)(ii), 2(e)(iii), 2(f) and 3, amounted to a 're-bilateralisation' of objective regimes established through parallel obligations for the protection of collective or community interests; it split up obligations *erga omnes* into

54. R. Ago, Third Report on State Responsibility, UN Doc. A/CN.4/246, 1971YILC, Vol. II (Part One), 199, at 211, para. 42.
55. For a detailed list of problems *see* Crawford, Third Report, *supra* note 5, at paras. 83–96; Crawford, The International Law Commission's Articles, *supra* note 6, at 24–25. *See also* S. Wittich, *Das Konzept des verletzten Staates: Die Feststellung der Aktivlegitimation im Entwurf der ILC über die Staatenverantwortlichkeit insbesondere im Falle der Verletzung von Verpflichtungen erga omnes*, *in* Marboe, Reinisch & Wittich, *supra* note 44, at 167–188.

a bundle of bilateral (secondary) relationships.[56] In other words, contrary to their specific structure of performance, former Article 40 treated obligations *erga omnes* as if they were traditional bilateral ones. By the same token, former draft Article 40 was too broad in that due to its equation of obligations *erga omnes* with those of a bilateral structure it treated all 'injured states' apparently in exactly the same way, irrespective of the degree of injury or affectedness.

Due to the various severe flaws of former Article 40 it was inevitable that the concept of the injured state was redrafted. The question of defining the states which may invoke the responsibility of another state is now dealt with in two separate articles. Article 42 contains the concept of the injured state in a much narrower sense than former Article 40, whereas Article 48 recognises a wider category of states which only have a legal interest in invoking state responsibility and ensuring compliance with the (community) obligation breached. With this new approach, the Articles make several important distinctions.[57]

First, they distinguish between the entitlement to invoke immediate remedial consequences of the breach (cessation, assurances of non-repetition and reparation) from the entitlement to merely invoke the responsibility, in principle, of another state. Secondly, Articles 42 and 48 distinguish between the states towards which an obligation was breached according to their affectedness by the breach. The concept of injured state(s) is limited to the immediate victim(s) of the breach. Thirdly, the rights of the injured state differ from those of the other states which only have a legal interest in the performance of the community obligation breached. While the former is entitled to the whole range of secondary rights, the latter only may invoke their general interest in cessation and further compliance with the primary norm as well as compliance with the obligations arising from the breach, in particular reparation in the interest of the injured state or the beneficiaries of the obligation breached; they may however not demand reparation in their own name. Fourthly, Articles 42 and 48 distinguish between obligations having a strictly bilateral structure of performance and obligations owed towards a community of states (obligations *erga omnes*). Finally, the distinction between injured and other states also has repercussions on the issue of countermeasures.[58]

By analogy with Article 60 of the Vienna Convention on the Law of Treaties,[59] Article 42 envisages three cases of injured state. First, Article 42(a) defines as an injured state one to which the obligation breached is owed individually. This covers strictly bilateral obligations, regardless of

56. *Cf.* C. Annacker, *The Legal Régime of* Erga Omnes *Obligations in International Law*, 46 AJPIL 131, at 151 (1994); K. Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status*, 35 NILR 273, at 282–283 (1988).
57. *See also* Crawford, The International Law Commission's Articles, *supra* note 6, at 38–45.
58. *See infra* Section 2.3.2, Arts. 49 and 54.
59. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

the source of these obligations. Article 42(a) is not confined to obligations arising under bilateral treaties; many multilateral treaties consist but of a bundle of bilateral relationships or obligations.[60]

Secondly, Article 42(b)(i) defines as an injured state one which is 'specially affected' by the breach of a collective obligation, *i.e.* an obligation owed to a group of States including that state or the international community as a whole.[61] An example would be that of a regional treaty in which several states agree not to produce specified toxic fumes. In the event that a state party does not comply with that obligation and the breach causes harmful effects on individual states parties, the latter will be considered 'specially affected,' and hence injured, in the sense of Article 42(b)(i).[62] The other states parties to the treaty will be considered as only affected in their legal interest pursuant to Article 48. An example of the second aspect of Article 42(b)(i), *i.e.* of an obligation owed to the international community as a whole, would be that of the obligation not to use force. Here again, the victim state(s) of the use of force will be 'specially affected,' while all other states will only be entitled to invoke responsibility under Article 48.

