

All's Well That Ends Well

Comments on the ILC's Articles on State Responsibility

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I. Introduction

On 12 December 2001, the UN General Assembly, upon recommendation of its Sixth (Legal) Committee, adopted GA Res. 56/83.¹ The crucial passage of this resolution is contained in the third operative paragraph, pursuant to which the General Assembly

“[t]akes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, ... and commends them to the attention of Governments”.

The matter-of-fact language of this paragraph, and of the resolution in general, is deceptive. It obscures the importance of the resolution, which should be regarded as a milestone in the process of clarification and development of international law. In fact, GA Res. 56/83 marks the conclusion of one of the most important – and certainly the most complex – codification projects of the United Nation’s International Law Commission (“Commission”, “ILC”), namely its work on the law of State responsibility. Since 1956, when work on the topic formally began, the Commission had struggled with this topic, first trying to codify and develop rules on State responsibility for injuries to aliens, then – since 1963 – focusing on the elaboration of what became to be called the ‘secondary rules’ of State responsibility.² After 40 years, the Commission, in 1996, finally concluded a first reading of the project and presented a set of 60 draft articles and two annexes.³ Since the 1970s,

¹ GA Res. 56/83, adopted without a vote on 12 December 2001, available at <http://www.un.org/Depts/dhl/resguide/r56c6.htm>.

² In response to GA Res. 799 (VIII) of 1953, requesting the Commission to undertake the codification of the principles of international law concerning State responsibility, the Commission at its seventh session in 1955 decided to take up the topic. Mr. F. V. García Amador was appointed Special Rapporteur and subsequently submitted six reports setting out substantive rules of injuries to aliens and property. In 1963, the Commission appointed Mr. Robert Ago as new Special Rapporteur and abandoned the approach of dealing with primary rules, instead focusing on the secondary rules of State responsibility. When Ago left the Commission in 1980, 35 articles comprising the first reading of Part One on “the origin of international responsibility” had been adopted (see: Yearbook of the International Law Commission [Yearbook] 1980, vol. II/2, 26-63).

Between 1980 and 1996, the Commission received fifteen reports from Special Rapporteurs Willem Riphagen and Gaetano Arangio-Ruiz, on the basis of which, in 1996, it completed the first reading of the draft articles of Part Two and Three.

Ago’s eight reports are reproduced in: Yearbook 1969, vol. II, 125; Yearbook 1970, vol. II, 177; Yearbook 1971, vol. II/1, 199; Yearbook 1972, vol. II/1, 71; Yearbook 1976, vol. II/1, 3; Yearbook 1977, vol. II/1, 3; Yearbook 1978, vol. II/1, 31; Yearbook 1979, vol. II/1, 3 and Yearbook 1980, vol. II/1, 13.

See also Yearbook 1980, vol. II/1, 107; Yearbook 1981, vol. II/1, 79; Yearbook 1982, vol. II/1, 22; Yearbook 1983, vol. II/1, 3; Yearbook 1984, vol. II/1, 1; Yearbook 1985, vol. II/1, 3 and Yearbook 1986, vol. II/1, 1 for the seven reports submitted by Willem Riphagen.

Arangio-Ruiz’ eight reports are contained in: Yearbook 1988, vol. II/1, 6; Yearbook 1989, vol. II/1, 6; Yearbook 1991, vol. II/1, 1; Yearbook 1992, vol. II/1, 1; Yearbook 1993, vol. II/1, 1; UN Doc. A/CN.4/461 and Add. 1-3; UN Doc. A/CN.4/469 and Add. 1 and 2 and UN Doc. A/CN.4/476 and Add.1.

³ For the text of the first reading draft see the 1996 report of the Commission, UN Doc. A/51/10, 125-151.

when the project started to take shape, the Commission's work on State responsibility has been closely followed in academic writings⁴ and relied upon in a number of international judgments.⁵ The text adopted after the first reading in particular was the subject of detailed analysis and criticism.⁶

In July 2001, after a comparably quick process of revision conducted under the guidance of Special Rapporteur James Crawford, this first reading text was replaced by a new set of 59 articles adopted after a second reading.⁷ As will be shown, this new set of (second reading) articles is considerably different from the 1996 text, both in terms of structure and substance. It is the purpose of this article to assess and evaluate the main changes introduced in the course of the second reading (*infra*, III.). Before doing so, it is however necessary briefly to outline common features of both texts (II.).

⁴ See e.g. the general discussions by Simma, *Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission*, 24 *Archiv des Völkerrechts* (1986), 357; *id.*/Spinedi (eds.), *United Nations Codification of State Responsibility* (1987); Allott, *State Responsibility and the Unmaking of International Law*, 29 *Harvard Journal of International Law* (1988), 1; Zemanek, *Responsibility of States: General Principles*, in: *EPIL*, vol. IV (Bernhardt ed., 2000), 219; *id.*/Weil, *La responsabilité internationale* (1987); Dupuy, *Le fait générateur de la responsabilité internationale*, 184 *RdC* (1984 V), 9; *id.*, *The International Law of State Responsibility: Revolution or Evolution?*, 11 *Michigan Journal of International Law* (1989-1990), 105; Annacker, *Part Two of the International Law Commission's Draft Articles on State Responsibility*, 37 *GYIL* (1994), 206; cf. also the contributions in: *Société Française de Droit International* (ed.), *Colloque du Mans: La responsabilité dans le système internationale* (1991).

⁵ See primarily *Gabcikovo Nagymaros case*, ICJ Reports 1997, 7, at paras. 47, 50-53, 58, 79, 83; *Difference Relating to Immunity From Legal Suit of a Special Rapporteur of a Commission of Human Rights*, ICJ Reports 1999, 62, at para. 62; *Rainbow Warrior*, R.I.A.A., vol. XX (1990) 217, at para. 114.

⁶ Pellet, *Remarques sur une révolution inachevée*, 42 *AFDI* (1996), *id.*, *La codification du droit de la responsabilité internationale: tâtonnements et affrontements*, in: Liber Amicorum Georges Abi-Saab (Boisson de Chazournes/Gowlland Debbas eds., 2001), 285; Dupuy, *Droit des traits, codification et responsabilité internationale*, 43 *AFDI* (1997), 7; and the various contributions in: 10 *EJIL* (1999), 339.

Comments of governments on the 1996 text are reproduced in: UN Doc. A/CN.4/488 and UN Doc. A/CN.4/492.

⁷ The second reading text including explanatory commentaries is reproduced in: UN Doc. A/56/10, 43, and, together with an introduction, also appears in: Crawford, *The International Law Commission's Articles on State Responsibility* (2002). An interim draft, which had been completed in summer 2000 and had formed the basis for the final revision during the Commission's 2001 session, was circulated as UN Doc. A/CN.4/L.600 and published in the ILC Report 2000, UN Doc. A/55/10.

See also UN Doc. A/CN.4/490; UN Doc. A/CN.4/498; UN Doc. A/CN.4/507 and UN Doc. A/CN.4/517 for Crawford's four reports on State responsibility.

Detailed progress reports on the work of the ILC have been published by Simma in subsequent volumes of the *Nordic Journal of International Law*: vol. 67 (1998), 431; vol. 68 (1999), 293; vol. 70 (2001), 183; vol. 70 (2001), [in press]; see also the reports by Tams, *GYIL*, vol. 42 (1999), 552; vol. 43 (2000), 403; vol. 44 (2001), 707.

II. Basic Assumptions

Although this article will concentrate on the changes and modifications introduced during the second reading, it must be stressed at the outset that none of these – important as they may be – go to the conceptual foundations of the project. In fact, as the ILC's Special Rapporteur made clear, essential features of the text "could be considered as established and as forming basic assumptions for the second reading".⁸ They include the following.

1. Responsibility of States

The first of these basic assumptions relates to the scope of the ILC's project. Just as in every other legal system, responsibility under international law may be incurred by all types of actors – in fact it is often seen as an essential requirement for international legal personality.⁹ Faced with this variety of legal relation between different types of legal subjects (international organisations, individuals, etc.),¹⁰ the ILC made it clear from the start that it was concerned with responsibility arising between States.¹¹ In the first place, this means that responsibility of non-State actors is excluded from the scope of the articles. Article 1, which was adopted in 1973 and has not been amended since, therefore refers to the "wrongful act of a State" as the basis for responsibility. If at all, this basic assumption was spelt out more clearly during the second reading. Hence, articles 57 and 58 were introduced, addressing the specific problems arising from the conduct of individuals or of States acting within the framework of international organisations. Pursuant to article 57, the ILC does not purport to address questions "of the responsibility under international law of an international organization, or of any State for the conduct of an international organization", or concerning "individual responsibility under international law".

A similar restriction applies to actors affected by internationally wrongful acts. Although pursuant to article 1, responsibility arises from any breach, by a State, of any of its international obligations – i.e. irrespective of the identity of the other parties to the obligation –, the draft articles only deal with inter-State remedies for breaches.¹² Violations of rights of non-State actors – e.g. in the field of

⁸ Crawford, "Introduction", in: *id.*, The International Law Commission's Articles on State Responsibility (2002), 11.

⁹ See only Brownlie, *Principles of Public International Law* (5th ed., 1998), 57; *Reparations for Injuries*, ICJ Reports 1949, 179.

¹⁰ In the following, we will not engage in a discussion of the scope of international legal personality under present-day international law, but take for granted that non-State actors, such as international organisations, individuals or multinational corporations enjoy limited personality. For an assessment see Cassese, *International Law* (2001), 46-47, 66-85.

¹¹ For a radical critique of this approach see Allott (note 4).

¹² See Commentary to article 33, para. (4).

human rights, to pick but one field – therefore would quite clearly trigger a State's international responsibility. However, the draft articles do not purport to regulate responses by non-State actors. Instead, they remain within the classical model of inter-State reactions. This assumption, which was implicit in the 1996 draft, is now clearly spelt out in article 33(2), pursuant to which the draft articles are

“without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.¹³

2. Responsibility for Breach

Secondly, even when focusing on the responsibility of States, one might still draw a distinction between different grounds entailing responsibility. Specific legal consequences, such as a duty to make reparation, might be triggered by different types of State conduct. For example, there has been on-going discussion whether States should be held liable for injurious consequences arising out of hazardous acts even where these acts are not prohibited.¹⁴ In contrast to this broad approach, the scope of the draft articles is defined in a more restrictive way. Pursuant to articles 1 and 2, responsibility arises from “an internationally wrongful act of a State”, i.e. an act which “[c]onstitutes a breach of an international obligation”. Evident as it may seem, this approach implicitly recognises a distinction between responsibility for breach, on the one hand, and responsibility without breach (sometimes referred to as “liability”), on the other.¹⁵ The decision to keep both disciplines apart was taken as early as 1969.¹⁶ It has prompted the separate elaboration of rules on “liability”, which so far has proved extremely difficult.¹⁷ During the second reading, the distinction was taken for granted, and the restrictive approach recognised as pivotal to the completion of the draft project.

¹³ By way of example of such direct rights, the Commission refers to rights of individuals under human rights conventions or investment treaties; see Commentary to article 33, para. (4).

¹⁴ See Magraw, *Transboundary Harm: The International Law Commission's Study of “International Liability”*, 80 AJIL (1986), 305; Tomuschat, *International Liability for Injurious Consequences of Acts Not Prohibited by International Law*, in: *International Responsibility for Environmental Harm* (Francioni and Scovazzi eds., 1991), 37.

¹⁵ The distinction may be aptly expressed in English, where “liability” and “responsibility” have different meanings. The dichotomy however does not properly work in other languages: for example, the French title of article 304 of the Law of the Sea Convention, which in English reads “Responsibility and Liability for Damage”, simply says “Responsabilité en cas de dommage”.

¹⁶ See Yearbook 1969, vol. II, 243 (para. 83).

¹⁷ Cf. primarily Barboza's article on the “Saga of Liability in the International Law Commission”, in: *L'évolution du droit international. Mélanges Thierry* (1998), 5. In the course of its 2001 session, the Commission's attempts have led to the adoption of a draft convention on the prevention of transboundary harm, which is reproduced in: UN Doc. A/56/10, 379-436.

3. Secondary Rules

Perhaps the most fundamental of the basic assumptions is the ILC's intention to codify the so-called 'secondary rules' of State responsibility, i.e. the "general rules governing ... international responsibility".¹⁸ Much has already been said about this decision, which was taken as early as 1963, when the initial attempts to codify the substantive rules governing State responsibility for injuries to aliens had reached a deadlock, and which has been confirmed ever since.¹⁹ There is little doubt that only by dropping the politically sensitive topic of injuries to aliens was the ILC able to continue its codification effort in the field of State responsibility. Interestingly however the conceptual foundation on which this fundamental assumption rests are rather weak. Instead of comprehensively defining what it means when referring to 'secondary rules', the ILC has adopted a pragmatic approach based on two propositions. First, in order to qualify as 'secondary', rules of State responsibility are to be distinguished from so-called 'primary rules', i.e. rules setting out specific rights or obligations.²⁰

Secondly, the secondary rules elaborated by the ILC are meant to apply to all forms of conduct attributable to a State. At least in principle, they are therefore of a general character.²¹ Inevitably, this means that the provisions of the text operate at a relatively high level of abstraction. Also, as is expressly recognised in article 55, they are residual and can be disappplied by specific, treaty-based rules.

These two factors do not allow for a conceptually clear and watertight definition of the concept of secondary rules. For example, the scope of specific primary rules depends on the content of secondary rules on attribution. To take but one example of practical relevance, the scope of the prohibition against the use of force crucially depends on the rules governing the attribution of acts by private actors.²² Moreover, despite the focus on general rules applicable to all types of breaches of the law, the content of primary norms will always influence the application of secondary rules.²³ Hence, an obligation to stop the violation of the law will only apply to breaches which are still on-going.²⁴

¹⁸ See Report of the Sub-Committee on State Responsibility, Yearbook 1963, vol. II, at 228 (para. 5).

¹⁹ See Combacau/Alland, "Primary" and "Secondary" Rules in the Law of State Responsibility, 16 Netherlands Yearbook of International Law (1985), 81; Crawford (note 8), 14-16; Wellens, Diversity in Secondary Rules and the Unity of International Law, 25 Netherlands Yearbook of International Law (1994), 3. Cf. the different use of terminology by Hart, *The Concept of Law* (2nd ed., 1994), 79-99.

²⁰ See Introductory Commentary to the 2001 Articles, paras. (1)-(3); and already Yearbook 1963, vol. II, at 227-228; Ago, Second Report (note 2), at 178; Yearbook 1973, vol. II, at 169-170.

²¹ Introductory Commentary to the 2001 Articles, para. (5); Yearbook 1973, vol. II/2, at 170.

²² Contrast the different approaches suggested by the International Court of Justice and the ICTY: *Nicaragua* case, ICJ Reports 1986, 14, at 62 and 64-65 (paras. 109 and 115); *Tadic* case, 38 ILM (1999) 1518, at 1541 (para. 117); and cf. the ILC's Commentary to article 8, especially paras. (4)-(5).

²³ Ago, Yearbook 1963, vol. II, at 253: "Once again, what I wish to emphasize is merely that the consideration of the contents of the various rules of substance [i.e. primary rules] should not be an object in itself in the study of responsibility." See further Yearbook 1979, vol. II/2, at 88 (para. 63).

Despite these areas of uncertainty, the distinction between primary and secondary rules has hardly ever given rise to major practical problems. If at all, there has been disagreement over whether specific rules set out in the ILC's project were really secondary in character.²⁵

The general approach adopted by the Commission has also been endorsed by governments, as has its pragmatic way of addressing concerns. During the second reading in particular, the Commission expressly accepted that there is no clear conceptual divide between primary and secondary rules.²⁶ It has, nevertheless, seen the distinction as essential, particularly since other classifications would cause similar problems.²⁷ There was thus broad agreement, in 1963 as well as in 2001, that "the province of the secondary rules on State responsibility"²⁸ includes rules on:²⁹

- the attribution of conduct to a State;
- the duration of breaches of international law;
- possible circumstances precluding the wrongfulness of otherwise unlawful conduct;
- the legal consequences arising from a breach of international law;
- means of responding to violations of international law by another State.

4. Objective Responsibility

Finally, the Commission, during the second reading, saw no need to change what might be called the conceptual approach to the law of State responsibility for breach. Prior to the start of the Commission's work on the topic, a number of key issues had been controversial, most prominently the role of fault and damage within the law of State responsibility.³⁰ Under the guidance of its then Special Rapporteur, Roberto Ago, the Commission opted for an "objective approach" to responsibility which today seems generally accepted. On the basis of this objective approach, responsibility of a State arises from:

²⁴ See article 30(a).

²⁵ Commenting on the 1996 first reading text, a number of governments however suggested that article 19 [on international crimes] as well as articles 27-28 [on complicity] created new obligations for States and thus were "primary" in character; see UN Doc. A/CN.4/488, at 75-76 (Germany and Switzerland); see also Crawford, First Report (note 7), paras. 14-18. It is characteristic that the Commission addressed these concerns by formulating the provisions in a more neutral way. The amendments adopted to the provisions are discussed *infra*, III.3.

²⁶ See Crawford, First Report (note 7), paras. 14-18. Already in 1963, Ago had admitted that the content of the primary norm influenced the application of secondary rules, see Yearbook 1963, vol. II, at 253; see further Yearbook 1979, vol. II/2, at 88 (para. 63).

²⁷ Crawford, First Report (note 7), paras. 14-18.

²⁸ Introductory Commentary to the 2001 Articles, para. (3).

²⁹ *Ibid.*

³⁰ On the following aspects see in particular Pellet, La codification (note 6), 290-291; Gattini, La notion de faute à la lumière du projet de convention de la Commission du droit international sur la responsabilité internationale, 3 EJIL (1992), 253; Tanzi, Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?, in: Simma/Spinedi (eds.) (note 4), 1.

- the breach of an obligation
- through conduct attributable to that State.³¹

In contrast there is no separate requirement of fault or of damage. Unless otherwise provided, responsibility thus arises from the mere fact that a State has engaged in conduct (whether consisting of an act or omission or a combination of acts and omissions) contrary to its international obligations. This does not mean, of course, that issues such as fault or damage become irrelevant. On the contrary, they are often decisive in assessing the legal consequences of a breach (such as the incidence of particular forms of reparation or the amount of compensation due) or in determining who is entitled to respond to breaches. However, there is no general rule pursuant to which responsibility can only arise in the event of damage and/or fault.

Viewed from a broader perspective, this shift is more than a mere formality.³² It has freed the law of responsibility from fruitless doctrinal controversies about the definitions of damage and fault. Furthermore, it has opened the way to a more objective understanding of responsibility that, at least partly, aims at an objective control of legality. One might even say that by opting for, and bringing about, an objective approach to responsibility, the ILC has been most influential in shaping the law of responsibility generally. The fact that, by the time of the second reading, the objective approach counted among the essential assumptions upon which the project was based is a measure of this success.

Summing up the preceding overview, it may thus be said that the basic parameters of responsibility remain unchanged.

III. The Key Changes

Even within the spectrum defined by these parameters, the ILC was left with plenty of room for manoeuvring. In the course of the second reading process, it has made use of this room and subjected the first reading text to a rigorous analysis. This has led to a number of important changes which will be dealt with in the following discussion. For the sake of convenience, it may be helpful to distinguish between changes affecting structure and form of the project and those bearing on the substance of specific provisions. These will be discussed in turn.

³¹ See article 2 (former article 3).

³² See the very clear analysis by Pellet, *Remarques* (note 6), at 10-13; *id.*, *La codification* (note 6), 290-291. The implications on the law of remedies are analysed in Tams, *Recognizing Guarantees and Assurances of Non-Repétition*, 27 *Yale JIL* (2002), 441.

1. Structure and Form

a) Structure

Although the scope of the project remained unchanged, the ILC used the second reading for a thorough re-organisation of the articles. Instead of three, there are now four parts, dealing with the origin (Part One, articles 1-27), content (Part Two, articles 28-41) and implementation of responsibility (Part Three, articles 42-54), and with certain general clauses (Part Four, articles 55-59). Of these, Part One is more or less identical in scope with the first part of the 1996 text.³³ In five chapters, it spells out the basic rules determining under which circumstances a State incurs responsibility, containing e.g. provisions on the attribution of conduct to a State,³⁴ complicity,³⁵ or circumstances precluding wrongfulness.³⁶ In contrast, the other parts have been re-structured. Parts Two and Three now separately elaborate the consequences of wrongful acts (such as cessation and the different forms of reparation) and modes of implementation (such as the entitlement to demand cessation and reparation, or countermeasures). Under the 1996 text, these had been dealt with together in the second part, then entitled "Content, Forms and Degrees of International Responsibility".³⁷ The newly introduced Part Four brings together general provisions which were either missing from the 1996 draft – such as the provision on responsibility of States for acts carried out in the framework of an international organisation³⁸ – or were scattered in different parts and chapters of the text.³⁹

The main difference between the 1996 draft and the new 2001 text however relates to Part Three of the first reading draft, then entitled "Dispute Settlement", which has been deleted *in toto* from the draft articles.⁴⁰ The reasons for this are manifold. One was the general dissatisfaction that governments had expressed in relation to Part Three.⁴¹ In their view, which was shared by the Special Rapporteur and the majority of Commission members, the 1996 provisions served little purpose as long as they merely presented States with an option to resort to third-party dispute settlement.⁴² In the only field where they had prescribed compul-

³³ Note, however, that former article 19, introducing the controversial distinction between crimes and delicts (on which *infra*) has been replaced by provisions which now belong to Part Two of the new text.

³⁴ Articles 4-11.

³⁵ Articles 16-19.

³⁶ Articles 20-27.

³⁷ Articles 36-53 of the 1996 draft.

³⁸ Article 57, see *supra*, II.1.

³⁹ See e.g. former articles 37 and 39 [1996] on the *lex specialis* rule and the relation between the draft articles and the UN Charter.

⁴⁰ Consequently, the two Annexes setting out rules for the establishment of dispute settlement bodies could also be deleted.

⁴¹ See the comments reproduced in: UN Doc. A/CN.4/488, 142-152; see also *ibid.*, 129 (Ireland), 132 (United Kingdom), 133 (Czech Republic).

sory dispute settlement, namely conflicts involving resort to countermeasures,⁴³ the draft, in view of most, had failed to strike a balance between the parties to the dispute by favouring the State against whom countermeasures were directed.⁴⁴

Another reason for deleting the provisions on dispute settlement undoubtedly was realism, as a proper elaboration of such rules would have hardly been possible within the five-year period that the Commission had set itself. In addition, there was the more fundamental consideration whether draft articles on a subject as general as responsibility should contain compulsory rules on the settlement of disputes.⁴⁵ The problem was that, given the generality of the topic, nearly all disputes could be formulated in terms of questions of State responsibility. Introducing compulsory rules on dispute settlement would have probably been too audacious a step, and it would have fundamentally endangered the acceptance, as a whole, of the draft articles.⁴⁶ In consequence, the Commission after relatively little discussion agreed that Part Three in its entirety would be dropped from the draft.

b) Form

The Commission's decision to delete the provisions on dispute settlement was facilitated by another modification which, however, proved more controversial. In their comments, a number of governments had proposed that the eventual text should not take the form of a binding convention, but rather be adopted in non-binding form, e.g. as a declaration of principles by the UN General Assembly.⁴⁷ Although this outcome would not have been without precedent,⁴⁸ it differed from the initial idea to devise articles that would eventually lead to the adoption of a convention on State responsibility. In the view of some, it also would not have done justice to the importance of the text.⁴⁹

During the second reading, the Commission initially deferred the issue, but seemed inclined towards a 'declaration approach'. During the 53rd session (2001), there was renewed debate, which eventually led to a compromise. As part of this compromise, the Commission refrained from recommending that the text be adopted in the form of a convention. However, the final decision on the issue was left to the UN General Assembly.⁵⁰ In the Sixth (Legal) Committee, the debate be-

⁴² See Crawford, Fourth Report (note 7), paras. 12-13.

⁴³ Cf. article 58(2) [1996].

⁴⁴ See the discussion and summary of governments' comments by Crawford, Fourth Report (note 7), paras. 10-11; and cf. already Second Report (note 7), paras. 384-387.

⁴⁵ Crawford, Second Report (note 7), paras. 12-19.

⁴⁶ Pellet, La codification (note 6) 297-8.

⁴⁷ See comments by Austria, China, Japan, the Netherlands, the United Kingdom and the United States; summarised in: Crawford, Fourth Report (note 7), para. 23.

⁴⁸ For example, in 1999, the Commission proposed the adoption of a declaration setting out the rules on nationality in relation to the succession of States, see ILC Report 1999, UN Doc. A/54/10, para. 34.

⁴⁹ See Crawford, Fourth Report (note 7), para. 22.

tween supporters of the 'convention' and 'declaration' approaches continued. While the final decision on the issue was postponed again, a majority favoured the adoption of the text in form of a non-binding resolution. As a consequence it is possible that the General Assembly will adopt a final resolution endorsing, in a more solemn form than GA Res. 56/83, the second reading text.⁵¹ Alternatively, the matter may be left as it stands now.