Thirdly, Article 42(b)(ii) covers the special case of 'integral' or 'interdependent' obligations.[63] These are, again, collective obligations owed either to a group of States or to the international community as a whole, breach of which

> is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

These interdependent obligations are based on the premise that the performance of each state bound by such obligations is effectively conditioned upon and requires the performance of each of the others.[64] Oft-cited examples include disarmament treaties or the Antarctic Treaty. In the event of a breach of such an obligation all states are considered injured, whether or not any one of them is particularly affected, and are entitled to cessation as well as reparation.

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60. The examples *par excellence* are the 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95, and the 1963 Vienna Convention on Consular Relations, 596 UNTS 261. Other examples of strictly bilateral obligations are those established by unilateral commitment made by one state to another or by a binding judgment of an international court or tribunal. *See* commentary to Article 42, paras. (6)–(10).
61. Thus Art. 42(b)(i) draws the analogy to Art. 60(2)(b) of the Vienna Convention on the Law of Treaties.
62. The commentary to Article 42, at para. (12), mentions violations of Art.194 of the 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3, which may have particular adverse effects on individual states.
63. As to these terms *see id.*, at para. (5), n. 706. Art. 42(b)(ii) is the parallel provision to Art. 60(2)(c) of the Vienna Convention on the Law of Treaties.
64. Commentary to Article 42, para. (13).

The complementary provision to Article 42 is Article 48, which deals with the invocation of responsibility by a state other than an injured state in case of breach of a collective obligation. Again, Article 48(1) distinguishes between two types of collective obligations. According to subparagraph (a), a state other than an injured state is entitled to invoke the responsibility of another state 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. This category may be called obligations *erga omnes partes*. While the wording of Article 48(1)(a) as well as the commentary[65] suggest that two distinct conditions must be met in order for states other than the injured state to invoke responsibility, it would appear that both are just two sides of the same coin. For, an obligation that is established for the protection of a collective interest of a group of states must necessarily be owed to that group rather than to the individual member states of that group. Conversely, it is hardly conceivable that an obligation which is owed to a group of states is *not* established for the protection of a collective interest of that group – even if this interest is not limited to that group but is also shared by a wider community of states. Therefore, the definition in Article 48(1)(a) is repetitive. In any event, what is clear is that the main purpose of such obligations is to foster a common or collective interest, "over and above any interests of the States concerned individually."[66] Examples are obligations concerning the regional protection of the environment or of human rights.

According to Article 48(1)(b), states other than the injured state may invoke the responsibility of another state if the obligation breached is owed to the international community as a whole and hence is an obligation *erga omnes*. This provision incorporates the ICJ's well known *dictum* in the *Barcelona Traction* case, where the Court made "an essential distinction" between obligations owed to states in their individual capacity and those "owed towards the international community as a whole." With regard to the latter, the Court continued to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[67] As regards specific obligations *erga omnes*, the commentary to Article 48 refers to the examples given by the Court itself: obligations arising from the outlawing of acts of aggression, and of genocide and from the principles and rules concerning the basic rights of the human person, including protection of slavery and racial discrimination, and the obligation to respect the right of self-determination of peoples.[68]

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65. Commentary to Article 48, para. (6).
66. *Id.*, at para. (7).
67. Barcelona Traction case, *supra* note 45, at 32, para. 33.
68. *Id.*, at 32, para. 34. The right to self-determination of peoples as entailing an obligation *erga omnes* was added by the Court in the East Timor case (Portugal *v.* Australia), Judgment of 30 June 1995, 1995 ICJ Rep. 90, at 102, para. 29.

It is a remarkable aspect of Article 48, as compared to Articles 40 and 41, that it does not make the entitlement to invoke the responsibility of the responsible state dependent on a certain 'gravity' or 'seriousness' of the breach of the collective obligation. In other words, any violation of a collective obligation allows any other party to that obligation to invoke the responsibility of the responsible state.