Of course, this tendency to adopt a non-binding text provided further support for the Commission's decision to delete from the text all provisions relating to dispute settlement.⁵² It would hardly have made sense to elaborate dispute settlement provisions that would not be legally binding. However, a decision against a convention would have further implications. In particular, it would spare governments the process of a – possibly lengthy – diplomatic conference, which would be a prerequisite for the adoption of a binding instrument. Given the explosiveness of some of the issues involved, a diplomatic process of this kind would almost invite governments to water down some of the issues which, in a non-binding instrument, they seemed able to accept. Moreover, non-adoption or non-ratification of a proposed convention could have overshadowed the whole process and put into question even basic principles set forth in the draft.⁵³

Finally, and perhaps most importantly, it is by no means sure that the adoption in form of a non-binding resolution would diminish the importance of the text. Recent experience rather suggests that it would not, as may be exemplified by reference to the Friendly Relations Declaration⁵⁴ and the Vienna Convention on the Law of Treaties.⁵⁵ As regards the Friendly Relations Declaration, the formally non-binding character has certainly not prevented its acceptance as one of the crucial legal texts of the post-war international legal order.⁵⁶ Conversely, the major importance of the Vienna Convention hardly stems from its formally binding character as a treaty – 32 years after its adoption, it has been ratified by less than half the States of the world.⁵⁷ If, in present-day international law, it is nevertheless applied and recognised universally,⁵⁸ this probably has more to do with its character

⁵⁰ See the summary of debates contained in ILC Report 2001, UN Doc. A/56/10, 61-67; see also the initial suggestion by Special Rapporteur Crawford to defer the decision, Yearbook 1998, vol. I, at 88 (paras. 10-13).

⁵¹ For the time being, the issue has been deferred until 2004, when it is likely that the General Assembly will again endorse the text in the form of a resolution.

⁵² Crawford, Introduction, (note 8) 57-58.

⁵³ Cf. ILC Report 2001, UN Doc. A/56/10, para. 64.

⁵⁴ GA Res. 2625 (XXV).

⁵⁵ 1155 UNTS 331.

⁵⁶ Cf. e.g. the *Nicaragua* case, where the International Court of Justice seemed to consider the Friendly Relations Declaration as a statement of customary international law, ICJ Reports 1986, 14, especially paras. 188, 191, 193. In para. 191, the Court stated that "[t]he adoption of this text [Res. 2625] affords an indication of their [States'] *opinio juris* as to customary international law". In para. 188, it had already observed that the consent of States to Res. 2625 "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution". Cf. also the comments summarised in ILC Report 2001, UN Doc. A/56/10, para. 64.

as a clear and easily accessible text crystallising basic principles than with the number of States parties.

Judging from these examples, there would seem to be a good case in favour of the 'declaration approach' favoured by the majority members of the Commission and of the Sixth Committee. In view of the authority that the text has already acquired,⁵⁹ what is seemingly less (i.e. a non-binding text) may be more.

2. Changes Affecting the Substance of the Draft

Irrespective of its structure or formal classification as binding or non-binding, it is the substance that will ultimately decide on the success of the text. The following section will therefore evaluate the main substantive changes that the ILC introduced during the process of second reading. We will focus on the three most controversial issues the Commission had to confront, namely the question of international crimes (a), the definition of the injured State (b), and the rules governing resort to countermeasures (c). An additional section will briefly recapitulate further amendments and clarifications to the 1996 text (d).

a) International Crimes

The first of the big issues that the Commission had to tackle during the process of second reading was the question of international crimes. This category of exceptionally grave breaches of international law had been introduced in the most controversial provision of the whole first reading draft, article 19.⁶⁰ In the course of its

⁵⁷ As of 31 December 1999, the Convention had 90 State parties. Leaving aside newly-independent States, there has hardly been any trend towards ratification in recent years. See further the comments summarised in: ILC Report 2001, UN Doc. A/56/10, para. 62.

⁵⁸ See primarily the frequent confirmations, by the ICJ, that particular provisions of the Convention represent general international law, for example *Gabcikovo Nagymaros*, ICJ Reports 1997, 7, at paras. 42-46, 99; or *LaGrand*, Judgment of 27 June 2001, available at <http://www.icj-cij.org/icjwww/idecisions.htm> (paras. 99, 101). See further Aust, *Modern Treaty Law and Practice* (2000), 6, 9-11. In the foreword to this book, Sir Arthur Watts observes that "The modern law [of treaties] is now authoritatively set out in the Vienna Convention on the Law of Treaties" (p. xv).

⁵⁹ See *supra*, references in note 5.

⁶⁰ Literature on the topic is extensive, see primarily Joergensen, *The Responsibility of States for International Crimes* (2001); de Hoogh, *Obligations Erga Omnes and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996); Weiler/Cassese/Spinedi (eds.), *International Crimes of States* (1989); Abi-Saab, *The Uses of Article 19, 10 EJIL* (1999), 339; Gaja, *Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?*, 10 *EJIL* (1999), 365; Hofmann, *Zur Unterscheidung zwischen Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit*, 45 *ZaöRV* (1985), 195; Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 *EJIL* (1999), 425; id., *Vive le crime! Remarques sur les degrés de l'illicite en droit international*, in: *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* (1997), 287; Rosenstock, *An International Criminal Responsibility of States?*, *ibid.*, 265; id., *Crimes of States – An Essay*, in: *Völkerrecht zwischen normativem Anspruch und politischer Realität. Fest-*

1998 session, debates about the retention, modification or deletion of this provision brought the Commission to a deadlock, which could only be resolved in the years 2000 and 2001. The result of the heated exchange of views is a compromise contained in articles 40 and 41 of the new draft, which replaces the concept of crimes by the category of "serious breaches of obligations under peremptory norms of general international law". The new provisions run as follows:

Article 40

Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this Chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

(1) International Crimes in the 1996 Draft

More than any other section of the new draft, these two provisions have to be seen against the background of the crimes provisions of the first reading draft. Relying on developments such as the emergence of the concepts of *jus cogens* and obligations *erga omnes* and the practice of the UN Security Council to sanction certain breaches of international law under Chapter VII of the Charter, article 19(2) of the 1996 text had labelled certain breaches as an "international crime", defined as a breach of "an international obligation ... essential for the protection of fundamental interests of the international community".⁶¹ Article 19(3) had given a non-exhaustive list of examples of such crimes, which included aggression, colonial domina-

schrift Zemanek (Hafner *et al.* eds., 1994), 319; Bowett, Crimes of State and the 1996 Report of the International Law Commission on State Responsibility, 9 EJIL (1998), 163; Tomuschat, International Crimes of States – An Endangered Species? in: International Law. Theory and Practice. Essays in Honour of Eric Suy (Wellens ed., 1998), 254; Quigley, The International Law Commission's Crime-Delict Distinction: A Toothless Tiger?, 66 Revue de Droit International et des Sciences Diplomatiques et Politiques (1988), 117.

For detailed bibliographical references see Spinedi, Crimes of States: A Bibliography, in: International Crimes of States (Weiler/Cassese/Spinedi eds., 1989), 339.

⁶¹ Yearbook 1976, vol. II/2, 95-122, especially paras. 6-34.

tion, large-scale violations of basic human rights and massive pollution of the sea or the atmosphere. Taking up this distinction, articles 40(3), 52, 53 of the 1996 draft had provided for a very limited range of specific legal consequences of international crimes.⁶² For example, article 52 had disapplied certain restrictions normally limiting demands for restitution and satisfaction, while under article 53, States were obliged not to recognise situations brought about by international crimes and to cooperate in order to bring to an end their consequences.

For a number of reasons, these provisions had prompted a flow of criticism. The main points of criticism seem to have been the following:⁶³

- the lack of State practice supporting the distinction introduced in article 19;
- the implications of the term “crime” which suggested a truly criminal responsibility;
- further technical problems, such as the use of examples in a definitional provision or the discrepancy between article 19(2), which referred to a category of obligations, and para. (3), which referred to the intensity of the breach;
- the scarcity of the special legal consequences entailed by an international crime;
- the vagueness of criteria used in order to distinguish criminal from delictual breaches; and
- the lack of criteria explaining the relation between international crimes and other concepts, such as *jus cogens* or obligations *erga omnes*.

(2) Renewed Discussion During the Second Reading

Based on these arguments, the Special Rapporteur strongly advocated the deletion of article 19.⁶⁴ Although this radical position had the support of a considerable number of members, it was unacceptable to the majority of the Commission.⁶⁵ Thus, articles 40 and 41 were adopted as a compromise. While this compromise accommodates some of the concerns set out above, it is submitted that it does very little to address the fundamental flaws of the 1996 regulation.

As to the positive elements of the compromise, it may be said that the second and third problem enumerated above have been solved. By referring to the neutral notion of “serious breaches of an obligation arising under a peremptory norm of

⁶² Supporters and critics of the concept of crimes agreed that the list was hardly satisfactory, see primarily Crawford, First Report (note 7), para. 43; Pellet, *Vive le crime!* (note 60), 301-302. For a thorough review of the special consequences of international crimes under the first reading text see Tomuschat (note 60).

⁶³ See Crawford, First Report (note 7), paras. 43-101; and the critical assessments by Rosenstock, Quigley, and Bowett (note 60).

Cf. also the many critical comments submitted by governments: UN Doc. A/CN.4/488, at 50-66 (especially the remarks by Austria, France, Ireland, Switzerland, the United Kingdom, and the United States).

⁶⁴ Crawford, First Report (note 7), para. 101.

⁶⁵ See the summary of the heated debates held during the Commission's 50th session, reproduced in Yearbook 1998, vol. I, at 94-132, 134-144, 146-158.

general international law", the Commission avoided the problematic implications of the term "crime" and has solved the problem of terminology.⁶⁶ As to drafting technique, article 40 now makes clear that the special consequences set out in article 41 only apply to breaches which (a) are of a serious nature (as defined in para. 2), and (b) affect a narrowly defined circle of obligations.⁶⁷ It may also be said that by requiring that the norm breached must be a peremptory norm of general international law, the Commission has very elegantly clarified the relation between the category formerly known as "crimes", and the concept of *jus cogens* as defined in article 53, VCLT.⁶⁸

(3) Remaining Problems

However, the compromise embodied in new articles 40 and 41 does not address, and even reinforces, the other concerns set out above. For example, it may still be doubted whether the distinction between two categories of breaches is well-established in international law. During the second reading, those supporting the distinction often tried to make their point by juxtaposing specific examples of crimes and other breaches, such as genocide (the "crime of crimes") and the ordinary breach of a bilateral treaty.⁶⁹ Was it not self-evident, so the argument ran, that these were qualitatively different and could not belong to the same category of breaches? Of course, one might readily agree that genocide and ordinary breaches of bilateral treaties require a different regime of responsibility. However, this does not mean that one has to accept the need for a categorical distinction between two types of breaches. The normal rules on reparation and implementation of responsibility already allow us clearly to distinguish between different types of breaches. For example, while only the other party may react against breaches of bilateral treaties,⁷⁰ any State has a legal interest in seeing the prohibition against genocide observed, since that prohibition is owed *erga omnes*.⁷¹ Whether there really is a need for a distinct category of breaches termed "crimes" or "serious breaches" is another question. Not surprisingly, the commentary to articles 40 and 41 provides very little evidence that such a categorical distinction between types of breaches is accepted under modern international law. All that is said is that articles 40 and 41 reflect the special consequences flowing from the concept of peremptory norms in the field of State responsibility.⁷²

⁶⁶ See the introductory Commentary to Part Two, Chapter III (articles 40 and 41), paras. (5)-(7).

⁶⁷ Commentary to article 40, para. (1).

⁶⁸ Introductory Commentary to Part Two, Chapter III (articles 40 and 41), para. (7); Commentary to article 40, para. (2).

⁶⁹ See primarily Pellet, the most ardent supporter within the Commission of old article 19, who asked: "Qui ne voit qu'entre un génocide et la violation banale d'une clause d'un traité de commerce entre deux états, il n'existe pas de commune mesure?" (Pellet, Remarques (note 6), at 19).

⁷⁰ See Commentary to article 42, para. (5) and cf. the rules on injury and interest discussed *infra*, III.2.b.

⁷¹ *Barcelona Traction* case, ICJ Reports 1970,3, at 32 (paras. 33-34); see Commentary to article 48, para. (8); and cf. the discussion *infra*, III.2.b.

However, State practice, while affirming the concept of peremptory norms and its relevance for the law of State responsibility, hardly supports the view that responsibility for serious breaches of peremptory norms is categorically different from other forms of international responsibility. Article 41 itself, which sets out the specific legal consequences entailed by such serious breaches, would seem to provide reasons enough for scepticism. Just as under the 1996 draft, the special consequences set out in the provision are rather trivial and do not justify the distinction between categories of breaches.⁷³ In fact, the legal regime governing serious breaches of peremptory norms differs from that governing ordinary breaches in two regards only. The only specific consequences that remain are the duty of non-recognition and a rather weakly-formulated duty to co-operate against serious breaches.⁷⁴ This does not mean that the Commission did not discuss further consequences: the interim version of the draft articles circulated after the Commission's 52nd session (2000), for example, contained a provision pursuant to which all States were entitled to resort to countermeasures in response to serious breaches.⁷⁵ Another possible consequence would have been to provide for exemplary damages reflecting the gravity of the breach, as proposed by the Special Rapporteur.⁷⁶ However, in the end, due to governmental pressure, these far-reaching proposals were deleted.⁷⁷ In consequence, the list of specific consequences of "serious breaches" now is even shorter than under the 1996 draft.