Article 48(2) lists the categories of claims which states other than the injured state may raise when invoking responsibility under Article 48(1). Since these states invoke responsibility in the collective rather than in their individual interest, their rights are more limited than those of the injured state(s) under Article 42. Under subparagraph (a), a state other than the injured state may claim from the responsible state cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with Article 30. Subparagraph (b) allows such a state to claim from the responsible state performance of the obligation of reparation, in the interest of the injured state or of the beneficiaries of the obligation breached. This list in Article 48(2) is exhaustive.[69] Finally, Article 48(3) extends the conditions applying to the invocation of responsibility by an injured state also to states other than the injured state. These conditions are of a procedural character and concern the notice of claim (Article 43), the admissibility of claims (Article 44) and the loss of the right to invoke responsibility (Article 45).

(b) Evaluation. Compared to Article 40 of the first reading text, the concept of injured and other states in Articles 42 and 48 is a remarkable improvement in many aspects and solves one of the most controversial issues in the entire text in a manner which appears satisfactory to this author. In particular, the narrow and precise definition of injured states in Article 42 is reasonable and seems to be generally acceptable. On the other hand, Article 48 recognises a broader category of states which have a legally protected interest in the community obligation breached, but at the same time limits the forms of reparation available to them. Article 48(2) lays down the 'minimum rights,' as it were, for states other than the injured state(s) in case of breach of a community obligation, and provides an acceptable means of enforcing community interests in cases where there is no injured state.

Nevertheless, the solution adopted also has its weak points. In particular, it is very regrettable that states not directly injured may not claim reparation in case of 'victimless' breaches of community obligations, *i.e.* where there is neither an injured state nor a particular beneficiary of the obligation breached. This may well be the case with certain collective obligations in the field of the environment, even where substantial harm was caused to the global commons. It is true that there is an important difference between human rights obligations and environmental obliga-

69. Commentary to Article 48, para. (11).

tions: while the former necessarily have a beneficiary (*viz.* the individual persons), the latter are owed 'only' towards the community of states and their violation does not produce an injured state, unless a state is specially affected or the obligation is an integral one in the sense of Article 42(b)(i) and (ii), respectively. However, given that Article 48 focuses on the structure of performance of the obligation at issue rather than on the question whether the breach has inflicted damage upon individualisable victims, a distinction between, *e.g.*, violations of obligations protecting the global commons and human rights violations appears to be unjustified. Apart from this dogmatic inconsistency, there is, from a practical point of view, no sound reason that would justify the unavailability of reparation in case of victimless breaches of obligations *erga omnes (partes)* in Article 48(2). It could of course be objected that the questions of how to restitute or of measuring the amount of damages due as well as the technical difficulties of administering and allocating the sums of reparation in the collective interest would pose insurmountable obstacles in the absence of competent institutional structures. However, these practical and structural problems of implementing state responsibility in the collective interest are the same, whether the breach of the community obligation has produced victims or not.[70] Why should other states, though not specially affected, not be allowed to demand from the wrongdoing state to wipe out the injurious consequences caused by the latter's breach of a collective obligation? If these other states themselves assume the task of remedying the damage at their own expense, why should they not be entitled to reimbursement of their costs under the title of reparation? Unfortunately, the commentary to Article 48 is silent on this question.[71]

Another problem with Article 48 is its paragraph 3, which raises a number of questions. It provides, for instance, that Article 44 on the admissibility of claims in general applies also to an invocation of responsibility by a state entitled to do so under Article 48(1). Article 44 in turn excludes the invocation of the responsibility of another state if "the claim is not brought in accordance with any applicable rule relating to the nationality of claims" or if "the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted." Keeping in mind that the nationality of claims rule only applies to claims for diplomatic protection, it is by definition not applicable to

70. To the same effect J. Peel, *New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context*, 10 RECIEL 82, at 93 (2001). *See also* the discussions by C.D. Gray, Judicial Remedies in International Law 214–215 (1987), and M. Spinedi, *Les consequences juridiques d'un fait internationalement illicite causant un dommage à l'environnement*, *in* F. Francioni & T. Scovazzi, International Responsibility for Environmental Harm 75, at 108–109 (1991).