If one agrees that in an important document, such as the text on State responsibility, one should only include specific categories if they actually produce specific consequences worth mentioning, this might already be reason enough to doubt the propriety of including the rules on serious breaches of peremptory norms. However, the newly-adopted regulation suffers from another problem. It must be asked whether the so-called specific consequences enumerated in article 41 are truly specific, in that they apply only to breaches in the sense of article 40. At least with regard to the proclaimed duty of non-recognition, set out in article 41, para. 2, this may be seriously doubted. Taking the example of the law regulating the use of force, international law would seem to recognise a duty of non-recognition under

⁷² Introductory Commentary to Part Two, Chapter III (articles 40 and 41), para. (7).

⁷³ On the following see the contributions by Wyler, Gattini and Tams at the 2001 Florence Symposium on State Responsibility, to be published in: 13 EJIL (2002).

⁷⁴ See articles 41(1) and 41(2), respectively.

⁷⁵ Cf. article 54(2) of the interim draft [2000] (note 7), which provided:

"In the case ... [of serious breaches], any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached." (Emphasis added.)

⁷⁶ Article 42(1) of the interim draft [2000] (note 7) provided:

"A serious breach ... may involve, for the responsible State, damages reflecting the gravity of the breach."

For a discussion see Wittich, Awe of the Gods and fear of the Priests: Punitive Damages and the Law of State Responsibility, 3 Austrian Review of International & European Law (1998), 101; Tams (note 73), Section A.2.

⁷⁷ See *infra*, III.3.c(5), for the problem of countermeasures in response to serious breaches and other obligations protecting common interests.

circumstances not covered by article 40. Pursuant to the *Stimson* doctrine, one of the earliest, and clearest, elaborations of the concept of collective non-recognition, the acquisition of territory by use of force is held to be illegal and must not be recognised.⁷⁸ Of course, the case of aggression – which is covered by article 40 – provides a classic example of such acquisition. However, the duty of non-recognition also applies to the occupation of territory effectuated by force not amounting to aggression. Principle I of the UN General Assembly's Friendly Relations Declaration, whose legal relevance has already been discussed,⁷⁹ thus unequivocally proclaims that:

“No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”⁸⁰

Strictly speaking, the duty of non-recognition is therefore not a specific consequence of “serious breaches”, but has a broader field of application. By including a “without prejudice” clause in article 41, para. 3, the Commission attempted to circumvent this problem.⁸¹ Nevertheless, the fact that some of the alleged “specific consequences” recognised in article 41 are not specific to the category employed sheds further doubts on the propriety of the concept of serious breaches.

(4) Conclusion

Summing up the preceding observations, it may thus be said that the concept of serious breaches of peremptory norms of general international law, as set out in articles 40 and 41, is an unconvincing attempt at saving an ill-conceived categorical distinction. It may be interesting to recall that in 1996, frustrated with what he saw as the disappointing result of the first reading, the then Special Rapporteur Gaetano Arangio-Ruiz had sarcastically remarked: “*mons peperit ridiculum murem*” (“the mountain had given birth to a ridiculous mouse”).⁸² Looking at the results of the second reading revision, one is bound to observe that if article 41 can at all be described as a “mouse”, then it is indeed a very small one. It is submitted that instead of agreeing on half-hearted compromises, the ILC would have been better advised to have abandoned altogether the first reading approach of introducing a distinction between categories of internationally wrongful acts.

b) Injury and Legal Interest

The second, and related, major problem confronted by the Commission was the question of “injury” and “legal interest”. In the 1996 draft, this had been addressed in old article 40, entitled “The injured State”.⁸³ In the course of the second reading,

⁷⁸ Secretary of State's Note to the Chinese and Japanese Governments, in: Hackworth, *Digest of International Law*, vol. I (1940), 334.

⁷⁹ See *supra*, III.1.b.

⁸⁰ GA Res. 2625 (XXV), Principle I, 10th paragraph. (Emphasis added.)

⁸¹ See also Commentary to article 41, paras. (13)-(14).

⁸² See Yearbook 1996, vol. I, at 179 (para. 69).

⁸³ On old article 40 [1996] see Bederman, Article 40(2)(E) & (F) of the ILC Draft Articles on State Responsibility: Standing of Injured States Under Customary International Law and Multilateral

this provision was replaced by a more nuanced regime spelt out in articles 42 and 48. As a result, the rules on injury and legal interest are now completely reformulated. This is of special importance since they count among the central provisions of the text. In fact, they operate as a hinge between Part One and the specific consequences of breaches in Parts Two and Three.⁸⁴ In other words, only an injured or otherwise legally interested State is entitled to demand cessation or reparation and, ultimately, to implement these claims.

(1) "Injury" and the Problem of Multilateralism

The determination which State should be entitled to respond to breaches did not pose major problems as long as international law was perceived of as consisting of bilateralist, or relative, legal relations only.⁸⁵ Within these relations involving, simplistically, one State's obligation and another State's correlative right to see that obligation performed, the right to respond to violations always lay with that other State. Taking the example of a bilateral treaty between States A and B, it is evident that if State A violates its obligations, it is State B (only) that is entitled to react.⁸⁶ A similar solution is possible under customary international law or multilateral treaties: As long as the violations of obligations affect the subjective rights of one State in particular, that State is entitled to respond to the breach. Oft-cited examples include the violation of obligations of the receiving State in the field of diplomatic or consular law.⁸⁷ Irrespective of the source of these obligations – which may be a multilateral treaty, such as the Diplomatic or Consular Conventions, or custom – the violation primarily affects the subjective rights of the sending State, which consequently is entitled to react.

Irrespective of whether this bilateralist model was ever a true picture of the reality of international law, it is clear that it fails to explain the more complex legal relations that are often referred to as "the rise of multilateralism" or "community interest".⁸⁸ How should it accommodate, for example, statements such as the famous ICJ dictum in the *Barcelona Traction* case that

Treaties, 92 Proceedings ASIL (1998), 291; Crawford, The Standing of States: A Critique of Art. 40 of the ILC's Draft Articles on State Responsibility, in: Liber Amicorum Lord Slynn of Hadley, vol. II (Adenas ed., 2000), 23; Sachariew, State Responsibility for Multilateral Treaty Violations. Identifying the Injured State, 35 Netherlands International Law Review (1988), 273; Hutchinson, Solidarity and Breaches of Multilateral Treaties, 59 BYIL (1988), 151.

⁸⁴ See Crawford, Third Report (note 7), para. 75.

⁸⁵ On the following see Simma, From Bilateralism to Community Interest, 250 RdC (1994 VI), especially 229-248; see further Frowein, Reaction by Not Directly Affected States to Breaches of Public International Law, 248 RdC (1994 IV), 349; Charney, Third-State Remedies in International Law, 10 Michigan Journal of International Law (1989), 57.

⁸⁶ See primarily article 60, para. 1, VCLT and article 40, para. 2(a) of the ILC's 1996 draft articles; for discussion in the literature cf. de Hoogh (note 60), at 37-8; Sicilianos, Les réactions décentralisées à l'illicite. Des contremesures à la légitime défense (1990), at 103-4.

⁸⁷ See Commentary to article 42, paras. (8)-(10); Simma (note 85), at 364; Sachariew (note 83), at 277; and cf. already Fitzmaurice, Second Report on the Law of Treaties, Yearbook 1957, vol. II, at 54 (para. 124).

"in view of the importance of the rights involved, all States can be held to have a legal interest in [the] protection [of] obligations *erga omnes*"⁸⁹?

Similar problems arise if the community interest in seeing certain norms observed is prescribed in a treaty provision, such as article 136 LOSC – succinctly stating that "the Area and its resources are the common heritage of mankind" – or if a State which has not itself suffered damage claims a right to respond to violations of a multilateral treaty. In all these situations, it is simply impossible to go back to the bilateralist pattern pursuant to which one State, and one State only, has a legal interest in seeing an obligation observed.

(2) Article 40 of the 1996 Draft

When drafting what was to become article 40 of the first reading text, ILC members were fully aware of the need for a more complex regime. They responded to this by adopting the longest provision of the entire 1996 draft, which identified, in a non-exhaustive way, instances in which States were considered to be injured by an internationally wrongful act. As subparas. (2)(a)-(d) were concerned with various types of bilateral legal relations, they did not give rise to major controversy. The core of the debate during the second reading focused on subparas. (2)(e) and (f) and para. 3, which read as follows:

2. In particular, "injured State" means: ...

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been

⁸⁸ Cf. primarily Commentary to article 1, paras. (4)-(5).

⁸⁹ *Barcelona Traction* case, ICJ Reports 1970, 3, at 32 (para. 33). The consequences flowing from that statement are discussed *infra*, III.2.b(4); see further Frowein, Die Verpflichtungen *erga omnes* im Völkerrecht und ihre Durchsetzung, in: Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte. Festschrift für Hermann Mosler (Bernhardt ed., 1983), 241; *id.*, Obligations *Erga Omnes*, in: EPIL, vol. III (Bernhardt ed., 1997), 757; Gaja, Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts, in: International Crimes of States (note 60), 151; Trautmannsdorf, Die Verantwortlichkeit von Staaten für Verletzungen von völkerrechtlichen Verpflichtungen *erga omnes*, in: Rechtsfragen an der Jahrtausendwende (Kötz ed., 1998), 211.

expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, “injured State” means, if the internationally wrongful act constitutes an international crime, all other States.”

While acknowledging that article 40 attempted to take account of the problems of community interests in international law, governments and scholars had been very critical of these provisions.⁹⁰ In particular, comments related to:

- the prolix and complicated drafting of the provision;
- the need to bring article 40 in line with article 60(2), VCLT, regulating which States are entitled to suspend or terminate multilateral treaties on grounds of breach;
- the specific reference to one area of international law, namely human rights obligations, in subpara. 2(e)(iii), and to obligations deriving from one specific source of international law, namely treaties, in subpara. 2(f);
- conversely, the failure to comprehensively address the concept of obligations *erga omnes*;
- the large overlap between subpara. 2(e) and (f) and para. 3;
- and, most importantly, the unitary approach to “injury”, which denied the need to distinguish between degrees of (direct/indirect) injury, but treated all injured States alike.

Aware of these fundamental problems, the Commission, in the course of the second reading of the draft articles, undertook a complete revision of article 40.

(3) A Differentiated Regime of Injury

In the first place, the Commission had to decide whether to maintain the unitary regime of injury set out in old article 40. Relatively quickly, it agreed that there was a need for a more differentiated approach. Its reasoning was simple yet convincing. In the view of the Commission, present-day international law, while recognising that obligations could be owed to a community of States (e.g. States parties to a treaty or the international community as a whole), did not necessarily equate the legal interests of members of this group of States with the subjective rights of States to demand performance of obligations owed to them individually.⁹¹ Where a wrongful act affected a State in its individual legal position, that State enjoyed a

⁹⁰ See primarily Crawford, Third Report (note 7), paras. 66-119, especially, para. 96; Bederman (note 83). For the – mostly critical – comments of governments see UN Doc. A/CN.4/488, at 95-102; and cf. Crawford, Third Report (note 7), paras. 77-81.

⁹¹ Introductory Commentary to Part Three, Chapter I, para. (2), Crawford, Third Report (note 7), paras. 83-85. In its comments on the 1996 draft, the German government had aptly observed:

“While the concept of obligations *erga omnes* is an established and widely accepted one, violations of such obligations do not necessarily affect all States in the same manner. The Commission should study whether provision could be made for different categories of ‘injured States’, leading to different ‘rights of injured States.’” (UN Doc. A/CN.4/488, at 100).

broad range of secondary rights. It could demand the cessation of the wrongful act, require the responsible State to make reparation and ultimately resort to countermeasures in order to enforce its claims. In contrast, the position is much more complex where the wrongful act affects legal interests of a group of States. One might readily agree that each State within the group was entitled to demand cessation of the wrongful act. But whether each State had a right to resort to countermeasures was open to doubt and required further elaboration. Similarly, where a State whose collective legal interest in seeing a certain multilateral obligation performed had been violated, it could not simply demand reparation for itself and thereby – personally, as it were – profit from the violation of a collective interest.⁹²

There was thus a need to differentiate between situations in which a wrongful act affected a State in its individual capacity and situations in which it affected various States in their capacity as members of a group. This differentiation is reflected in new articles 42 and 48, which distinguish between “injured States” and “other States entitled to invoke responsibility”.

Although one might have wished for a slightly more imaginative use of terminology, the basic idea underlying the differentiation is convincing. Indeed, it could almost be called paradoxical that old article 40 – in many respects an extremely progressive position – relied on a unitary regime of injury, which seemed reminiscent of a very traditional approach to questions of law enforcement.⁹³ The Commission's decision to introduce a more differentiated regime of injury therefore marks a great step forward.

(4) The Scope of the Respective Provisions

As to the scope of the respective provisions on injured and other legally interested States, there has similarly been considerable progress. Article 42 – spelling out which States are injured by internationally wrongful acts – is now very clearly based on article 60, VCLT.⁹⁴ Pursuant to the new rules, a State is held to be injured, if the breach (a) had affected an obligation owed to it individually, (b) had affected a collective obligation, but had had special factual effects on one particular State.⁹⁵ In addition, in case of the so-called integral obligations, where the purpose of the obligation is dependent on the performance, by all parties, of their obligations, all States are entitled to respond to violations.⁹⁶ Thus – apart from the special category

⁹² Contrast Commentary to article 42, para. (3) and to article 48, paras. (12) et seq.

⁹³ In the view of Crawford, article 40 “was a pure statement of the subjective [i.e. bilateralist] theory of responsibility” (Introduction, note 8, at 24).

⁹⁴ Commentary to article 42, para. (4). This takes up the comments by States such as the United Kingdom or Germany, see UN Doc. A/CN.4/488, at 97.

⁹⁵ See article 42(a) and article 42(b)(i), and cf. article 60(2)(a) and article 60(2)(b), VCLT.

⁹⁶ On this rather special category see Feist, Kündigung, Rücktritt und Suspendierung multilateraler Verträge (2001), 47-52; Simma (note 85), 336-337; Crawford, Third Report (note 7), para. 91. As Feist and Crawford point out, the category was first analysed by Sir Gerald Fitzmaurice in his work on the law of treaties; see his Second Report on the Law of Treaties (note 87), at 54.

of integral obligations, whose special character had been recognised as distinct already under article 60, VCLT – only States individually affected are held to be injured under article 42. It is submitted that this approach conceptually marks a clear step forward from the unitary regime adopted in the 1996 draft and the formulation of the various provisions of article 42 now avoids the confusion created by the 1996 draft.

Similar progress has been made in relation to the formulation of article 48, regulating which (non-injured) States are held to have a legal interest in the observation of multilateral obligations. Instead of singling out special areas of law (such as human rights law)⁹⁷ or special sources (such as treaties protecting collective interests)⁹⁸, article 48(1) takes a neutral approach and is formulated in a very straightforward way. Under the new approach, States are entitled to invoke the responsibility of another State for breaches of obligations that protect a collective interest. Clearly, this is the case if the obligation is owed to the international community as a whole, i.e. is an obligation *erga omnes*.⁹⁹ The same also applies if the obligation is owed to a group of States (e.g. the State parties to a treaty) and protects the collective interest of all contracting parties.¹⁰⁰ Unlike old article 40, the new regulation does not indicate when this is the case, but leaves the matter to the interpretation of the primary rules. Especially in the field of environmental and human rights law, treaties often contain detailed rules determining who may respond to breaches of the applicable treaty regime.¹⁰¹ Moreover, the ILC's neutral approach has the advantage of not prejudicing the development of international law and not giving the impression that special areas of the law – such as the law of human rights – are *a priori* more “multilateralised” than others. Furthermore, unlike under old article 40(2)(f), there is no requirement that the obligations protecting collective interests have to derive from conventional international law. This decision in favour of a more open and neutral provision is indeed very convincing and also better in line

⁹⁷ See old article 40(2)(e)(iii).

⁹⁸ See old article 40(2)(f).

⁹⁹ Cf. article 48(1)(b) and Commentary to article 48, paras. (8)–(10). In the view of the Commission, it was preferable to avoid the term “obligations *erga omnes*” and instead refer to “obligations owed to the international community as a whole”. The difference, however, is merely terminological, see Commentary to article 48, para. (9).

¹⁰⁰ Cf. article 48(1)(a). This type of obligation is sometimes described as belonging to obligations *erga omnes partes* or *erga omnes contractantes*, see primarily the ICTY's appeals judgment in the *Blaskic* case, 110 ILR 607, at para. 29; Arangio-Ruiz, Fourth Report on State Responsibility (note 2), para. 92; Gaja (note 89), 151–3.

¹⁰¹ See e.g. the different approaches adopted in article 33, ECHR, article IX, Genocide Convention, article 41, CCPR, article 218, LOSC, or the non-compliance procedure under the 1987 Montreal Ozone Protocol. For a general survey of inter-state complaint procedures see Leckie, 10 Human Rights Quarterly (1988), 249–303; Weschke, Internationale Instrumente zur Durchsetzung der Menschenrechte (2001) [in the field of human rights law] and Beyerlin, Umweltvölkerrecht (2000), 231–294; Fitzmaurice/Redgwell, Environmental Non-Compliance Procedures and International Law, 31 Netherlands Yearbook of International Law (2000), 35 [in the field of environmental law].

As the ILC observes, “[I]n relation to article 42, such treaty right could be considered a *lex specialis*”, Commentary to article 42, footnote 703.

with the secondary character of the draft articles as a whole. Summing up, it can therefore be said that by revising the provisions on legal interest and injury, the Commission has considerably clarified the rules on the invocation of State responsibility.

(5) The Rights of Injured and Other Interested States

Finally, it remains to be analysed what rights injured States and other interested States have at their disposal. Few problems arise if a State has been injured in the sense of article 42. Obviously, this State enjoys the full arsenal of rights; i.e. it is entitled to demand cessation or reparation, and it can enforce its claims by resorting to countermeasures pursuant to articles 49 to 53.¹⁰² The situation is different for other interested States, i.e. States affected in their capacity as members of a group. While these States certainly enjoy the right to demand the cessation of the wrongful act, they are not automatically entitled to resort to other forms of reaction.

Leaving aside the issue of third-party countermeasures, which will be discussed below,¹⁰³ the main problem was under which circumstances legally interested States could demand reparation. In this regard, article 48(2)(b) stipulates that demands for reparation can only be made in the interests of the primary victims of the breach.¹⁰⁴

This approach is correct as a matter of principle, but at times may be difficult to apply in practice. The Commission's position is clearly informed by the ICJ's *Nicaragua* judgment¹⁰⁵ and Judge Vereshchetin's separate opinion in the *East Timor* case.¹⁰⁶ In the former case, the Court found that States which were not themselves victims of an armed attack could only exercise collective self-defence upon a prior request by the direct victim, in other words, subject to the wishes of the primary victim.¹⁰⁷ In *East Timor*, Judge Vereshchetin argued that if Portugal wanted to protect the right of the East Timorese people to self-determination, it had to establish that it acted in accordance with the interests of that people.¹⁰⁸ Quite convincingly, the Commission found that the idea underlying those pronouncements could and should be generalised, thereby taking into account the differentiation between "injury" and "other legal interests".¹⁰⁹

¹⁰² Commentary to article 42, para. (3).

¹⁰³ See *infra*, III.2.b.(5).

¹⁰⁴ The provision runs as follows:

"(2) Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State ... (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached."

¹⁰⁵ ICJ Reports 1986, 14.

¹⁰⁶ *East Timor* case, Sep.Op. Vereshchetin, ICJ Reports 1995, 90, at 135.

¹⁰⁷ ICJ Reports 1986, 14, at 105 (para. 199).

¹⁰⁸ ICJ Reports 1995, at 135-138.

¹⁰⁹ See Crawford, Third Report (note 7), paras. 376-379.

It is another matter whether its approach will always be practically feasible. This to some extent depends on the identity of the entity for whose protection the collective obligation was established. Depending on the type of obligation concerned, the primary victim could e.g. be another State (such as the victim of an aggression), a non-State entity (such as a group of persons subjected to racial discrimination), or an individual. Finally, there may also be situations where the wrongful act in question affects a common good which cannot be personified (such as biological diversity or the safety of the marine environment).¹¹⁰

If the primary victim is a State, few problems arise, since there are recognised rules prescribing who may act for the State. Under normal circumstances, the required consent will have to be given by the government. The situation is different if the primary victim is a non-State entity. In the absence of a theory of representation of non-State entities, express consent will often be difficult to obtain since the State disregarding the rights of the group will often prohibit its political organisation. If the primary victim is an individual, there will equally be problems of communication. Finally, such communication is, by definition, impossible, if the breach primarily affects non-personified common goods, e.g. in the field of environmental law. Given this degree of uncertainty, it will be left to international practice to work out in detail under what conditions a State taking up rights of other actors can claim to act in those actors' interest.¹¹¹ That said, the ILC deserves to be commended for having elaborated a balanced conceptual framework on the basis of which international practice may evolve. Compared to the 'all or nothing' approach taken in old article 40, the differentiated new regime set out in article 48 marks a considerable step forward.

(6) Conclusion

During the second reading, the ILC has substantially clarified the rules on invocation of State responsibility and, by adopting detailed rules on the rights of legally interested States, has broken new ground. As has been stated, a lot depends on whether States will actually make use of their rights under article 48. However, there is no denying that the ILC's debates are the most ambitious attempt at conceptualising the problem of multilateral legal relations. It is to be hoped that articles 42 and 48 guide the international community on its way "[f]rom Bilateralism to Community Interest".¹¹²

¹¹⁰ Commentary to article 48, paras. (7) and (12). In his Third Report, the Special Rapporteur stated that "[e]xamples of such [collective] obligations arise in the fields of environment (for example, in relation to biodiversity or global warming) and disarmament (for example, a regional nuclear free zone treaty or a test ban treaty) (note 7), para. 106(b).

¹¹¹ Cf. the Commission's acknowledgement that article 48(2)(b) "involves a measure of progressive development", Commentary to article 48, para. (12).

¹¹² Cf. the title of Bruno Simma's Hague Lecture, 250 *Receuil des Cours* (1994 VI), 217-384.

c) Countermeasures

The third major substantive issue that the Commission had to resolve during the second reading was the question of countermeasures.¹¹³ Under the 1996 draft, article 30 stipulated that the wrongfulness of a State's conduct was precluded if the act in question constituted a lawful countermeasure. Old articles 50 to 55 then spelt out the various procedural and material conditions which had to be fulfilled for countermeasure to be lawful. Agreement on these provisions had only been reached at the last minute and after tortuous discussion often opposing the then Special Rapporteur and the majority of Commission members.¹¹⁴ As a consequence, articles 50 to 55 bore all the marks of a compromise that had been drafted in a hurry.¹¹⁵ As was clear from the governments' comments on the first reading draft articles, the regulation of countermeasures continued to pose many problems. For example, there was considerable uncertainty about the procedural conditions governing resort to countermeasures and the concept of urgent countermeasures as provided for in old article 48(2).¹¹⁶ Most importantly, however, many governments had taken the view that it would be unnecessary to adopt detailed provisions spelling out the conditions governing resort to countermeasures. Instead, it was sufficient to recognise, in a general provision along the lines of old article 30, the concept and legal effects of countermeasures.¹¹⁷

(1) Retention of Detailed Rules on Countermeasures

The first question for the ILC to decide, therefore, was whether it should pursue its plan to adopt a detailed regulation of the law of countermeasures. Despite con-

¹¹³ On countermeasures see generally the debates of the German Society of International Law at its 37th session, especially the contributions by Fiedler and Klein, published in: 37 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1997), at 9 and 39 respectively. See further Elagab, *The Legality of Non-forcible Counter-measures in International Law* (1987); Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984); Zemanek, *The Unilateral Enforcement of International Obligations*, 47 *ZaöRV* (1987), 32; Doebling, *Die Selbstdurchsetzung internationaler Verpflichtungen*, 47 *ZaöRV* (1987), 44; Sicilianos (note 86); Malanczuk, *Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit*, 43 *ZaöRV* (1983), 293; and Dzida, *Zum Recht der Repressalie im heutigen Völkerrecht* (1997).

¹¹⁴ See in particular Arangio-Ruiz' draft article 12(1) [Part Two], pursuant to which resort to countermeasures required the exhaustion of all available dispute settlement procedures. For a summary of the ensuing debate see Dzida (note 113), 142-150; see further the various contributions to the symposium on countermeasures, reproduced in: 5 *EJIL* (1994), 20.

¹¹⁵ An additional problem derived from article 58 pursuant to which the party against which countermeasures were taken could initiate third-party dispute settlement procedures against the State resorting to countermeasures (see *supra*, notes 43-44). By deciding to delete from the draft articles all provisions relating to the settlement of disputes, the ILC had solved this problem rather elegantly.