71. The Special Rapporteur held the view that the limited entitlement of the other states to cessation, satisfaction and assurances against repetition in case of victimless breaches of community obligations was significant in itself. Crawford, Third Report, *supra* note 5, at para. 379.

violations envisaged in Article 48. Suffice it to refer to the commentary to Article 48 itself, which at paragraphs (2) and (8) invokes the dictum of the ICJ in the *Barcelona Traction* case, where the Court precisely distinguished, in terms of invoking responsibility, obligations *erga omnes* from "[o]bligations the performance of which is the subject of diplomatic protection."[72] It could of course be argued that in such a case the nationality rule is not applicable in the sense of Article 44(a); but obviously this would render the entire provision superfluous. Similar considerations apply to the reference in Article 48(3) to the rule on the prior exhaustion of local remedies as provided for in Article 44(b). The local remedies rule is hardly conceivable to be applicable in case of serious breaches of obligations under peremptory norms of general international law. Oddly enough, this is recognised by the commentary to Article 40 with reference to consistent patterns of gross violations of human rights.[73] Therefore, while the nationality of claims rule appears generally inapplicable in case of Article 48, the reference to the local remedies rule can only apply to the invocation by States other than the injured State of responsibility under Article 48 provided that the breach of the collective obligation is not a serious one within the meaning of Article 40.

Despite these shortcomings, however, the main achievement of the complete redrafting of the concept of injured state is that Article 48(2) explicitly closes the gap which the ICJ had observed in its highly criticised decision in *South West Africa*. There the Court held that

> the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest […] is not known to international law *as it stands at present*.[74]

Hidden in a footnote in the commentary, the ILC states that "article 48 is a deliberate departure" from that decision.[75] After all the ILC fortunately carried out the progressive development which the ICJ probably had indicated 35 years ago.

2.3.2. Countermeasures

Chapter II of Part Three deals with the conditions and limitations on the taking of countermeasures by an injured state. The question as to whether or not to include countermeasures in the text was one of the most con-

72. *Supra* note 45, at paras. 33–35.
73. Commentary to Article 40, para. (7). *See also* Wittich, *supra* note 15, at 165–167.
74. South West Africa, Second Phase (Ethiopia/Liberia *v.* South Africa), Judgment of 18 July 1966, 1966 ICJ Rep. 1, at 47 (emphasis added).
75. Commentary to Article 48, para. (7), n. 766. *See also id.*, at para. (12), where it is stated that Art. 48(2)(b) "involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake."

troversial aspects during the process of the second reading.[76] Many governments argued in favour of excluding any detailed regulation of countermeasures from the text, albeit for different, even opposing, reasons. On the one side, it was argued that a comprehensive regulation of countermeasures might further their abuse; on the other side were those states which opposed specific substantive and procedural regulations of countermeasures as these might unduly restrict the conditions relating to resort to countermeasures. As a compromise, the ILC eventually decided to retain a separate Chapter on countermeasures which, however, was limited to countermeasures taken by an injured state as defined in Article 42. Other contentious issues in respect of countermeasures were those of substantive limitations on, and procedural conditions for the taking of, countermeasures.

Article 49 lays down the permissible objects of countermeasures and places certain limits on their scope. Countermeasures are generally not perceived as a form of punishment. Rather their aim is to achieve compliance by the responsible state with its obligations arising as a consequence of the wrongful act. Therefore, Article 49(1) provides that an injured state may only take countermeasures against a responsible state in order to induce that state to comply with its obligations under Part Two on the content of state responsibility. Yet, it is unclear whether these obligations include each and every obligation, *i.e.* cessation, assurances and guarantees of non-repetition and reparation. While Article 49(1) itself is couched in broad terms ("[the responsible state's] obligations under Part Two"), the commentary only refers to the "obligations of cessation and reparation."[77] It is doubtful whether countermeasures are justified for the sole purpose of inducing the responsible state to provide assurances and guarantees of non-repetition when it has already ceased its wrongful conduct and provided reparation.