¹¹⁶ See e.g. comments by Ireland ((UN Doc. A/CN.4/488, at 119), the United States (*ibid.*, at 122-123), Austria (*ibid.*, at 114), or Japan (UN Doc. A/CN.4/492, at 15-16).

¹¹⁷ See e.g. comments by the United Kingdom (UN Doc. A/CN.4/488, at 83 and 116), the United States (*ibid.*, at 116-117).

siderable pressure from governments, it decided that it should, thereby rejecting the two main arguments put forward in favour of a "lean" approach.

The first of these arguments was conceptual. Some governments took the view that the rules governing countermeasure were outside the scope of the ILC's project.¹¹⁸ Just as retorsions, protests, judicial claims or other forms of self-help, countermeasures were a means of enforcing international law. Since the Commission did not purport to lay down rules governing these other means of enforcement, they argued that including detailed rules on countermeasures would have led to a conceptual imbalance. Secondly, in the view of some governments, the law of countermeasures was not sufficiently clear and a codification therefore premature.¹¹⁹

However, neither of these arguments was fully convincing and the ILC's decision to adhere in principle to its initial approach deserves to be commended. As to the alleged conceptual imbalance, one might have wondered what other forms of law enforcement should have been regulated in the draft articles. Reactions such as retorsions or protests did not violate the law in the first place, and hence did not require regulation in a text on State responsibility.¹²⁰ Furthermore, the conditions for the making of judicial claims before international courts and tribunals depended on the rules of the respective forum or the treaty conferring jurisdiction.¹²¹ For example, the ICJ's decision to require applicants to establish that they have a legal interest in the subject-matter of a dispute¹²² constitutes a court-specific condition, and other courts have taken different approaches.¹²³ In short, there were simply no general rules governing judicial claims and the ILC lacked the mandate to re-draft the procedural law of international judicial bodies. Therefore, countermeasures were the only means of law enforcement which the ILC could sensibly regulate.

The law of countermeasures could also not be said to be particularly unclear. Already by the time of the first reading, the basic substantive conditions had been developed in a series of international awards.¹²⁴ In its decision in the *Gabcikovo Nagymaros* case, the International Court, in 1997, in principle confirmed the ILC's approach and added some further clarifications.¹²⁵ If anything, the time therefore

¹¹⁸ See e.g. UN Doc. A/CN.4/488, at 22 and 83, and UN Doc. A/CN.4/488, Add. 3, at 5 (comments by France, the United Kingdom and Singapore); and already the earlier comments, made in the General Assembly's Sixth Committee, by France (UN Doc. A/C.6/47/SR.26, para. 5) and Israel (UN Doc. A/C.6/47/SR.27, para. 21). The point was reiterated by some governments in their comments on the interim draft circulated in summer 2000, see UN Doc. A/CN.4/515, at 74-76 (Japan and the United Kingdom).

¹¹⁹ See the summary of views contained in: ILC Report 2001, UN Doc. A/56/10, para. 53.

¹²⁰ Introductory Commentary to Part Three, Chapter II, para. (3); see already Arangio-Ruiz, Third Report (note 2), para. 19; Dzida (note 113), at 49-50.

¹²¹ Introductory Commentary to Part Three, Chapter I, para. (5).

¹²² See in particular *South West Africa* cases, ICJ Reports 1996, 6, at 32 (para. 44).

¹²³ Cf. the approach under the European Convention on Human Rights (article, 33 ECHR), or the European Court of Justice (article 227 TEC).

¹²⁴ Cf. notably the arbitral awards in: *Naulilaa*, R.I.A.A., vol. II, at 1011; *Cysne*, *ibid.*, at 1057; *Air Services Agreement*, R.I.A.A., vol. XVII, 416.

seemed ripe for an attempt to spell out the different conditions limiting the freedom of States to resort to countermeasures.

(2) Substantive Limitations on Countermeasures

Having opted for retaining detailed provisions, the ILC had to address certain problems of the first reading draft. Insofar as old articles prescribed substantive limitations on countermeasures, they had generally been approved and required only minor modifications. For example, the requirement that countermeasures be reversible and aim at inducing the State responsible for the initial wrongful act to comply with its obligations had been affirmed in the ICJ's judgment in the *Gabcikovo Nagymaros* case.¹²⁶ Likewise, the Court there had clarified that "the effects of a countermeasure must be commensurate with the injury suffered", thereby endorsing the requirement of proportionality.¹²⁷ Consequently, new articles 49 and 51 are only marginally different from the 1996 text. The situation is slightly different with regard to the exclusion of specific forms of countermeasures (article 50). Under the first reading draft, then article 50 had prohibited countermeasures consisting of:

- a threat or use of force;
- a derogation from basic human rights;
- conduct affecting the inviolability of diplomatic or consular agents, premises, archives and documents;
- extreme economic or political coercion; or
- any contravention of a peremptory norm of international law.

During the second reading, the ILC did not question the need for a provision prohibiting some forms of countermeasures. There was some discussion as to whether this provision should be drafted in a very general way, e.g. excluding countermeasures that would violate obligations under peremptory norms.¹²⁸ However, the majority of the Commission members felt that referring to at least some specific examples would enhance the clarity of the provision.¹²⁹

As regards the scope of the exclusions, the Commission adopted a number of changes. The most important of these is the deletion of former article 50(1)(b), pro-

¹²⁵ ICJ Reports 1997, 7, especially at 52 et seq.; and cf. the references in the ILC's Commentary to article 49, paras. (2), (4), and (9).

¹²⁶ ICJ Reports 1997, 7, at 56-57 (para. 87); cf. Commentary on article 49, paras. (7) and (9). Article 53 now expressly stipulates that countermeasures shall be terminated once the responsible State has complied with its obligations.

¹²⁷ ICJ Reports 1997, 7, at 56 (para. 85). The Commission chose to take up the terminology used by the ICJ and accordingly speaks of countermeasures being "commensurate" rather than "proportionate", see article 51 as compared to old article 49 ("... shall not be out of proportion ..."). Cf. further ILC Report 2000, UN Doc. A/55/10, paras. 305, 333-334 and, for a comprehensive assessment, Cannizzaro, *El principio della proporzionalità nell'ordinamento internazionale* (2000).

¹²⁸ See the summary of debates in ILC Report 2000, UN Doc. A/55/10, paras. 320-327.

¹²⁹ Ibid. It is interesting to note that it had vigorously rejected this argument during the debates on article 19 of the 1996 draft; see above text accompanying note 63.

hibiting the use, by way of a countermeasure, of extreme economic or political coercion.¹³⁰ As was pointed out, international practice did not support this exclusion.¹³¹ Moreover, the requirement that the countermeasure in question had to be commensurate with the injury suffered was held to afford sufficient protection for the rights of the responsible State.

In addition, the Commission included in the text a new exclusion clause pursuant to which a State resorting to countermeasures is not relieved from "fulfilling its obligations ... under any dispute settlement procedure applicable between it and the responsible State".¹³² This is a helpful clarification. It builds on the ICJ's decisions in the *ICAO Council* and *Hostages* cases, where the Court had made clear that States could not suspend or terminate dispute settlement provisions by way of countermeasure.¹³³

(3) Procedural Limitations on Countermeasures

The Commission's attempt to spell out the procedural conditions limiting a State's freedom to take countermeasures gave rise to heated debates. The 1996 draft had been a compromise between the views of the Commission's (then) Special Rapporteur, Gaetano Arangio-Ruiz, and the majority of Commission members. In his reports, Arangio-Ruiz had repeatedly argued for an "ambitious" approach, under which countermeasures could only be taken once available mechanisms of institutionalised dispute settlement had been exhausted.¹³⁴ The majority of Commission members held this to be over-ambitious and undesirable. As part of compromise, set out in old article 48, a State could take countermeasures without having to exhaust dispute settlement procedures. However, countermeasures could not be taken pending negotiations unless they qualified as "interim" or "urgent measures" in the sense of article 48(1) [1996].¹³⁵ Moreover, all countermeasures had to be suspended if the State against which they were directed initiated proceedings before an international judicial body.¹³⁶ This of course was of particular relevance as article 58(2) [1996] recognised the right of that State unilaterally to initiate such dis-

¹³⁰ See Crawford, Third Report (note 7), paras. 352-354.

¹³¹ See the discussion by Dzida (note 113), 207-214.

¹³² Article 50(2)(a); see Commentary to article 50, para. (12)-(13).

¹³³ See ICJ Reports 1972, 46, at 53; ICJ Reports 1980, 3, at 28 (para. 53) respectively. The passage from the *ICAO* case is worth citing in full, as it makes the point in a rather unequivocal way. Rejecting the Indian argument that the relevant jurisdictional clause was no longer applicable, the Court stated:

"Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested."

¹³⁴ See *supra*, references in notes 113-114.

¹³⁵ On the notion of *interim measures* see in particular Oberleitner, Gegenmaßnahmen und vorläufige Schutzmaßnahmen im ILC-Entwurf zur Staatenverantwortlichkeit 1996, in: Rechtsfragen an der Jahrtausendwende (Kötz ed., 1998), 137; Crawford, Countermeasures as Interim Measures, 5 EJIL (1994), 65.

pute settlement procedures.¹³⁷ In addition, a State willing to resort to countermeasures had to notify the other State of its intention, and it had to demand cessation or reparation.¹³⁸

During the second reading, these latter two requirements (notification and prior demands) were accepted without much debate.¹³⁹ The Commission, however, considerably modified most of the other aspects of the old regime. It is submitted that the rules contained in new article 52 strike an appropriate balance which accommodates both the need for flexibility and the general interest in "taming" countermeasures.

In a first step, the Commission decided to abandon the distinction between "normal" and "interim countermeasures", thereby avoiding the problematic implications of old article 48.¹⁴⁰ Indeed, it was difficult to see how a distinction between both types of measures could sensibly be drawn. After all, since they have to be reversible and must cease once the initial wrongful act ceases, all countermeasures could be said to be "interim measures".¹⁴¹ In any event, the draft articles provided little guidance as to when a situation would be pressing enough to warrant an interim measure.¹⁴² Under the new second reading text, all countermeasures are now, in principle, treated alike. This harmonisation was possible because the Commission agreed to take a more cautious approach to the requirement of prior negotiations. Unlike under the 1996 draft, this requirement has now been abandoned.¹⁴³ Again, the reasoning behind this change is convincing. The requirement of prior negotiation had been informed by a very schematic understanding of diplomatic activity, which seemed to distinguish between a negotiation and a post-negotiation stage.

¹³⁶ See article 48(3) [1996] and cf. the assessment by Dzida (note 113), 162-170. Article 48(4) [1996] provided for an exception to this rule, if the State that had committed the initial breach failed to honour its obligations under the dispute settlement clause.

¹³⁷ See *supra*, notes 43-44 and 115.

¹³⁸ See old articles 47(1) and 48(1) [1996].

¹³⁹ See article 52(1)(a) and (b) and cf. Commentary to article 52, paras. (3)-(5). The requirement of prior notification had been stressed by the International Court in the *Gabcikovo* case, ICJ Reports 1997, 7, at 56 (para. 84).

¹⁴⁰ Strangely, the notion of "urgent countermeasures" reappears in article 48(2) of the new draft. Under that provision, States may take urgent countermeasures without complying with the requirement of prior notification. The typical example of an urgent countermeasure is the case where notification might frustrate the purpose of the countermeasure, e.g. the freezing of assets (see Commentary to article 48, para. (6)). One wonders whether the same result could not have been achieved by clarifying that notification only applies where it does not run counter to the object of the countermeasure. This would have had the advantage of entirely avoiding any distinction between types of countermeasures. In any event, the practical implications of article 48(2) are limited, since it only eliminates the requirement of prior notification, but no longer affects the – far more important – duty to negotiate.

¹⁴¹ See Oberleitner (note 135), at 143-146; Crawford, Second Report (note 7), para. 386.

¹⁴² Comments by Ireland, Germany, the United Kingdom, the United States, UN Doc. A/CN.4/488, at 120-122; see further Japan, UN Doc. A/CN.4/492, at 15-16. Even Arangio-Ruiz had to admit that the concept escaped any clear definition, see *id.*, Countermeasures and Amicable Settlement Means in the Implementation of State Responsibility, 5 EJIL (1994), at 33.

¹⁴³ See Crawford, Introduction (note 8), at 53.

However, as was pointed out in the comments of governments, such a neat division is hardly ever possible in practice. Instead a State will often take countermeasures in order to force another State to resume negotiations – a view that seemed to be endorsed by the arbitral award in *Air Services*.¹⁴⁴ Furthermore, the rule contained in old draft article 48 had been open to abuse. By postponing and prolonging negotiations, the State responsible for the initial wrongful act could have prevented the other State from taking countermeasures.¹⁴⁵ In light of these considerations, the ILC's decision to abandon the requirement of prior negotiations seems a sensible readjustment.

Finally, the Commission's decision to delete from the text all provisions providing for the settlement of disputes also had repercussions on the law of countermeasures. Unlike under the 1996 draft, a State facing countermeasures by another State no longer has a unilateral right to institute proceedings before an international court. Consequently, the misgivings expressed about former draft article 58(2) were alleviated.¹⁴⁶ In contrast, the Commission maintained its position, set out in new article 52(3), that countermeasures could not be taken (or had to be suspended) if both parties have submitted the dispute to an international court or tribunal competent to render binding decisions.¹⁴⁷ As is clarified in the Commentary, this provision is based on the assumption that the court or tribunal has jurisdiction over the dispute and is competent to grant interim relief.¹⁴⁸ Within the limits so prescribed, article 52(3) should be broadly acceptable to governments.

(4) Interim Conclusion

To sum up, the rules on countermeasures are one of the parts of the text that has profited most from the process of second reading. Despite pressure from governments, the Commission has managed to produce a comprehensive set of rules setting out the law of countermeasures. This in itself is an achievement which makes the hitherto unwritten law more reliable and clearer.

As to the content of the rules, it cannot be denied that the second reading text leaves States more freedom to resort to countermeasures.¹⁴⁹ While this may be disappointing for those (States and writers) that see countermeasures as a tool of the rich and powerful States, the new rules are informed by a more neutral and pragmatic approach than the 1996 draft. Judging from the experience of the early 1990s, when the Commission's over-critical and over-ambitious approach to countermeasures led to a deadlock, this pragmatism has proved very helpful.

¹⁴⁴ See the comments by the United Kingdom, Germany, the United States, Mexico and France on old article 48, reproduced in UN Doc. A/CN.4/488, at 121-123 and 149-150. Cf. *Air Services Agreement* (note 124), at 444-446.

¹⁴⁵ UN Doc A/CN.4/515, at 84-85 (United Kingdom, United States).

¹⁴⁶ See *supra*, text accompanying notes 43-44 and 115.

¹⁴⁷ See Commentary to article 52, paras. (7)-(8). Pursuant to article 52(4), this does not apply if the responsible State fails to implement the dispute settlement procedure in good faith.

¹⁴⁸ Commentary to article 52, para. (8).

¹⁴⁹ See also Crawford, Introduction (note 8), at 53.

(5) Countermeasures by Legally Interested States

There remained the crucial question whether States other than injured States in the sense of article 42 could ever resort to countermeasures in order to protect a collective interest. Under the rubric of "third-party countermeasures", this question has been extensively discussed in the literature, often in relation to the concept of obligations *erga omnes*.¹⁵⁰ In the ILC's text, it is touched upon, but ultimately left open. The crucial provision is article 54, which provides that:

"This chapter [on countermeasures] does not prejudice the right of any State, entitled under article 48, paragraph 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 breached."

Whether or not countermeasures aimed at protecting a collective interest qualify as "lawful measures" in the sense of the provision is left unclear. This ambiguity is deliberate: Article 54 was only adopted during the last weeks of the ILC's drafting process and marks a significant step away from the courageous position taken in the interim draft [2000]. Then article 54 [2000] had expressly allowed for countermeasures by States not directly injured in response to wrongful acts amounting to "serious breaches".¹⁵¹ As the Special Rapporteur had pointed out in his Third Report, there were a number of instances in which States not themselves injured had resorted to countermeasures in defence of a public interest, among them the collective sanctions against South Africa and Iraq and, more recently, the Federal Republic of Yugoslavia.¹⁵² Conceding that practice was inconclusive, and dominated by political considerations, the ILC, in July 2000, found that there was nonetheless sufficient reason to support a rule allowing for third-party countermeasures in response to serious breaches of obligations *erga omnes*.

¹⁵⁰ See primarily Frowein, Reactions by Not Directly Affected States (note 85), 416-422; Dupuy, Observations sur la pratique récente des "sanctions" de l'illicite, 87 RGDIP (1983), 505; Simma, Fragen der zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte, in: Staatsrecht – Europarecht – Völkerrecht. Festschrift Schlochauer (von Münch ed., 1981), 635; Weschke (note 101), 90-125; Dzida (note 113), 236-267; Fiedler (note 113), 26-28; Klein (note 113), 50-51; Akehurst, Reprisals by Third States, 44 BYIL (1970), 1; Dinstein, The *erga omnes* Applicability of Human Rights, 30 Archiv des Völkerrechts (1992), 16; Oellers-Frahm, Comment: The *erga omnes* Applicability of Human Rights, 30 Archiv des Völkerrechts (1992), 28; Mohr, The ILC's Distinction Between "International Crimes" and "International Delicts" and Its Implications, in: Simma/Spinedi (note 4), 115; McCaffrey, *Lex Lata* or the Continuum of State Responsibility, in: International Crimes of State (note 4), 242.

¹⁵¹ Provisional draft article 54(2) [2000] ran as follows:

"In the cases referred to in article 41 [then defining "serious breaches"], any State may take countermeasures, in accordance with the present Chapter, in the interest of the beneficiaries of the obligation breached." (Emphasis added.)

¹⁵² See Third Report (note 7), paras. 391-394; Commentary to new article 54, para. (3). Cf. further the summary of debates within the Commission, reproduced in: ILC Report 2000, UN Doc. A/55/10, paras. 335-373; and the assessment of State practice by Frowein (note 85), 416-422; and Weschke (note 101), 98-125.

As was abundantly clear from the comments of governments on the interim draft [2000], this provision provoked considerable irritation.¹⁵³ For example, Japan succinctly stated:

“Entitlement of any State to countermeasures in such a manner stipulated in article 54, paragraph 2, goes far beyond the progressive development of international law. Rather, it should be called ‘innovative’ or ‘revolutionary’”,

and suggested the deletion of the provision.¹⁵⁴ Even those governments which, in practice, actually had resorted to third-party countermeasures, stressed the risk of abuse, and warned that keeping a provision as controversial as article 54 [2000] would endanger the completion of the second reading.¹⁵⁵ Faced with these thinly veiled threats, the ILC decided to water down its position and opt for a more neutral approach, which leaves open the crucial question if, and under which conditions, international law recognises a right of States not directly injured to resort to countermeasures in defence of a collective interest.¹⁵⁶

This has the advantage of not prejudicing the development of the law in an area which indeed is far from settled. Apart from that, however, the vagueness of article 54 can only be deplored. As it stands, the provision clarifies very little and might as well have been left out of the draft entirely. In any event, unlike articles 49 to 53, it cannot be said to bring about reliability and predictability. Given the great importance, both practical and conceptual, of the issue, this is a disappointing outcome.

d) Further Issues

In addition to the three big issues discussed so far, the Commission, during the second reading, adopted a great number of smaller modifications. While not provoking the same degree of debate, these have helped make the new text a considerably more balanced document than the 1996 draft.¹⁵⁷ At the risk of oversimplification, it is possible to identify three different functions that these modifications fulfil: (i) updating, (ii) clarification and/or correction, and (iii) completion.

¹⁵³ See the summary of governments' comments by Crawford, Fourth Report (note 7), paras. 70-74; cf. also UN Doc. A/CN.4/515, at 87-90.

¹⁵⁴ UN Doc. A/CN.4/515, at 89.

¹⁵⁵ In his Fourth Report, the Special Rapporteur summarised the position as follows:

“The thrust of government comments is that article 54, and especially paragraph 2, has no basis in international law and would be destabilising. This is stressed both by those governments which are generally worried about the “subjectivity” and risks of abuse inherent in the taking of countermeasures, and by those who are more supportive of countermeasures as a vehicle for resolving disputes about responsibility.” (Fourth Report, note 7, para. 72; footnotes omitted.)

¹⁵⁶ Commentary to new article 54, para. (3): “Practice ... is limited and rather embryonic.”

¹⁵⁷ The following brief account of course cannot do justice to the many issues addressed by the Commission. For a more detailed account see the progress reports by Simma and Tams (note 7).

(1) Updating

Some of these modifications reflect developments of the law since the adoption of the first reading provisions. Articles 11 and 30(b) constitute two notable examples in this regard.

The former of these provisions, situated in Part One, Chapter II ("Attribution of Conduct to a State") deals with a previously unaddressed hypothesis of attribution. Based on the ICJ's judgment in the *Hostages* case,¹⁵⁸ the provision now stipulates that the conduct of private individuals is attributed to a State if that State – while not instigating or ordering such conduct – subsequently acknowledges and adopts it as its own.¹⁵⁹ While the provision may apply to other situations, e.g. in the context of State succession,¹⁶⁰ its inclusion was prompted by the *Hostages* judgment, which was rendered after the ILC had completed the first reading of the attribution provisions.¹⁶¹

Article 30(b) equally takes account of new developments of the law. It provides that "if circumstances so require", the State responsible for a wrongful act can be under a duty to provide guarantees and assurances of non-repetition. As the Commission notes in the commentary, the Court's recent decision in *LaGrand*¹⁶² has established guarantees and assurances as a distinct legal consequence of internationally wrongful acts.¹⁶³ Admittedly, even in the first reading draft, the Commission had taken the view that guarantees and assurances were an accepted remedy under international law.¹⁶⁴ International practice evidencing that provision had, however, been sparse.¹⁶⁵ The *LaGrand* judgment now provides crucial support for the ILC's view and is duly reflected in the commentary to article 30.¹⁶⁶

¹⁵⁸ ICJ Reports 1980, 3, at 35 (para. 74).

¹⁵⁹ Article 11 had initially been proposed by Crawford in his First Report (note 7), para. 287.

¹⁶⁰ See e.g. the reference to the *Lighthouses Arbitration*, Commentary to article 11, para. (3); for further instances see para. (5).

¹⁶¹ The old provisions on attribution had been adopted between 1973 and 1975, see Yearbook 1973, vol. II, 191-193; Yearbook 1974, vol. II/1, 277-290; Yearbook 1975, vol. II, 61-70, 91-106.

¹⁶² *LaGrand* case, note 58, especially paras. 123-125.

¹⁶³ Commentary to article 30, para. (10). It is interesting to note that the Commission had suspended the adoption of article 30 until after the Court's judgment, see Crawford/Peel/Olleson, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, 12 EJIL (2001), at 985-987.

¹⁶⁴ See old article 46 [1996] and Commentary thereto, Yearbook 1993, vol. II/2, at 82-84.

¹⁶⁵ Earlier instances, in which assurances and guarantees were at issue, include e.g. the *Trail Smelter* case, in which the arbitral tribunal mentioned specifically a series of measures apt to "prevent future significant fumigations in the United States" (cf. R.I.A.A., vol. III., 1934 et seq.); see also the naval incidents involving the *Allianca*, *Herzog*, and *Bundesrat*, in which the affected governments (the United States and Germany respectively) protested against interference with their shipping and demanded that positive orders be given to prevent a repetition of the acts (cf. Moore, Digest of International Law, vol. II., 908-909; Martens, Nouveau Recueil, 2nd series, vol. XXIX, 456, 486 respectively).

¹⁶⁶ See Commentary to article 30, paras. (10)-(12). On the case see Mennecke/Tams, 51 ICLQ (2002), 449.

(2) Clarification and Correction

Many other changes can be seen as clarifications and corrections of previously ambiguous provisions.

Articles 4(2) and 39 are good examples of clarifications brought about during the second reading which, while not introducing major changes, enhance the clarity of the text.

Article 4 addresses the issue of State organs. Evidently, the Commission took for granted that the conduct of State organs *ipso facto* is attributable to the State.¹⁶⁷ Paragraph 2, which was included during the second reading, now underlines that, when determining which national institutions should be considered State organs, the internal law of the State is of decisive, if not exclusive, importance.¹⁶⁸ While States cannot avoid international responsibility by denying certain entities the status of organs, usually internal law will be the first point of reference.¹⁶⁹ Article 4(2) therefore brings about a helpful clarification.

The same can be said of article 39. It makes clear that when determining the form of reparation and its extent (for example, the amount of damages owed), an injured State's own contribution to the damage shall be taken into account. As the Commission points out, this principle is widely recognised in international jurisprudence.¹⁷⁰

In addition, the Commission also took the opportunity to correct minor misunderstandings to which the 1996 text had given rise.

For example, the important issue of interest owed, as part of reparation, on any principal sum, is now addressed in a separate provision.¹⁷¹ This hopefully corrects the misleading impression given by the first reading text, under which there had been only a cursory and vague reference to the problem.¹⁷²

The rules on complicity, contained in Part One, Chapter IV (articles 27, 28), provide another example of such a correction, although it may be doubted whether the problems created by these rules could still be said to be "minor". In the first reading text, articles 27-28 [1996] had been formulated in extremely broad terms. Pursuant to article 27, aiding or assisting another State in the commission of a wrongful act was in itself declared unlawful. Article 28 extended this to situations where

¹⁶⁷ In the words of the Commission, "the principle stated in article 4 is clear and undoubted", see Commentary to article 4, para. (13).