Paragraph 1 furthermore implies the uncontested principle that a countermeasure may not be directed against third states.[78] Article 49(2) expresses the temporary and remedial character of countermeasures and makes it clear that they are limited to the non-performance for the time being of international obligations of the state taking the measures towards the responsible state. In other words, countermeasures may not create new situations which cannot be rectified and have to be discontinued when the responsible state complies with its obligations of cessation and reparation.[79] Finally, under Article 49(3), countermeasures shall, as far as

76. As to the debate on these issues *see* in detail Crawford, The International Law Commission's Articles, *supra* note 6, at 48–56.
77. Commentary to Article 49, para. (3).
78. As the commentary points out, "[t]he word 'only' in paragraph 1 applies equally to the target of the countermeasures as to their purpose." *Id.*, at para. (4).
79. *Id.*, at para. (7). The latter aspect is explicitly set out in Art. 53 according to which countermeasures shall be terminated as soon as the responsible state has complied with its obligations under Part Two in relation to the internationally wrongful act.

possible, be taken in such a way as to permit the resumption of performance of the obligations in question. In particular, the injured state shall not take irreversible measures so as to inflict irreparable damage upon the responsible state, since this could amount to a form of punishment.[80]

Article 50 stipulates certain obligations which shall not be infringed by the taking of countermeasures. Paragraph 1 lists particular obligations which due to their substantive character must not be the subject of countermeasures at all. These are: (a) the obligation to refrain from the threat or use of force as embodied in the UN Charter; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; and (d) other obligations under peremptory norms of general international law. Although the formulation of the last subparagraph may well be taken to the contrary, the commentary states that "[t]he reference to 'other' obligations under peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs" as to the peremptory character of the obligations included therein.[81]

Article 50(2) specifies two other categories of obligations which may not be suspended by way of countermeasures, *viz.* obligations under any dispute settlement procedure applicable between the injured and the responsible states and obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents. The reason for the exemption of these obligations from countermeasures is that they might precisely become relevant in bringing the dispute to an end by maintaining the channels of communication between the states concerned.

The formal distinction between paragraph 1 and paragraph 2 of Article 50 is justified in principle due to the different reasons why the two categories of obligations are not subject to countermeasures. While paragraph 1 excludes from the scope of countermeasures certain obligations due to their substantive character (peremptory norms and other obligations protecting essential interests), paragraph 2 focuses on the function of the obligations concerned. However, the difference in the legal consequences as between the two categories of obligations is less clear, and the commentary to Article 50 does not shed light on this question. In any event, it would appear that both categories of obligations in Article 50 are in no circumstances subject to countermeasures.[82]

Article 51 contains the essential principle of proportionality and provides that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. Since the state taking countermeasures is not restricted by considerations of reciprocity and since countermeasures are not confined to the obligations affected by the previous breach,[83] a

80. *Id.*, at para. (9).
81. Commentary to Article 50, para. (9).
82. *Cf. id.*, at para. (1).
83. *See* introductory commentary to Part Three, Chapter II, para. (5).

comparison between different obligations protecting different values and interests is difficult. In this sense, the Tribunal in the *Air Services* arbitration observed that "judging the 'proportionality' of counter-measures is not an easy task and can at best be accomplished by approximation."[84] In any event, proportionality must be assessed taking into consideration the injury suffered, which consists of a quantitative and a qualitative element, such as the importance of the interest protected by the rule infringed. And while Article 51 relates proportionality primarily to the injury suffered, the gravity of the breach as well as the rights in question must also be taken into account.[85]

The rather strict procedural conditions for the taking of countermeasures as contained in Article 48 of the text at first reading were simplified during the second reading and are now specified in Article 52. Paragraph 1 provides that, before taking countermeasures, an injured state shall call on the responsible state, in accordance with Article 43, to fulfil its obligations of cessation and reparation and notify the responsible state of any decision to take countermeasures and offer to negotiate with that state. This provision shall ensure that the responsible state, faced with the proposed countermeasures, has an opportunity to reconsider its position and to present a response.[86] Nevertheless, under paragraph 2 the injured state may take such urgent countermeasures as are necessary to preserve its rights. Otherwise the injured state could be faced with the situation that the intended countermeasures do not achieve their purpose because the responsible state seeks to immunise itself from the countermeasures by taking protective measures.[87] Article 53 thus strikes a balance between the interests of the injured and those of the responsible state.

Countermeasures are a form of self-help and as such a main feature of the decentralised international legal system. In general, disputes on breaches of international law are not often submitted to judicial or arbitral settlement. However, Article 53(3) provides that where such a dispute is submitted to a court or tribunal and if the responsible state has ceased the wrongful act, the injured state may not take countermeasures or, if it has already taken countermeasures, must suspend them without undue delay. Paragraph 3 is based on the assumption that the dispute is pending before a court or tribunal which has jurisdiction over the dispute and which has the power to order binding provisional measures. In that case, the injured state may request the court or tribunal to order provisional measures of protection. Provided the responsible state complies with the order, there

84. Air Services Agreement of 27 March 1947 (United States *v.* France), 18 RIAA 417, at 444, para. 83 (1978).
85. *Id. See also* Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, 1997 ICJ Rep. 7, at 56, para. 85; Commentary to Article 51, para. (6).
86. Commentary to Article 53, paras. (4) and (5).
87. The commentary gives the example that the responsible state might withdraw its assets from banks in the injured state, *id.*, at para. (6).

will be no need for the injured state to take countermeasures.[88] Finally, Article 53(4) provides the general principle that the injured state may nevertheless take countermeasures, or need not suspend them, if the responsible state fails to implement the dispute settlement procedures in good faith.

Article 54 concludes Chapter II and with it Part Three. It is not concerned with countermeasures by an injured state but with the possible reactions of states other than the injured state against unremedied breaches of collective or community obligations. Given the uncertain state of international law on countermeasures taken in the general or collective interest,[89] the ILC decided not to include in the Articles a provision to the effect that states other than the injured state are entitled to take countermeasures to induce the responsible state to comply with its obligations. Instead the Commission opted for a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law. Article 54 accordingly provides that the Chapter on countermeasures does not prejudice the right of any state, entitled under Article 48(1) to invoke the responsibility of another state, to take lawful measures against that state to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation.

The Special Rapporteur had proposed a much more progressive provision with regard to countermeasures by states other than the injured state. Draft Article 54 as provisionally adopted by the Drafting Committee in 2000 provided that states other than the injured state were entitled to take countermeasures at the request and on behalf of the injured state, to the extent that that state may itself take countermeasures; in case of serious breaches of essential obligations to the international community (what is now Article 40), any state was entitled to take countermeasures in the interest of the beneficiaries of the obligation breached.[90] Ironically, many states opposed this provision for going much too far, thus completely ignoring the fact that the corresponding provisions of the first reading text (former Article 47 in connection with former Article 40) went much further in that any state, irrespective of the position of the (directly) injured state, was allowed to take countermeasures in response to an international crime or the breach of certain collective or community obligations.[91]

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88. *Id.*, at para. (8).
89. For a review of the sparse state practice in the field *see* commentary to Article 54, paras. (3)–(5).
90. It also provided that where more than one state took countermeasures, the states concerned had to cooperate in order to ensure that the conditions for the taking of countermeasures were fulfilled. UN Doc. A/CN.4/L.600.
91. *See* the sarcastic remark by the Special Rapporteur that this argument "was a purely historical justification" of Draft Article 54, while "[n]ow that the proposed position was clarified, article {54} needed substantive justification." Crawford, The International Law Commission's Articles, *supra* note 6, at 55.

Be that as it may, it is questionable whether the finally adopted provision contributes much to clarify the as yet unclear state of the law. No doubt the issue of countermeasures in the general interest is a highly sensitive one, and the drafting history shows that any proposed solution necessarily attracts much criticism. Yet the wording of Article 54, especially the emphasis on the lawfulness of the measures involved, obfuscates any exact meaning of the provision. Article 54 does not 'legitimise' countermeasures – in the proper sense – of states not directly injured in order to enforce compliance of a community obligation; admittedly, it does not exclude the possibility of taking such 'measures' either. The emphasis of the lawfulness certainly means that these measures are legal *per se*, since countermeasures are lawful as well, albeit only by virtue of their being a circumstance precluding wrongfulness (Article 22). Viewed from this angle, the measures pursuant to Article 54 could be considered as acts of retorsion, *i.e.* 'unfriendly' acts that are not incompatible with the international obligations of the acting state even if they are a response to a prior wrongful act of the state affected by them. But it must be recalled that the ILC deliberately excluded acts of retorsion from the scope of the Articles.[92]