¹⁶⁸ Article 4(2) provides:

"An organ includes any person or entity which has that status in accordance with the internal law of the State."

¹⁶⁹ Commentary to article 4, para. (11).

¹⁷⁰ See e.g. *Delagoa Bay Railway Arbitration*, in: Moore, *International Arbitration*, Vol. II, p.1865 (1900); and the references cited in the ILC's Commentary to article 39, paras. (3)-(4).

¹⁷¹ See article 38 and Commentary, which contains a concise discussion of the practically relevant issues.

¹⁷² See old article 44 [1996], pursuant to which "compensation ... may include interest". Note however that Special Rapporteur Arangio-Ruiz had extensively discussed the problem in his Second Report, Yearbook 1989, ii/1, 23-30.

one State directed and controlled, or even coerced, another State in the commission of wrongful acts.¹⁷³

Simple as they might seem, these provisions gave rise to a number of problems.¹⁷⁴ For example, if taken literally, the third State was held responsible irrespective of whether it had had knowledge of the circumstances leading to the principal State's wrongful acts.¹⁷⁵ In the course of the second reading, the Commission restricted the scope of the provision by expressly requiring that the State must have been aware of the circumstances of the wrongful act.¹⁷⁶ Given that Chapter IV is not meant to introduce a standard of strict responsibility, this is a necessary correction.

Similarly, under the text of the 1996 draft, a State could incur responsibility for aid and assistance, or direction, control and coercion, irrespective of whether it had been bound by the obligation breached by the principal wrongful act.¹⁷⁷ Of course, this is not problematic as long as the principal wrongful act violates an obligation of customary international law binding upon all the States involved. However, the broad formulation led to very irritating results where obligations of treaty law were concerned. Taking the example of old article 27, State A would have been responsible if it assisted State B in the violation of a bilateral treaty rule between States B and C.¹⁷⁸ The fact that State A itself was not bound by the rule in question (and thus would have been entitled to adopt State B's conduct) would not have precluded this result. In other words, under the 1996 draft, responsibility for aid and assistance (or direction, control or coercion) was broader than responsibility for the principal act. Given the accessory character of responsibility arising under Chapter IV, this seemed an odd result, which the Commission corrected during the second reading.¹⁷⁹

¹⁷³ See Yearbook 1978, vol. II/2, 99 et seq. For the renewed discussion during second reading see Crawford, Second Report (note 7), paras. 157-212.

¹⁷⁴ See the critical assessment by Klein, *Beihilfe zum Völkerrechtsdelikt*, in: Staatsrecht – Europarecht – Völkerrecht. Festschrift Schlochauer (von Münch ed., 1981), 425; see further Graefrath, *Complicity in the Law of International Responsibility*, 29 *Revue Belge de Droit International*, (1996), 370.

¹⁷⁵ Crawford, Second Report (note 7), paras. 178-180.

¹⁷⁶ Articles 16(a), 17(a) and 18(b), respectively; cf. the summary of debates in the Commission's report to the General Assembly, UN Doc. A/54/10, paras. 253-267.

¹⁷⁷ See Crawford, Second Report (note 7), paras. 181-184.

¹⁷⁸ *Ibid.*, para. 181.

¹⁷⁹ See articles 16(b) and 17(b) pursuant to which responsibility requires that the "act would have been internationally wrongful if committed by the [third] State". Conversely, in the case of coercion, there is no reason to protect the third State from being held responsible for the effects of the coerced State's acts, and hence no requirement of opposability has been included. This is convincing as the coercion itself will usually constitute a circumstance precluding the wrongfulness, and the coerced State will therefore not incur responsibility. For a discussion of the issue see Commentary to article 16, para. (6), article 17, para. (8), article 18, para. (6); and cf. the summary of debates reproduced in: UN Doc. A/54/10, paras. 253-267.

Despite these important (and necessary) corrections, the rules on complicity still present many problems and can still be counted among the more problematic sections of the text. For example, there is still no definition of what constitutes aid or assistance for the purposes of article 16, or why aid and assistance is held to be unlawful, whereas incitement is not.¹⁸⁰ Most importantly, it seems that the Commission still has not succeeded in establishing that a broad rule against complicity is actually accepted in present-day international law.¹⁸¹ That said, clearly the new rules on complicity are far less problematic than the provisions of the first reading text. One might thus cautiously say that the Commission has succeeded in mitigating damage.

(3) Completion

Finally, a number of further modifications serve to complete the text and to fill gaps. Articles 43-45 are typical examples of this kind of modification.

These three provisions set out basic rules governing the implementation of responsibility. As has been stated, the 1996 draft articles had not contained any detailed provisions on this issue.¹⁸² By adding three new provisions, the Commission has tried to remedy this situation.

Article 43 prescribes, in a very flexible manner, the basic principle pursuant to which the State invoking responsibility shall notify the responsible State of its claim, and preferably also of the specific remedy sought.¹⁸³ Since the provision does not prescribe any specific form of notification or require a particular degree of specificity, it may be said to be of a suggestive character rather than an attempt to give rise to strict legal rules. Hence, it includes the qualification that notice is not "a condition for the operation of the obligation to provide reparation."¹⁸⁴

Article 44 is also drafted in a very flexible way. It states that invocation of responsibility is subject to the rules on the nationality of claims and the exhaustion of local remedies. Since these concepts are considered in detail in the framework of the Commission's study on diplomatic protection,¹⁸⁵ article 44 merely refers to

¹⁸⁰ Note that a number of international conventions outlaw specific forms of incitement, including article III c) Genocide Convention (78 UNTS 277), article 4(a) Anti-Apartheid Convention (1015 UNTS 243), article 4 Racial Discrimination Convention (660 UNTS 195). See also GA Res. 110 (II) of 8 November 1947 condemning "propaganda ... designed ... to provoke aggression".

¹⁸¹ Cf. Klein (note 174), at 434-438. In their comments on the first reading text, a number of governments had proposed the deletion of article 27 [1996], see e.g. UN Doc. A/CN.4/488, at 75-76 (Germany) and 76 (Switzerland).

¹⁸² See *supra*, III.1.a.

¹⁸³ Commentary to article 43, para. (5). The Commission noted that such notice need not be in writing, see *ibid.*, para. (3).

¹⁸⁴ Commentary to article 43, para. (3).

¹⁸⁵ Cf. the Reports submitted by Special Rapporteur John Dugard, UN Doc. A/CN.4/506 and Add. 1-4 and A/CN.4/514. On the progress of the Commission's work see the annual Reports of the ILC to the General Assembly, UN Doc. A/55/10, paras. 406-495; UN Doc. A/CN.4/56/10, paras. 158-207.

them. However, it should be noted that by placing the local remedies rule within the chapter on invocation of responsibility, the Commission has taken a significant step towards a procedural understanding of the concept.¹⁸⁶

Finally, article 45 deals with the loss of the right to invoke responsibility. By analogy with article 45, VCLT, responsibility may not be invoked if the injured State has waived its right.¹⁸⁷ Again, the provision does not intend to specify the conditions of validity, but it is clear from the commentary that waiver may be inferred from a State's conduct if such conduct is unequivocal.¹⁸⁸ More controversial is the second circumstance leading to a loss of the right to invoke responsibility, namely unreasonable delay.¹⁸⁹ While accepted in principle as a reason for the loss of a right, the conditions under which delay in bringing a claim leads to a loss of right have always been somewhat nebulous.¹⁹⁰ The new commentary does a lot to remove uncertainties by specifying that it is not the lapse of time as such that prompts the loss, but rather the reasonable expectation, on behalf of the respondent State, that the claim would no longer be pursued.¹⁹¹ In the view of the Commission, there is thus no clear line between concepts such as delay, acquiescence or extinctive prescription. This may indeed help to avoid unnecessary doctrinal controversies about the rationale of the various grounds entailing the loss of rights.

All in all, it would be wrong to say that the newly-added provisions were revolutionary or that the draft could not have been adopted without them. Nevertheless, they round off the text and contain useful additions and clarifications.

IV. Concluding Remarks

During the 2001 session of the General Assembly's Sixth (Legal) Committee, States' representatives expressed an unusual degree of support for the ILC's work. One may speculate that this was, at least partly, informed by a measure of relief

¹⁸⁶ See commentary to article 44, para. (1). In contrast, article 22 of the 1996 draft had been based on a substantive understanding of the local remedies rule; see the discussion by Crawford, Second Report (note 7), paras. 136-148.

¹⁸⁷ Article 45(a).

¹⁸⁸ Commentary to article 45, para. (5). In line with international jurisprudence, the Commission however makes clear that the relevant conduct has to be clear and unequivocal, see *ibid.*, and cf. the International Court's decision in the *Certain Phosphates* case, ICJ Reports 1992, 240, at 247-250 (paras. 13-20).

¹⁸⁹ See article 45(b).

¹⁹⁰ See generally Cottier/Müller, Acquiescence, in: EPIL, vol. I (Bernhardt ed., 1992), 14; Fleischauer, Prescription, in: EPIL, vol. III (Bernhardt ed., 1997), 1105; Müller, Vertrauensschutz im Völkerrecht (1971).

¹⁹¹ Commentary to article 45, para. (9); and cf. Müller (note 190), at 69-73. Note that in the *Gentini* case, which is often relied on as a landmark case supporting the concept of delay, Ralston, Umpire, observed that "[t]he principle of prescription finds its foundation in the highest equity – the avoidance of possible injustice to the defendant" (R.I.A.A., vol. x, page 552, emphasis added.) This again clearly supports the Commission's point that it is not the lapse of time as such that entails the loss of the claim.

that, after having debated the topic for decades and exhausted the efforts of no less than five Special Rapporteurs, the Commission finally managed to complete its work on State responsibility. Our discussion has shown that even after nearly four decades, some features of the text might have needed further discussion, notably in regard to articles 40 and 41 on "serious breaches". That said, on balance, the result of the ILC's work is impressive. The set of 59 articles constitutes a comprehensive code of State responsibility and will soon be regarded as the most authoritative exposition of the law in this field. Given the practical relevance of the law of responsibility, the clarification brought about by the ILC is very welcome. Moreover, in those areas where the law had been far from settled – such as the rules on invocation of collective interest provisions, or countermeasures – the ILC has proposed well-balanced provisions which constitute by far the most elaborate attempts at achieving legal certainty.

When focussing more specifically on the process of second reading, there is similarly reason for satisfaction. Aware of the rather pressing time-frame, the Commission has put pragmatism before principle, and it has thereby been able to agree on compromises without compromising the integrity of the project. As a result of the thorough and efficient revision, the text is now at the same time more in line with general international law, more user-friendly and conceptually more balanced.

In addition to feeling relief, States' representatives in the Sixth Committee therefore had good reasons to commend the text. There is room for optimism that after decades of – often frustrating – debates, the ILC's work on State responsibility will render a crucial and eminently relevant area of the law more reliable and predictable.

Annex

United Nations General Assembly

Fifty-sixth session

RESOLUTION 56/83. (RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS)

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,¹ which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts".

85th plenary meeting

12 December 2001

Responsibility of States for internationally wrongful acts

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II

Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is act-

ing in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

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

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There 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.

*Article 13**International obligation in force for a State*

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

*Article 14**Extension in time of the breach of an international obligation*

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

*Article 15**Breach consisting of a composite act*

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV**Responsibility of a State in connection with the act of another State***Article 16**Aid or assistance in the commission of an internationally wrongful act*

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

*Article 17**Direction and control exercised over the commission of an internationally wrongful act*

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

*Article 18**Coercion of another State*

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

*Article 19**Effect of this chapter*

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V**Circumstances precluding wrongfulness***Article 20**Consent*

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

*Article 21**Self-defence*

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

*Article 22**Countermeasures in respect of an internationally wrongful act*

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

*Article 23**Force majeure*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The State has assumed the risk of that situation occurring.

*Article 24**Distress*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

*Article 25**Necessity*

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

*Article 26**Compliance with peremptory norms*

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

*Article 27**Consequences of invoking a circumstance precluding wrongfulness*

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE
Chapter I
General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33

Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Chapter II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

Invocation of the responsibility of a State

Article 42

Invocation of responsibility by an injured State

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

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specifically affects that State; or
 - (ii) Is of such a character as 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.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

- (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take in accordance with the provisions of part two.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) 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.

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim;

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible States.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

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

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II Countermeasures

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

- (a) The internationally wrongful act has ceased; and
- (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

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.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 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 breached.

PART FOUR GENERAL PROVISIONS

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.