What Article 54 says is that a state entitled under Article 48(1) to invoke the responsibility of another state may take (counter)measures on condition that it is allowed to do so under general international law. The redundancy is evident. The only reasonable information included in Article 54 seems to be that such measures may only be taken to ensure reparation *in the interest* of the *injured state* or of the *beneficiaries of the obligation* breached. But this would appear to follow already from Article 48(2), given that a state cannot obtain more by way of countermeasures than it is entitled to claim in terms of invocation of responsibility. The reference to lawful measures as embodied in Article 54 appears also superfluous in view of the general saving clause in Article 56. It is difficult to see what could be achieved by Article 54 which could not be achieved by Article 56. One has the feeling that the presence of Article 54 makes the absence of a provision on 'real' countermeasures in the collective interest even more noticeable than the total lack of any regulation to this effect. On the whole, Article 54 as it stands is a compromise without, however, providing any method of solution; and on this as on so many other issues, the commentary unfortunately fails to shed more light on the content and meaning of specific provisions. In this respect, Article 54 is in line with Article 41(3), although in a negative sense to the effect that the purported regulation of a problem is left in complete abeyance.

92. *See* introductory commentary to Part Three, Chapter II, para. (3).

2.4. Part Four: General Principles

Part Four consists only of five articles covering general provisions and without prejudice clauses which are applicable to the entire text, as compared to general principles applicable to individual chapters or parts. These general principles are the rule of *lex specialis* (Article 55), the principle that questions of state responsibility not regulated by the Articles are governed by the applicable rules of international law (Article 56), the provision that the Articles are without prejudice to any question of the responsibility of international organizations (Article 57), the provision that the Articles are without prejudice to any question of individual responsibility of persons (Article 58) and the provision that the Articles are without prejudice to the Charter of the United Nations (Article 59).

3. EVALUATION

On the whole, the Articles on Responsibility of States for Internationally Wrongful Acts are a well balanced result of codification and progressive development of the law of state responsibility. Many parts of the text may unquestionably be said to constitute a codification of the existing law of state responsibility. In particular this applies to Chapter V of Part One on the circumstances precluding wrongfulness which has repeatedly been referred to by international courts and tribunals.[93] Likewise, the rules of attribution or, more generally, on the origin of state responsibility reflect existing (customary) international law,[94] and the same holds true for the forms and basic principles of reparation.[95] On the other hand, the Articles progressively develop the law, and with regard to controversial issues this is at times frankly admitted by the commentaries. For instance, the ILC doubts as to whether general international law at present prescribes a

93. *See* Rainbow Warrior case, *supra* note 26, at 217, at paras. 76–101 (*force majeure* and state of necessity); Libyan Arab Foreign Investment Company ('LAFICO') and the Republic of Burundi, Arbitral Tribunal, Award of 4 March 1991, 96 ILR 288, at 318–319, paras. 55–56 (*force majeure* and state of necessity); The M/V "Saiga" (No. 2) case, Judgment of 1 July 1999, International Tribunal for the Law of the Sea, at paras. 133–135 (state of necessity); Gabčíkovo-Nagymaros case, *supra* note 85, at paras. 49–58 (state of necessity).

94. *See* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, 1999 ICJ Rep. 62, at 87, para. 62, where the ICJ held that the rule that the conduct of any organ of a state must be regarded as an act of that state as embodied in Art. 6 of the 1996 Draft (now Art. 4) was of a customary character. Other rules of attribution as applied by the ICJ and codified by the ILC are that on conduct directed or controlled by a state (Art. 8, Nicaragua case, *supra* notes 7–8 and accompanying text), or that of conduct acknowledged and adopted by a state (Art. 11, Diplomatic and Consular Staff case, *supra* notes 12 and 13 and accompanying text). *See also* Crawford, The International Law Commission's Articles, *supra* note 6, at 2–3 and 16.

95. Thus, the International Tribunal for the Law of the Sea referred to the Article 42(1) 1996 Draft (now Art. 34), Saiga case, *supra* note 93, at para. 171.

positive duty of states to cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.[96] Similarly, the commentary states that the right of states other than the injured state to claim from the responsible state performance of the obligation of reparation in the interest of the injured state or the beneficiaries of the community obligation breached (Article 48(2)(b)), "involves a measure of progressive development."[97]

The text at first reading suffered from many general drafting deficiencies, such as excessive prescription and over-refinement, and it injected far more complexity into the draft than necessary. Examples of this over-regulation could be found throughout the first reading text; in particular, the provisions on attribution consisted of a "series of convoluted articles establishing a typology of obligations,"[98] which turned out to be unnecessarily complex, unhelpful and even counterproductive. The same holds true for cumbersome definitions, such as that of the injured state (former Article 40), which were hardly understandable even if one read the commentary carefully. With hindsight, the Articles adopted on first reading, as compared to those finally adopted, give the impression of an attempt to detailed statutory regulation in an exhaustive manner, rather than of a set of rules which seeks to give real and firm guidance for state conduct in everyday inter-state relations. This result was perhaps partly due to the fact that the previous Special Rapporteurs had a civil law background. In that respect, it was an advantage that the last Special Rapporteur represented the common law tradition, which emphasises practice oriented, empirical approaches, much more than the civil law tradition. On the other hand, it was certainly an achievement of the civil law tradition to provide the entire project with an overall structure which proved to be coherent and comprehensive.

While the Articles are, to be sure, a compromise solution, it is probably no exaggeration to state that the ILC almost accomplished the impossible, given the rather short period of time available for the second reading, which had to be completed within one quinquennium. Yet, the pressure of time is unfortunately perceptible in the commentaries, which in many respects are of a hasty and superficial quality and often do not provide sufficient explanation; this is particularly regrettable where recourse to the commentaries would be needed to clarify fundamental problems raised by the Articles themselves.[99]

It is of course too early to make a definite assessment of the work of the ILC. What must be underlined, however, is that the conceptual key problems of the 1996 text, in particular the disputed 'criminalisation' of international law, the flawed concept of injured state, or the issue of coun-

96. Commentary to Article 41, para. (3).
97. Commentary to Article 48, para. (12).
98. Crawford, The International Law Commission's Articles, *supra* note 6, at 20–23.
99. *See*, *e.g.*, the text accompanying notes 23, 51–53 and 72.

termeasures, were solved in a reasonable manner. Where the Commission could not agree on a generally acceptable solution, it acted prudently by leaving the resolution of the matter to the further development of international law. Moreover, under the wise and efficient guidance of the Special Rapporteur, the Commission brought the Articles in line with judicial practice, state practice and important rules in related areas of international law (in particular, the law of treaties).

The Commission can certainly be reproached for having adhered to an overall state-centred approach that is generally characterised by a process of bureaucratisation which replaces the search for a workable solution by the search for state approval.[100] And from a theoretical point of view, there is not much to object to this fundamental criticism, which is directed towards the very foundations of the international legal order. Yet what would be the use of a draft that attempts to completely rewrite the rules on state responsibility and seeks to reconstitute international society, but which does not even take the hurdle of being adopted by the General Assembly. After all it must be acknowledged that the ILC has incorporated much of the criticism the state responsibility project has necessarily attracted during the decades of work on the topic. The Articles strike a realistic balance between a communitarian approach taking into account the long-term interests of international society on the one hand, and the traditional state-centred approach focusing on the individual self-interest of the states on the other hand.

Ultimately, the Articles may assist in enforcing collective or community interests on a global level more effectively than hitherto. Let us believe that the increasing permeation of the Articles by provisions on the enforcement of obligations protecting the fundamental interests of the international community signifies an important step towards the establishment of a more anthropocentric international legal society. In this sense, it is to be hoped that international practice will extensively rely on and apply the Articles in the future and thus continue to strengthen their authority.

100. *See*, *e.g.*, Allott, *supra* note 3, *passim*.